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THE  
ENGLISH AND EMPIRE DIGEST  
WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS.

VOLUME XXXIII.



# THE ENGLISH AND EMPIRE DIGEST

WITH  
COMPLETE AND EXHAUSTIVE  
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED  
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL  
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE  
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN  
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

## VOLUME XXXIII.

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*MAGISTRATES.*

*MALICIOUS PROSECUTION AND  
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MARKETS AND FAIRS.	C. A. COLLINGWOOD, Esq., M.A., LL.B., Barrister-at-Law.

**In this Volume English Cases reported up to 1st January, 1927, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.**



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### LODGING HOUSES.

See INNS AND INNKEEPERS; LANDLORD AND TENANT; PUBLIC HEALTH  
AND LOCAL ADMINISTRATION.

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### LORD HIGH STEWARD.

See COURTS; PARLIAMENT.

### LORDS, HOUSE OF.

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MARSHALLING.

*See* BANKRUPTCY AND INSOLVENCY; EQUITY; EXECUTORS AND  
ADMINISTRATORS; MORTGAGE.

## REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 ( <i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
c. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—	
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Ayl. Pan.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Par.	Ayliffe's New Pandect of Roman Civil Law	Eng.
	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) ( <i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Di	Bose's Digest	Ind.
B. L.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.



xvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Baild. ... ..	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B. ... ..	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R. ... ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn. ... ..	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust. ... ..	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch. ... ..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B. ... ..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes ... ..	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt. ... ..	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat. ... ..	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	Ir.
Beav. ... ..	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal. ... ..	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw. ... ..	Beawes's <i>Lex Mercatoria</i>	Eng.
Bell, C. C. ... ..	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ... ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ... ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec. ... ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App. ... ..	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe ... ..	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup. ... ..	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben. ... ..	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl. ... ..	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber. ... ..	New Brunswick Reports (Berton)	Can.
Bing. ... ..	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C. ... ..	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Biss. & Sm. ... ..	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas. ... ..	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch. ... ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com. ... ..	Blackstone's Commentaries	Eng.
Bl. D. & Osb. ... ..	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli. ... ..	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S. ... ..	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—	Eng.
Bluett ... ..	Bluett's Isle of Man Cases	I. of M.
Bom. ... ..	Bombay High Court Reports	Ind.
Bom. A. C. ... ..	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca. ... ..	Bombay Reports, Crown Cases	Ind.
Bom. O. C. ... ..	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P. ... ..	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R. ... ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bott. ... ..	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827	Eng.
Bourke ... ..	Bourke's Reports	Ind.
Br. & Col. Pr. Cas. ... ..	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract. ... ..	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr. ... ..	Sir R. Brooke's Abridgement	Eng.
Bro. C. C. ... ..	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep. ... ..	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C. ... ..	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas. ... ..	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor. ... ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop. ... ..	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing. ... ..	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F. ... ..	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun ... ..	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lush. ... ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	
Brownl. ... ..	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
... ..	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot.

Buch.	...	...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	...	...	...	S. Af.
Buch. A. C.	...	...	Buchanan's Reports of Appeal Court (Cape)	...	...	...	S. Af.
Buchan.	...	...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	...	...	...	Scot.
Buck	...	...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	...	...	...	Eng.
Bull. N. P.	...	...	Buller's Nisi Prius (published, London, 1772)	...	...	...	Eng.
Bulst.	...	...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	...	...	...	Eng.
Bunb.	...	...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	...	...	...	Eng.
Burr.	...	...	Burrow's Reports, King's Bench, 5 vols., 1756—1772	...	...	...	Eng.
Burr. S. C.	...	...	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	...	...	...	Eng.
Burrell	...	...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	...	...	...	Eng.
C. A.	...	...	Court of Appeal Reports, 3 vols., 1867—1877	...	...	...	N.Z.
C. & P.	...	...	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	...	...	...	Eng.
C. B.	...	...	Common Bench Reports, 18 vols., 1845—1856	...	...	...	Eng.
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C. B. R.	...	...	Canadian Bankruptcy Reports Annotated, 1920—(current)	...	...	...	Can.
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C. L. T.	...	...	Canadian Law Times	...	...	...	Can.
C. L. T. Occ. N.	...	...	Canadian Law Times, Occasional Notes	...	...	...	Can.
C. P.	...	...	Upper Canada Common Pleas	...	...	...	Can.
C. P. D.	...	...	Law Reports, Common Pleas Division, 5 vols., 1875—1880	...	...	...	Eng.
C. P. D.	...	...	Cape Provincial Division Reports	...	...	...	S. Af.
C. R. [date] A. C.	...	...	Canadian Reports, Appeal Cases	...	...	...	Can.
C. T. R.	...	...	Cape Times Reports of the Supreme Court of the Cape of Good Hope	...	...	...	S. Af.
C. W. N....	...	...	Calcutta Weekly Notes	...	...	...	Ind.
Cab. & El.	...	...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	...	...	...	Eng.
Cald. Mag. Cas.	...	...	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	...	...	...	Eng.
Calth.	...	...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—	...	...	...	Eng.
Cam. Cas.	...	...	Cameron's Supreme Court Cases	...	...	...	Can.
Cam. Prac.	...	...	Cameron's Supreme Court Practice	...	...	...	Can.
Camp.	...	...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	...	...	...	Eng.
Can. Com. Cas.	...	...	Commercial Law Reports of Canada	...	...	...	Can.
Can. Crim. Cas.	...	...	Canadian Criminal Cases, Annotated	...	...	...	Can.
Can. Gaz.	...	...	Canadian Gazette	...	...	...	Can.
Can. Ry. Cas.	...	...	Canadian Railway Cases	...	...	...	Can.
Car. & Kir.	...	...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	...	...	...	Eng.
Car. & M.	...	...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	...	...	...	Eng.
Car. C. L.	...	...	Carrington's Treatise on Criminal Law	...	...	...	Can.
Card. Doc. Ann.	...	...	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	...	...	...	Eng.
Carl.	...	...	New Brunswick Reports (Carleton)	...	...	...	Can.
Carp. Pat. Cas.	...	...	Carpmael's Patent Cases, 2 vols., 1602—1842	...	...	...	Eng.
Cart.	...	...	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	...	...	...	Eng.
Cart.	...	...	Cases on British North America Act (Cartwright)	...	...	...	Can.
Carth.	...	...	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	...	...	...	Eng.
Cary	...	...	Cary's Reports, Chancery, 1 vol.	...	...	...	Eng.
Cas. in Ch.	...	...	Cases in Chancery, fol., 3 parts, 1660—1697	...	...	...	Eng.
Cas. Pract. K. B.	...	...	Cases of Practice, King's Bench, 1 vol., 1655—1775	...	...	...	Eng.
Cas. Sett.	...	...	Cases of Settlements and Removals, 1 vol., 1685—1727	...	...	...	Eng.
Cas. temp. Finch	...	...	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	...	...	...	Eng.
Cas. temp. King	...	...	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733	...	...	...	Eng.
Cas. temp. Talb.	...	...	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	...	...	...	Eng.
Cass. Dig.	...	...	Cassells' Digest	...	...	...	Can.
Ch. (preceded by date)	...	...	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	...	...	...	Eng.
Ch. App.	...	...	Law Reports, Chancery Appeals, 10 vols., 1865—1875	...	...	...	Eng.
Ch. Cas. in Ch.	...	...	Choyce Cases in Chancery, 1557—1606	...	...	...	Eng.
Ch. Ch.	...	...	Upper Canada Chancery Chambers Reports	...	...	...	Can.
Ch. D.	...	...	Law Reports, Chancery Division, 45 vols., 1875—1890	...	...	...	Eng.
Ch. Rob.	...	...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	...	...	...	Eng.
Char. Cham. Cas.	...	...	Charley's Chamber Cases, 2 vols., 1875—1876	...	...	...	Eng.
Char. Pr. Cas.	...	...	Charley's New Practice Reports, 3 vols., 1875—1876	...	...	...	Eng.
Chip.	...	...	New Brunswick Reports (Chipman)	...	...	...	Can.



xviii      **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

Chit. ...	...	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822...	Eng.
Cl. & Fin. ...	...	Clark and Finnely's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas. ...	...	Clark and Scully's Drainage Cases	Can.
Clay. ...	...	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick. ...	...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph. ...	...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A. ...	...	Cook's Lower Canada Admiralty Court Cases	Can.
Co. Ent. ...	...	Coke's Entries	Eng.
Co. Inst. ...	...	Coke's Institutes	Eng.
Co. L. J. ...	...	Colonial Law Journal	N.Z.
Co. Litt. ...	...	Coke on Littleton (1 Inst.)	Eng.
Co. Rep. ...	...	Coke's Reports, 13 parts, 1572—1616	Eng.
Coch. ...	...	Nova Scotia Reports (Cochran)	Can.
Cockb. & Rowe	...	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll. ...	...	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid. ...	...	Collectanea Juridica, 2 vols.	Eng.
Colles ...	...	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
Colt. ...	...	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com. ...	...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng.
Com. Cas. ...	...	Commercial Cases, 1895—(current)	Eng.
Com. Dig. ...	...	Comyns' Digest	Eng.
Comb. ...	...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law. ...	...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cong. Dig. ...	...	Congdon's Digest	Can.
Const ...	...	Const's edition of Bott's Poor Laws, 3 vols., 1807	Eng.
Cooke & Al. ...	...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas. ...	...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg.	...	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
Coop. G. ...	...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	Eng.
Coop. Pr. Cas. ...	...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. temp. Brough.	...	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834	Eng.
Coop. temp. Cott.	...	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	Eng.
Cor. ...	...	Coryton's Reports	Ind.
Corb. & D. ...	...	Corbett and Daniell's Election Cases, 1 vol., 1819	Eng.
Correspondances Jud.	...	Correspondances Judiciaires	Can.
Couper ...	...	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	Scot.
Cout. ...	...	Coutlees' Unreported Cases	Can.
Cout. Dig. ...	...	Coutlees' Digest	Can.
Cowp. ...	...	Cowper's Reports, King's Bench, 2 vols., 1774—1778	Eng.
Cox & Atk. ...	...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
Cox, C. C. ...	...	E. W. Cox's Criminal Law Cases, 1843—(current)	Eng.
Cox, Eq. Cas. ...	...	S. C. Cox's Equity Cases, 2 vols., 1745—1797	Eng.
Cox, M. & H. ...	...	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852	Eng.
Cr. & J. ...	...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M. ...	...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph. ...	...	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	Eng.
Cr. App. Rep. ...	...	Cohen's Criminal Appeal Reports, 1908—(current)	Eng.
Cr. M. & R. ...	...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	Eng.
Craw. & D. ...	...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C.	...	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas.	...	Cresswell's Insolvency Cases, 1 vol., 1827—1829	Eng.
Cripps' Church Cas.	...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	Eng.
Cro. Car. ...	...	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	Eng.
Cro. Eliz. ...	...	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	Eng.
Cro. Jac. ...	...	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625	Eng.
Cru. Dig. ...	...	Cruise's Digest of the Law of Real Property, 7 vols.	Eng.
Cunn. ...	...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt. ...	...	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844	Eng.
D. ...	...	Duxbury's Reports of the High Court of the South African Republic	S. Af.
D. C. A. ...	...	Dorion's Queen's Bench Reports	Can.
D. L. R. ...	...	Dominion Law Reports	Can.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Dal.	...	...	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	...	Eng.
Dalr.	...	...	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	...	Scot.
Dan.	...	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	...	Eng.
Dan. & Ll.	...	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	...	Eng.
Dav. & Mer.	...	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	...	Eng.
Dav. Ir.	...	...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611	...	Ir.
Dav. Pat. Cas.	...	...	Davies' Patent Cases, 1 vol., 1785—1816	...	Eng.
Day	...	...	Day's Election Cases, 1 vol., 1892—1893	...	Eng.
Dea. & Sw.	...	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	...	Eng.
Deac.	...	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	...	Eng.
Deac. & Ch.	...	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	...	Eng.
Dears. & B.	...	...	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858	...	Eng.
Dears. C. C.	...	...	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856	...	Eng.
Deas & And.	...	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	...	Scot.
De G.	...	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	...	Eng.
De G. & J.	...	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859	...	Eng.
De G. & Sm.	...	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852	...	Eng.
De G. F. & J.	...	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862	...	Eng.
De G. J. & Sm.	...	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865	...	Eng.
De G. M. & G.	...	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857	...	Eng.
Delane	...	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835	...	Eng.
Den.	...	...	Denison's Crown Cases Reserved, 2 vols., 1844—1852	...	Eng.
Dick.	...	...	Dickens' Reports, Chancery, 2 vols., 1559—1798	...	Eng.
Dirl.	...	...	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677	...	Scot.
Dods.	...	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822	...	Eng.
Donnelly	...	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837	...	Eng.
Doug. El. Cas.	...	...	Douglas' Election Cases, 4 vols., 1774—1776	...	Eng.
Doug. K. B.	...	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785	...	Eng.
Dow	...	...	Dow's Reports, House of Lords, 6 vols., 1812—1818	...	Eng.
Dow & Cl.	...	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	...	Eng.
Dow. & L.	...	...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	...	Eng.
Dow. & Ry. K. B.	...	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827	...	Eng.
Dow. & Ry. M. C.	...	...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	...	Eng.
Dow. & Ry. N. P.	...	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	...	Eng.
Dowl.	...	...	Dowling's Practice Reports, 9 vols., 1830—1841	...	Eng.
Dowl. N. S.	...	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	...	Eng.
Dr. & Wal.	...	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841	...	Ir.
Dr. & War.	...	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843	...	Ir.
Dra.	...	...	Draper's King's Bench Reports	...	Can.
Drew.	...	...	Drewry's Reports, Chancery, 4 vols., 1852—1859	...	Eng.
Drew. & Sm.	...	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865	...	Eng.
Drinkwater	...	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841	...	Eng.
Drury temp. Nap.	...	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859	...	Ir.
Drury temp. Sug.	...	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844	...	Ir.
Dugd. Orig.	...	...	Dugdale's Origines Juridicales	...	Eng.
Dunl. (Ct. of Sess.)	...	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862	...	Scot.
Dunning	...	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754	...	Eng.
Durie	...	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642	...	Scot.
Dyer	...	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581	...	Eng.
E. & A.	...	...	Upper Canada Error and Appeal	...	Can.
E. & B.	...	...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858	...	Eng.
E. & E.	...	...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	...	Eng.
E. B. & E.	...	...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860	...	Eng.
E. D. C.	...	...	Reports of the Eastern Districts Court (Cape) from 1880	...	S. Af.
E. D. L.	...	...	South African Law Reports, Eastern Districts Local Division	...	S. Af.
E. L. R.	...	...	Eastern Law Reporter	...	Can.
E. R. (or Eng. Rep.)	...	...	English Reports	...	Eng.
E. R.	...	...	Ontario Election Reports	...	Can.
Eag. & Y.	...	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	...	Eng.



East	...	...	East's Reports, King's Bench, 16 vols., 1800—1812	...	...	Eng.
East, P. C.	...	...	East's Pleas of the Crown	...	...	Eng.
Ecc. & Ad.	...	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	...	...	Eng.
Eden	...	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	...	Eng.
Edgar	...	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	...	Scot.
Edw.	...	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	...	Eng.
Elchies	...	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	...	...	Scot.
Emden's B. C.	...	...	Emden's Building Contracts, Building Leases and Building Statutes	...	...	Eng.
Eng. Pr. Cas.	...	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	...	Eng.
Eq. Cas. Abr.	...	...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	...	...	Eng.
Eq. Rep.	...	...	Equity Reports, 3 vols., 1853—1855	...	...	Eng.
Esp.	...	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	...	Eng.
Ex. D.	...	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	...	Eng.
Exch.	...	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	...	Eng.
Exch. C. R.	...	...	Exchequer Court Reports	...	...	Can.
F. (Ct. of Sess.)	...	...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	...	...	Scot.
F.	...	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	...	S. Af.
F. & F.	...	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	...	Eng.
F. N. D.	...	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	...	S. Af.
Fac. Coll.	...	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1811	...	...	Scot.
Falc.	...	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	...	Scot.
Falc. & Fitz.	...	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	...	Eng.
Fenton	...	...	Fenton, Important Judgments	...	...	N.Z.
Ferg.	...	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	...	Scot.
Fitz. Nat. Brev.	...	...	Fitzherbert's Natura Brevium	...	...	Eng.
Fitz-G.	...	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	...	Eng.
Fl. & K.	...	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	...	...	Ir.
Fonbl.	...	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	...	Eng.
For.	...	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	...	Eng.
Forb.	...	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	...	Scot.
Fort. De Laud.	...	...	Fortesque, De Laudibus Legum Angliæ	...	...	Eng.
Fortes. Rep.	...	...	Fortescue's Reports, fol., 1 vol., 1692—1736	...	...	Eng.
Fost.	...	...	Foster's Crown Cases, 1 vol., 1708—1760	...	...	Eng.
Fount.	...	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	...	Scot.
Fox & S. Ir.	...	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	...	Ir.
Fox & S. Reg.	...	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	...	...	Eng.
Fras.	...	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	...	Eng.
Freem. Ch.	...	...	Freeman's Reports, Chancery, 1 vol., 1660—1706	...	...	Eng.
Freem. K. B.	...	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	...	Eng.
G.	...	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	...	S. Af.
G. & R.	...	...	Nova Scotia Reports (Geldert & Russell)	...	...	Can.
G. I. Dig.	...	...	General Index Digest	...	...	Can.
G. W. D.	...	...	South African Law Reports, Griqualand West Local Division	...	...	S. Af.
G. W. L.	...	...	South African Law Reports, Griqualand West Local Division	...	...	S. Af.
Gal. & Dav.	...	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	...	Eng.
Gale	...	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	...	Eng.
Gaz. L. R.	...	...	New Zealand Gazette Law Reports	...	...	N.Z.
Geld. Dig.	...	...	Geldert's Digest	...	...	Can.
Gib. Cod.	...	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	...	Eng.
Giff.	...	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	...	Eng.
Gilb.	...	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	...	Eng.
Gilb. C. P.	...	...	Gilbert's History and Practice of the Court of Common Pleas	...	...	Eng.
Gilb. Ch.	...	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	...	Eng.
Gilm. & F.	...	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	...	Scot.
Gl. & J.	...	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	...	Eng.
Glanv.	...	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	...	Eng.
Glanv. El. Cas.	...	...	Glanville's Election Cases, 1 vol., 1623—1624	...	...	Eng.
Glascok	...	...	Glascok's Reports (Ireland), 1 vol., 1831—1832	...	...	Ir.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Godb. ...	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb. ...	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow ...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr. ...	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases ...	Griffin's Patent Cases, 1884—1887	Eng.
Gwill. ...	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
H. ...	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C. ...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N. ...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw. ...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
H. & W. ...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. B. R. (preceded by date) ...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 ( <i>e.g.</i> , [1915] H. B. R.)	Eng.
H. C. ...	Reports of the High Court of Griqualand West	S. Af.
H. E. C. ...	Hodgin's Election Reports	Can.
H. L. Cas. ...	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
Hag. Adm. ...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con. ...	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Ecc. ...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes ...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L. ...	Hale's Common Law	Eng.
Hale, P. C. ...	Hale's Pleas of the Crown, 2 vols.	Eng.
Han. ...	New Brunswick Reports (Hannay)	Can.
Har. & Ruth. ...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W. ...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc. ...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard. ...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare ...	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C. ...	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay ...	Hay's Reports	Ind.
Hay & Marr. ...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Hayes ...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo. ...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M. ...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het. ...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob. ...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
Hodg. ...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Hog. ...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Holt, Adm. ...	W. Holt's Rule of the Road Cases. Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq. ...	W. Holt's Equity Reports, 2 vols., 1845	Eng.
Holt, K. B. ...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P. ...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess. ...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R. ...	Hong Kong Reports	Hong Kong
Hop. & Colt. ...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph. ...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H. ...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp. ...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C. ...	Howard's Chancery Practice	Ir.
How. C. S. ...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E. ...	Howard's Equity Exchequer	Ir.
How. P. L. ...	Howard on the Popery Laws	Ir.
Hud. & B. ...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C. ...	Hudson on Building Contracts, 2 vols.	Eng.
Hume ...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut. ...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
Hy. Bl. ...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde ...	Hyde's Reports	Ind.
I. C. L. R. ...	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
I. Ch. R. ...	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. Eq. R. ...	Irish Equity Reports, 13 vols., 1838—1851	Ir.

# xxii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. ...	...	Irish Law Reports, 13 vols., 1838—1851	...	...	Ir.
I. L. R. (Vol.) All.	...	Indian Law Reports, Allahabad	...	...	Ind.
I. L. R. (Vol.) Bom.	...	Indian Law Reports, Bombay	...	...	Ind.
I. L. R. (Vol.) Calc.	...	Indian Law Reports, Calcutta	...	...	Ind.
I. L. R. (Vol.) Lah.	...	Indian Law Reports, Lahore	...	...	Ind.
I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	...	Ind.
I. L. R. (Vol.) Pat.	...	Indian Law Reports, Patna	...	...	Ind.
I. L. R. (Vol.) Ran.	...	Indian Law Reports, Rangoon	...	...	Ind.
I. L. T. ...	...	Irish Law Times, 1867—(current)	...	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 ( <i>e.g.</i> , [1894] 1 I. R.)	...	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	...	Ir.
I. R., R. & L.	...	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	...	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	...	Eng.
J. R.	...	Jurist Reports	...	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	...	Eng.
James	...	Nova Scotia Reports (James)	...	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	...	Ir.
Jebb, C. C.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	Eng.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 ( <i>e.g.</i> , [1901] 2 K. B.)	...	...	
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	Eng.
Keb.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	Eng.
Keilw.	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	Eng.
Kel. W.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	Eng.
	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...	Eng.
Keny. Ch.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	Eng.
Kerr	...	New Brunswick Reports (Kerr)	...	...	Can.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
Knox	...	Knox's Reports	Aus.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	Eng.
L. & G. temp. Plunk.	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. temp. Sugd.	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	Can.
L. C. J.	...	Lower Canada Jurist	Can.
L. C. L. J.	...	Lower Canada Law Journal	Can.
L. C. R.	...	Lower Canada Reports	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	...	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	...	Leader Law Reports	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.	...	Legal News	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	...	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	Eng.
L. T.	...	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	...	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	...	La Themis	Can.
Lane	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	...	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach	...	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
Lee	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee temp. Hard.	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.



## xxiv      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Leg. Rep.	...	...	Legal Reporter	...	...	...	...	...	Ir.
Legge	...	...	Legge's Reports	...	...	...	...	...	Aus.
Leon.	...	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	...	...	...	...	Eng.
Lev.	...	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	...	...	...	...	...	Eng.
Lew. C. C.	...	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	...	...	...	...	Eng.
Ley	...	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	...	...	...	...	Eng.
Lib. Ass.	...	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	...	...	...	...	Eng.
Lilly	...	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	...	...	...	...	Eng.
Litt.	...	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	...	...	Eng.
Lloyd, L. R.	...	...	Lloyd's List Law Reports, 1919—(current)	...	...	...	...	...	Eng.
Lloyd, Pr. Cas.	...	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	...	...	...	...	Eng.
Lofft	...	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	...	...	...	...	Eng.
Long. & T.	...	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	...	...	...	...	Ir.
Lords Journals	...	...	Journals of the House of Lords	...	...	...	...	...	Eng.
Lud. E. C.	...	...	Luder's Election Cases, 3 vols., 1784—1787	...	...	...	...	...	Eng.
Lumley, P. L. C.	...	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	...	...	...	...	Eng.
Lush.	...	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	...	...	...	...	Eng.
Lut.	...	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	...	...	...	...	Eng.
Lut. Reg. Cas.	...	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	...	...	...	...	Eng.
Lynd.	...	...	Lyndwood, Provinciale, fol., 1 vol.	...	...	...	...	...	Eng.
M.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	...	...	...	S. Af.
M. & S.	...	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	...	...	...	...	Eng.
M. & W.	...	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	...	...	...	...	Eng.
M. C. R.	...	...	Montreal Condensed Reports	...	...	...	...	...	Can.
M. H. C. R.	...	...	Madras High Court Reports	...	...	...	...	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	...	Montreal Law Reports, King's Bench or Queen's Bench	...	...	...	...	...	Can.
M. L. R. (Vol.) S. C.	...	...	Montreal Law Reports, Superior Court	...	...	...	...	...	Can.
M. M. Cas.	...	...	Martin's Reports of Mining Cases	...	...	...	...	...	Can.
Mac.	...	...	Macassey's New Zealand Reports	...	...	...	...	...	N.Z.
Mac. & G.	...	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1819—1852	...	...	...	...	...	Eng.
Mac. & H.	...	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	...	...	...	...	Eng.
M'Cle.	...	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	...	...	...	...	Eng.
M'Cle. & Yo.	...	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	...	...	...	...	Eng.
Macfarlane	...	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	...	...	...	...	Scot.
Macl. & Rob.	...	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	...	...	...	...	Scot.
Macph. (Ct. of Sess.)	...	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	...	...	...	...	Scot.
Macq.	...	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1819—1865	...	...	...	...	...	Scot.
Macr.	...	...	Macrory's Patent Cases, 2 parts, 1817—1856	...	...	...	...	...	Eng.
Mad.	...	...	Madras High Court Reports	...	...	...	...	...	Ind.
Madd.	...	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	...	...	...	...	Eng.
Madd. & G.	...	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	...	...	...	...	Eng.
Madox	...	...	Madox's Formulæ Anglicanum	...	...	...	...	...	Eng.
Madox, Exch.	...	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	...	...	...	...	Eng.
Mag.	...	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	...	...	...	...	Eng.
Man. & G.	...	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	...	...	...	...	Eng.
Man. & Ry. K. B.	...	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	...	...	...	...	Eng.
Man. & Ry. M. C.	...	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	...	...	...	...	Eng.
Man. L. J.	...	...	Manitoba Law Journal	...	...	...	...	...	Can.
Man. L. R.	...	...	Manitoba Law Reports	...	...	...	...	...	Can.
Man. R. temp. Wood	...	...	Manitoba Reports temp. Wood	...	...	...	...	...	Can.
Mans.	...	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	...	...	...	...	Eng.
Mar. L. C.	...	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	...	...	...	...	Eng.
March	...	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	...	...	...	...	Eng.
Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	...	...	...	Eng.
Marsh.	...	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	...	...	...	...	Eng.
Marsh.	...	...	Marshall's Reports	...	...	...	...	...	Ind.
Mayn.	...	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	...	...	...	...	Eng.
Meg.	...	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	...	...	...	...	Eng.

Men.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	...	S. Af.
Mer.	...	...	Merivale's Reports, Chancery, 3 vols., 1815—1817	...	...	...	Eng.
Milw.	...	...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	...	...	...	Ir.
Mod. Rep.	...	...	Modern Reports, 12 vols., 1669—1755	...	...	...	Eng.
Mol.	...	...	Molloy's Report's, Chancery (Ireland), 3 vols., 1808—1831	...	...	...	Ir.
Mont.	...	...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	...	...	Eng.
Mont. & A.	...	...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	...	...	...	Eng.
Mont. & B.	...	...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	...	...	...	Eng.
Mont. & Ch.	...	...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	...	...	...	Eng.
Mont. & M.	...	...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	...	...	...	Eng.
Mont. D. & De G.	...	...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	...	...	...	Eng.
Moo. & P.	...	...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	...	...	...	Eng.
Moo. & S.	...	...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	...	...	...	Eng.
Moo. Ind. App.	...	...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	...	...	...	Eng.
Moo. P. C. C.	...	...	Moore's Privy Council Cases, 15 vols., 1836—1863	...	...	...	Eng.
Moo. P. C. C. N. S.	...	...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	...	...	...	Eng.
Mood. & M.	...	...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	...	...	...	Eng.
Mood. & R.	...	...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	...	...	...	Eng.
Mood. C. C.	...	...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	...	...	...	Eng.
Moore, C. P.	...	...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	...	...	...	Eng.
Moore, K. B.	...	...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	...	...	...	Eng.
Mor. Dict.	...	...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	...	...	...	Scot.
Morr.	...	...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	...	...	...	Eng.
Mos.	...	...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	...	...	...	Eng.
Mun. Rep.	...	...	Municipal Reports	...	...	...	Can.
Murd. Epit.	...	...	Murdoch's Epitome	...	...	...	Can.
Murp. & H.	...	...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	...	...	...	Eng.
Murr.	...	...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	...	...	...	Scot.
My. & Cr.	...	...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	...	...	...	Eng.
My. & K.	...	...	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	...	...	...	Eng.
N. (preceded by date)	...	...	Northern Ireland Law Reports, 1925—(current) ( <i>e.g.</i> , [1925] N.)	...	...	...	Ir.
N. A. C.	...	...	Native Appeal Cases	...	...	...	S. Af.
N. & S.	...	...	Nichols and Stop's Reports (Tasmania)	...	...	...	Tasmania
N. B. Dig.	...	...	New Brunswick Digest (Stevens)	...	...	...	Can.
N. B. Eq. Rep.	...	...	New Brunswick Equity Reports	...	...	...	Can.
N. B. R.	...	...	New Brunswick Reports	...	...	...	Can.
N. B. R. (All.)	...	...	New Brunswick Reports (Allen)	...	...	...	Can.
N. B. R. (Ber.)	...	...	New Brunswick Reports (Berton)	...	...	...	Can.
N. B. R. (Carl.)	...	...	New Brunswick Reports (Carleton)	...	...	...	Can.
N. B. R. (Chip.)	...	...	New Brunswick Reports (Chipman)	...	...	...	Can.
N. B. R. (Han.)	...	...	New Brunswick Reports (Hannay)	...	...	...	Can.
N. B. R. (Kerr)	...	...	New Brunswick Reports (Kerr)	...	...	...	Can.
N. B. R. (P. & B.)	...	...	New Brunswick Reports (Pugsley and Burbidge)	...	...	...	Can.
N. B. R. (P. & T.)	...	...	New Brunswick Reports (Pugsley and Trueman)	...	...	...	Can.
N. B. R. (Pug.)	...	...	New Brunswick Reports (Pugsley)	...	...	...	Can.
N. B. R. (Tru.)	...	...	New Brunswick Reports (Trueman)	...	...	...	Can.
N. L. R.	...	...	Natal Law Reports	...	...	...	S. Af.
N. P. D.	...	...	South African Law Reports, Natal Provincial Division	...	...	...	S. Af.
N. S. R.	...	...	Nova Scotia Reports	...	...	...	Can.
N. S. R. (Coch.)	...	...	Nova Scotia Reports (Cochran)	...	...	...	Can.
N. S. R. (G. & O.)	...	...	Nova Scotia Reports (Geldert and Oxley)	...	...	...	Can.
N. S. R. (G. & R.)	...	...	Nova Scotia Reports (Geldert and Russell)	...	...	...	Can.
N. S. R. (James)	...	...	Nova Scotia Reports (James)	...	...	...	Can.
N. S. R. (Old.)	...	...	Nova Scotia Reports (Oldrights)	...	...	...	Can.
N. S. R. (R. & C.)	...	...	Nova Scotia Reports (Russell and Chesley)	...	...	...	Can.
N. S. R. (R. & G.)	...	...	Nova Scotia Reports (Russell and Geldert)	...	...	...	Can.
N. S. R. (Thom.)	...	...	Nova Scotia Reports (Thomson)	...	...	...	Can.
N. S. W. Adm. or Ad.	...	...	New South Wales Reports, Admiralty	...	...	...	Aus.
N. S. W. B.	...	...	New South Wales Reports, Bankruptcy	...	...	...	Aus.
N. S. W. Bkpty. Cas.	...	...	New South Wales Bankruptcy Cases	...	...	...	Aus.
N. S. W. Eq.	...	...	New South Wales Reports, Equity	...	...	...	Aus.
N. S. W. Ind. Arbtrn. Cas.	...	...	New South Wales Industrial Arbitration Cases	...	...	...	Aus.
N. S. W. L. R.	...	...	New South Wales Law Reports	...	...	...	Aus.
N. S. W. Land App. Cts.	...	...	New South Wales Land Appeal Courts	...	...	...	Aus.
N. S. W. S. C. R. (Eq.)	...	...	New South Wales Supreme Court Reports (Equity)	...	...	...	Aus.
N. S. W. S. C. R. (L.)	...	...	New South Wales Supreme Court Reports (Law)	...	...	...	Aus.
N. S. W. S. C. R. N. S.	...	...	New South Wales Supreme Court Reports, New Series	...	...	...	Aus.
N. S. W. W. N.	...	...	New South Wales Weekly Notes	...	...	...	Aus.
N. W.	...	...	North-Western Provinces High Court Reports	...	...	...	Ind.
N. W. T. R.	...	...	North-West Territories Reports	...	...	...	Can.
N. Z. Jur.	...	...	New Zealand Jurist	...	...	...	N.Z.
N. Z. Jur. Mining Law	...	...	New Zealand Jurist Mining Law	...	...	...	N.Z.



N. Z. Jur. N. S. ...	...	New Zealand Jurist, New Series ... ..	N.Z.
N. Z. L. R. ...	...	New Zealand Law Reports, 1883—(current) ... ..	N.Z.
N. Z. L. R. C. A. ...	...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels. ...	...	Nelson's Reports, Chancery, 1 vol., 1625—1693 ... ..	Eng.
Nev. & M. K. B. ...	...	Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C. ...	...	Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B. ...	...	Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C. ...	...	Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837 ...	Eng.
New Mag. Cas. ...	...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850 ... ..	Eng.
New Pract. Cas. ...	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep. ...	...	New Reports, 6 vols., 1862—1865 ... ..	Eng.
New Sess. Cas. ...	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851 ... ..	Eng.
Nfld. L. R. ...	...	Newfoundland Reports ... ..	Nfld.
Nolan ...	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793 ... ..	Eng.
Notes of Cases ...	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850 ... ..	Eng.
Noy ...	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ...	Eng.
O. B. & F. ...	...	Ollivier Bell and Fitzgerald's Reports ... ..	N.Z.
O. B. S. P. ...	...	Old Bailey Session Papers ... ..	Eng.
O. Bridg. ...	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666 ... ..	Eng.
O. F. S. ...	...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R. ...	...	Ontario Law Reports ... ..	Can.
O'M. & H. ...	...	O'Malley and Hardcastle's Election Cases, 1869—(current) ...	Eng.
O. P. D. ...	...	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R. ...	...	Ontario Reports ... ..	Can.
O. R. ...	...	Official Reports of the South African Republic, 1894—1899 ...	S. Af.
O. R. C. ...	...	Reports of the High Court of the Orange River Colony ...	S. Af.
O. S. ...	...	Upper Canada Queen's Bench, Old Series ... ..	Can.
O. W. N. ...	...	Ontario Weekly Notes ... ..	Can.
O. W. R. ...	...	Ontario Weekly Reporter ... ..	Can.
Old. ...	...	Nova Scotia Reports (Oldrights) ... ..	Can.
Ont. Dig. ...	...	Digest of Ontario Case Law, 4 vols., 1823—1900 ... ..	Can.
Owen ...	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614 ... ..	Eng.
P. (preceded by date) ...	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e.g.</i> , [1891] P.) ... ..	Eng.
P. & B. ...	...	New Brunswick Reports (Pugsley and Burbidge) ... ..	Can.
P. & T. ...	...	New Brunswick Law Reports (Pugsley and Trueman) ... ..	Can.
P. Cas. ...	...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922 ... ..	Eng. & Col.
P. D. ...	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890 ... ..	Eng.
P. E. I. ...	...	Prince Edward Island Reports ... ..	Can.
P. R. ...	...	Ontario Practice ... ..	Can.
P. Wms. ...	...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., ... ..	Eng.
Palm. ...	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ...	Eng.
Park. ...	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717 ... ..	Eng.
Pat. App. ...	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App. ...	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake ...	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794 ... ..	Eng.
Peake, Add. Cas. ...	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ...	Eng.
Peck. ...	...	Peckwell's Election Cases, 2 vols., 1803—1806 ... ..	Eng.
Pelham ...	...	Pelham (S. A.) Reports ... ..	Aus.
Per. & Dav. ...	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn. ...	...	Perry and Knapp's Election Cases, 1 vol., 1833 ... ..	Eng.
Per. C. S. ...	...	Perrault's Conseil Supérieur ... ..	Can.
Per. P. ...	...	Perrault's Prévosté de Quebec, 1726—1756 ... ..	Can.
Ph. ...	...	Phillips' Reports, Chancery, 2 vols., 1841—1849 ... ..	Eng.
Phil. El. Cas. ...	...	Philipps' Election Cases, 1 vol., 1780 ... ..	Eng.
Phillim. ...	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ...	Eng.
Phillim. Eccl. Jud. ...	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip. ...	...	Phipson's Digest of Natal Reports, 1858—1859 ... ..	S. Af.
Pig. & R. ...	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ...	Eng.
Pitc. ...	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ...	Scot.
Plowd. ...	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I. ... ..	—
Poll. ...	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ...	Eng.
Poph. ...	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ...	Eng.
Power, Rodwell, & D. ...	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.

Pratt	...	...	Pratt's Supplement to Bott's Poor Laws, 1833	...	...	Eng.
Preo. Ch.	...	...	Precedents in Chancery, fol., 1 vol., 1689—1722	...	...	Eng.
Price	...	...	Price's Reports, Exchequer, 13 vols., 1814—1824	...	...	Eng.
Price	...	...	Price's Mining Commissioners' Cases	...	...	Can.
Pug.	...	...	New Brunswick Reports (Pugsley)	...	...	Can.
Py. R.	...	...	Pykes' Lower Canada Reports	...	...	Can.
Q. B.	...	...	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	...	...	Eng.
Q. B. (preceded by date)	...	...	Law Reports, Queen's Bench Division, 1891—1901 ( <i>e.g.</i> , [1891] 1 Q. B.)	...	...	Eng.
Q. B. D.	...	...	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	...	...	Eng.
Q. J. P.	...	...	Queensland Justice of Peace Reports	...	...	Aus.
Q. L. J.	...	...	Queensland Law Journal and Reports, 11 vols., 1879—1901	...	...	Aus.
Q. L. R.	...	...	Quebec Law Reports	...	...	Can.
Q. L. R. (Beor)	...	...	Queensland Law Reports by Beor, 1876—1878	...	...	Aus.
Q. P. R.	...	...	Quebec Practice Reports	...	...	Can.
Q. R. (Vol.) K. B. or Q. B.	...	...	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	...	...	Can.
Q. R. (Vol.) S. C.	...	...	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	...	...	Can.
Q. S. C. R.	...	...	Queensland Supreme Court Reports, 5 vols., 1860—1881	...	...	Aus.
Q. S. R.	...	...	Queensland State Reports	...	...	Aus.
Q. W. N.	...	...	Weekly Notes, Queensland	...	...	Aus.
R.	...	...	The Reports, 15 vols., 1893—1895	...	...	Eng.
R.	...	...	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	...	...	S. Af.
R. (Ct. of Sess.)	...	...	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	...	...	Scot.
R. A. C.	...	...	Ramsay, Appeal Cases	...	...	Can.
R. & C.	...	...	Nova Scotia Reports (Russell & Chesley)	...	...	Can.
R. & G.	...	...	Nova Scotia Reports (Russell and Geldert)	...	...	Can.
R. C.	...	...	La Revue Critique de Législation et de Jurisprudence de Canada	...	...	Can.
R. de J.	...	...	Revue de Jurisprudence	...	...	Can.
R. de L.	...	...	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	...	...	Can.
R. E. D.	...	...	New South Wales, Reserved and Equity Decisions	...	...	Aus.
R. E. D.	...	...	Ritchie's Equity Decisions (Russell)	...	...	Can.
R. J. R. Q.	...	...	Quebec Revised Reports	...	...	Can.
R. L. N. S.	...	...	Revue Légale, New Series, 1895—(current)	...	...	Can.
R. L. O. S.	...	...	Revue Légale, Old Series, 21 vols., 1869—1892	...	...	Can.
R. P. C.	...	...	Reports of Patent Cases, 1884—(current)	...	...	Eng.
R. R.	...	...	Revised Reports	...	...	Eng.
Rast.	...	...	Rastell's Entries	...	...	Eng.
Rayn.	...	...	Rayner's Tithe Cases, 3 vols., 1575—1782	...	...	Eng.
Real Prop. Cas.	...	...	Real Property Cases, 2 vols., 1843—1847	...	...	Eng.
Rep. Ch.	...	...	Reports in Chancery, fol., 3 vols., 1615—1710	...	...	Eng.
Rep. in C. of A.	...	...	Reports in Courts of Appeal	...	...	N.Z.
Res. & Eq. Jud.	...	...	New South Wales Reserved and Equity Judgments	...	...	Aus.
Reserv. Cas.	...	...	Reserved Cases	...	...	Ir.
Rick. & M.	...	...	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	...	...	Eng.
Rick. & S.	...	...	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	...	...	Eng.
Ridg. L. & S.	...	...	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	...	...	Ir.
Ridg. Parl. Rep.	...	...	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	...	...	Ir.
Ridg. temp. H.	...	...	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	...	...	Eng.
Ritch. Eq. Rep.	...	...	Ritchie's Equity Reports	...	...	Can.
Rob. Eccl.	...	...	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	...	...	Eng.
Rob. L. & W.	...	...	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	...	...	Eng.
Robert. App.	...	...	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	...	...	Scot.
Robin. App.	...	...	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	...	...	Scot.
Roll. Abr.	...	...	Rolle's Abridgment of the Common Law, fol., 2 vols.	...	...	Eng.
Roll. Rep.	...	...	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	...	...	Eng.
Rom.	...	...	Romilly's Notes of Cases in Equity, 1 part, 1772—1787	...	...	Eng.
Roscoe's B. C.	...	...	Roscoe, Digest of Building Cases	...	...	Eng.
Rose	...	...	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	...	...	Eng.
Ross, L. C.	...	...	Ross's Leading Cases in Commercial Law (England and Scotland), 9 vols.	...	...	Eng.
Rowe	...	...	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	...	...	Eng.
Rul. Cas.	...	...	Campbell's Ruling Cases, 25 vols.	...	...	Eng.
Russ.	...	...	Russell's Reports, Chancery, 5 vols., 1824—1829	...	...	Eng.
Russ. & M.	...	...	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	...	...	Eng.



# xxviii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry. ...	...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R. ...	...	Russell's Election Reports...	Can.
Ry. & Can. Cas. ...	...	Railway and Canal Cases, 7 vols., 1835—1854 ...	Eng.
Ry. & Can. Tr. Cas. ...	...	Railway and Canal Traffic Cases, 1855—(current) ...	Eng.
Ry. & M. ...	...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App. ...	...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ...	Eng.
Ryde, Rat. App. ...	...	Ryde's Rating Appeals, 3 vols., 1871—1893 ...	Eng.
S. ...	...	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J. ...	...	South African Law Journal ...	S. Af.
S. A. L. R. ...	...	South Australian Law Reports ...	Aus.
S. A. L. R. ...	...	South African Law Reports ...	S. Af.
S. A. R. ...	...	Reports of the High Court of the South African Republic, 1881—1892 ...	S. Af.
S. A. S. R. ...	...	South Australian State Reports, since 1921 ( <i>e.g.</i> , [1921] S. A. S. R.) ...	Aus.
S. C. ...	...	Reports of the Supreme Court of the Cape of Good Hope from 1880 ...	S. Af.
S. C. (preceded by date)	...	Court of Session Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	...	Court of Session Cases (Scotland) (House of Lords), since 1906 ( <i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date)	...	Court of Justiciary Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R. ...	...	Canada, Supreme Court Reports ...	Can.
S. L. T. ...	...	Scots Law Times, 1893 (current) ...	Scot.
S. Q. R. ...	...	Queensland State Reports ...	Aus.
S. R. ...	...	Reports of the High Court of Southern Rhodesia ...	S. Af.
S. R. C. ...	...	Stuart's Lower Canada Reports ...	Can.
S. R. N. S. W. ...	...	New South Wales, State Reports ...	Aus.
S. R. Q. ...	...	Queensland Reports, Supreme Court ...	Aus.
S. V. A. R. ...	...	Stuart's Vice-Admiralty Reports ...	Can.
S. W. A. ...	...	South-West Africa Law Reports ...	S.-W. Af.
Saint ...	...	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ...	Eng.
Salk. ...	...	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ...	Eng.
Sask. L. R. ...	...	Saskatchewan Law Reports ...	Can.
Sau. & Sc. ...	...	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840 ...	Ir.
Saund. ...	...	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ...	Eng.
Saund. & A. ...	...	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B. ...	...	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C. ...	...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M. ...	...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858 ...	Eng.
Sav. ...	...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Say. ...	...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. Jur. ...	...	Scottish Jurist, 46 vols., 1829—1873 ...	Scot.
Sc. L. R. ...	...	Scottish Law Reporter, 1865—1924 ...	Scot.
Sc. R. R. ...	...	Scots Revised Reports ...	Scot.
Sch. & Lef. ...	...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ...	Ir.
Scott ...	...	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ...	Eng.
Scott, N. R. ...	...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm. ...	...	Seale and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860 ...	Eng.
Sel. Cas. Ch. ...	...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.) ...	Eng.
Selwyn's N. P. ...	...	Selwyn's Abridgement of the Law of Nisi Prius ...	Eng.
Sess. Cas. K. B. ...	...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem. ...	...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742 ...	Eng.
Sh. (Ct. of Sess.) ...	...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838 ...	Scot.
Sh. & Macl. ...	...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838 ...	Scot.
Sh. Dig. ...	...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ...	Scot.
Sh. Just. ...	...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App. ...	...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct. ...	...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch. ...	...	Sheppard's Touchstone of Common Assurances ...	Eng.
Show. ...	...	Shower's Reports, King's Bench, 2 vols., 1678—1695 ...	Eng.
Show. Parl. Cas. ...	...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ...	Eng.
Sid. ...	...	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ...	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

xxix

Sim. ...	...	Simons' Reports, Chancery, 17 vols., 1826—1852 ...	Eng.
Sim. & St. ...	...	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S. ...	...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Skin. ...	...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat. ...	...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ...	Ir.
Sm. & G. ...	...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B. ...	...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C. ...	...	Smith's Leading Cases, 2 vols. ...	Eng.
Smith, Reg. Cas. ...	...	C. L. Smith's Registration Cases, 1895—(current) ...	Eng.
Smythe ...	...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840 ...	Ir.
Sol. Jo. ...	...	Solicitors' Journal, 1856—(current) ...	Eng.
Spence ...	...	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks ...	...	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	Eng.
St. R. Qd. (preceded by date) ...	...	Queensland State Reports, since 1902 ( <i>e.g.</i> , [1902] St. R. Qd.) ...	Aus.
Stair Rep. ...	...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ...	Scot.
Stark. ...	...	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ...	Eng.
State Tr. ...	...	State Trials, 34 vols., 1163—1820 ...	Eng.
State Tr. N. S. ...	...	State Trials, New Series, 8 vols., 1820—1858 ...	Eng.
Stewart ...	...	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton ...	...	Stockton's Vice-Admiralty Report and Digest ...	Can.
Story ...	...	Story's Commentaries on Equity Jurisprudence ...	Eng.
Stra. ...	...	Strange's Reports, 2 vols., 1716—1747 ...	Eng.
Stu. M. & P. ...	...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ...	Scot.
Stuart ...	...	Sessions Cases (Stuart) ...	Scot.
Stuart, Adm. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ...	Can.
Stuart, K. B. ...	...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ...	Can.
Sty. ...	...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw. ...	...	Swabey's Report, Admiralty, 1 vol., 1855—1859 ...	Eng.
Sw. & Tr. ...	...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ...	Eng.
Swan. ...	...	Swanston's Reports, Chancery, 3 vols., 1818—1821 ...	Eng.
Swin. ...	...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme ...	...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M. ...	...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ...	Eng.
T. H. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ...	S. Af.
T. Jo. ...	...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ...	Eng.
T. L. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ...	S. Af.
T. L. R. ...	...	The Times Law Reports, 1884—(current) ...	Eng.
T. P. ...	...	Reports of the Supreme Court of the Transvaal, 1910—(current) ...	S. Af.
T. P. D. ...	...	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym. ...	...	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ...	Eng.
T. S. ...	...	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml. ...	...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ...	Eng.
Tas. L. R. ...	...	Tasmanian Law Reports ...	Aus.
Taunt. ...	...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas. ...	...	Tax Cases, 1875—(current) ...	Eng.
Tay. ...	...	Taylor's King's Bench Reports ...	Can.
Temp. Wood ...	...	Manitoba Reports <i>temp.</i> Wood ...	Can.
Term Rep. ...	...	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R. ...	...	Territories Law Reports ...	Can.
Thom. ...	...	Nova Scotia Reports (Thomson) ...	Can.
Toth. ...	...	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr. ...	...	Townsend, Modern State Trials ...	Eng.
Trem. P. C. ...	...	Tremaine Pleas of the Crown, 1 vol., 1667 ...	Eng.
Trist. ...	...	Tristram's Consistory Judgments, 1 vol., 1872—1890 ...	Eng.
Tru. ...	...	New Brunswick Reports (Trueman) ...	Can.
Tudor, L. C. Merc. Law. ...	...	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop. ...	...	Tudor's Leading Cases on Real Property ...	Eng.
Turn. & R. ...	...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr. ...	...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ...	Eng.
Tyr. & Gr. ...	...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ...	Eng.
U. C. Jur. ...	...	Upper Canada Jurist ...	Can.
U. C. L. J. N. S. ...	...	Canada Law Journal, New Series, 1865—(current) ...	Can.

U. C. L. J. O. S.	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	...	Can.
U. C. R.	...	Upper Canada Reports, Queen's Bench	...	Can.
Udal	...	Fiji Law Reports (Udal)	...	Fiji.
V. L. R.	...	Victorian Law Reports	...	Aus.
V. R.	...	Victorian Reports	...	Aus.
V. R. (Adm.)	...	Victorian Reports (Admiralty)	...	Aus.
V. R. (Eq.)	...	Victorian Reports (Equity)	...	Aus.
V. R. (Law)	...	Victorian Reports (Law)	...	Aus.
Vaugh.	...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	...	Eng.
Vent.	...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	...	Eng.
Vern.	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	Eng.
Vern. & Scr.	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	Ir.
Ves.	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	Eng.
Ves. & B.	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	Eng.
Ves. Sen.	...	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	Eng.
Vin. Abr.	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	Eng.
Vin. Supp.	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	Eng.
W.	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	S. Af.
W. A. L. R.	...	West Australian Law Reports	...	Aus.
W. A'B. & W.	...	Webb, A'Beckett and Williams' Victorian Reports	...	Aus.
W. & W.	...	Wyatt and Webb	...	Aus.
W. C. C.	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	Eng.
W. H. C.	...	South African Law Reports, Witwatersrand High Court	...	S. Af.
W. Jo.	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	Eng.
W. L. D.	...	South African Law Reports, Witwatersrand Local Division	...	S. Af.
W. L. R.	...	Western Law Reporter	...	Can.
W. L. T.	...	Western Law Times	...	Can.
W. N. (preceded by date)	...	Law Reports, Weekly Notes, 1866—(current) ( <i>e.g.</i> , [1866] W. N.)	...	Eng.
W. N.	...	Calcutta Weekly Notes	...	Ind.
W. R.	...	Weekly Reporter, 54 vols., 1852—1906	...	Eng.
W. R.	...	Sutherland's Weekly Reporter	...	Ind.
W. R.	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	S. Af.
W. W. & A'B.	...	Wyatt, Webb and A'Beckett	...	Aus.
W. W. R.	...	Western Weekly Reports	...	Can.
Wallis by Lyne	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	Ir.
Web. Pat. Cas.	...	Webster's Patent Cases, 2 vols., 1602—1855	...	Eng.
Welsh, Reg. Cas.	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	Ir.
Went. Off. Ex.	...	Wentworth's Office and Duty of Executors	...	Eng.
West	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	Eng.
West temp. Hard.	...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	...	Eng.
West. Tithe Cas.	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	Eng.
White	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	Scot.
White & Tud. L. C.	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	Eng.
Wight	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	Eng.
Will. Woll. & Dav.	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	Eng.
Will. Woll. & H.	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	Eng.
Willes	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	Eng.
Wilm.	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	Eng.
Wils.	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	Eng.
Wils. & S.	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	Scot.
Wils. Ch.	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	Eng.
Wils. Ex.	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	Eng.
Win.	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	Eng.
Wm. Bl.	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	...	Eng.
Wm. Rob.	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	Eng.
Wms. Saund.	...	Williams' Notes to Saunders' Reports, 2 vols.	...	Eng.
Wolf. & B.	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	Eng.
Wolf. & D.	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	Eng.
Woll.	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	...	Eng.
Wood	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	...	Eng.
Y. A. D.	...	Young's Vice-Admiralty Reports	...	Can.



Y. & C. Ch. Cas.	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—	
Y. & C. Ex.	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	
Y. & J.	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	Eng.
Y. B.	...	Year Books	Eng.
Y. B. (Rolls Series)	...	Year Books (Rolls Series)	Eng.
Y. B. (Sel. Soc.)	...	Year Books (Selden Society)	Eng.
Yelv.	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	Eng.
You.	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	Eng.





# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xv—xxxi, *ante*.)

A.-G. .	for Attorney-General.
Act. .	„ Actiengesellschaft.
Admlty.	„ Admiralty.
Affd.	„ Affirmed.
Affg.	„ Affirming.
Akt.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Alta.	„ Alberta.
Anon.	„ Anonymous.
Apid.	„ Applied.
Appet.	„ Applicant.
Appln.	„ Application.
Appln.	„ Application to Register a Trade Mark.
Appit.	„ Appellant.
Apprvd.	Approved.
Arbn. .	„ Arbitration.
Archbp.	Archbishop.
Art. .	Article.
Ass. Tax Case	Assessed Tax Case.
Assce. .	Assurance.
Assocn.	Association.
B. C. .	Borough Council.
B. C. .	British Columbia.
Bkpcy. .	Bankruptcy.
Bkpt. .	Bankrupt.
Bldg. Soc.	Building Society.
Bp. .	Bishop.
C. A. .	„ Court of Appeal.
C. & S. L. Ry Co.	City & South London Railway Co.
C. C. A.	Court of Criminal Appeal.
C. C. R.	County Court Rules.
C. C. R.	Court of Crown Cases Reserved.
C. L. P. Act.	Common Law Procedure Act.
C. L. Ry Co.	Central London Railway Co.
C. O. R.	Crown Office Rules.
C. S. U. C.	Consolidated Statutes of Upper Canada.
Ca.	<i>Capias ad satisfaciendum.</i>
Cale. Ry. Co.	Caledonian Railway Co.
Ch. .	Chancery.
Ch. Div.	„ Chancery Division.
Co. .	Company.
Co-op. Assocn	Co-operative Supply Association.
Comrs. .	Commissioners.
Consd. .	Considered.
Corpn. .	Corporation.
Ct. .	Court.
Ct. of Ch.	Court of Chancery.
Ct. of Eq.	Court of Equity.
Ct. of R.	Court of Review.
D. C. . . . .	„ Divisional Court.
„ . . . . .	„ Doubted.

Deft. . . . .	for Defendant.
Distd. . . . .	„ Distinguished.
Div. Ct. . . . .	„ Divisional Court.
Eccl. Comrs.	Ecclesiastical Commissioners.
Eccl. Ct.	Ecclesiastical Court.
Ex. Ch.	Exchequer Chamber.
<i>Ex p.</i> .	<i>Ex parte.</i>
Exch. .	Exchequer.
Exor. .	Executor.
Exorship.	Executorship.
Expld. .	Explained.
Extd. .	Extended.
Extrix. .	Executrix.
<i>Fi. fa.</i> . . . .	„ <i>Fieri facias.</i>
Folld. . . . .	„ Followed.
G. & S. W. Ry. Co. .	Glasgow & South Western Railway Co.
G. C. Ry. Co. . .	Great Central Railway Co.
G. E. Ry. Co. . .	Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	Great North of Scotland Railway Co.
G. N. Ploc. & Brompton Rly. Co	Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co. . .	Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co. . .	Great Western Railway Co.
Govt. . . . .	Government.
Grdns. . . . .	Guardians or Guardians of the Poor.
H. C. of A. . . .	„ High Court of Australia.
H. L. . . . .	„ House of Lords.
I. R. Comrs. . . .	„ Inland Revenue Commissioners.
Insce. . . . .	„ Insurance.
JJ. . . . .	„ Justices.
Jud. Act . . . .	„ Judicature Act.
K. B. Div. . . . .	„ King's Bench Division.
L. & B. Ry. Co. . .	„ London & Brighton Railway Co.
L. & N. E. Ry. Co. .	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co. .	„ London & North Western Railway Co.
L. & S. W. Ry. Co. .	„ London & South Western Railway Co.
L. & Y. Ry. Co. . .	„ Lancashire & Yorkshire Railway Co.
L. B. . . . .	„ Local Board.
L. B. & S. C. Ry. Co. .	„ London, Brighton & South Coast Railway Co.
L. C. . . . .	„ Lord Chancellor.
L. C. & D. Ry. Co. .	„ London, Chatham & Dover Railway Co.
L. C. C. . . . .	„ London County Council.
L. Elec. Ry. Co. .	London Electric Railway Co.
L. G. Board . . .	Local Government Board.
L.J. . . . .	Lord Justice.
L.JJ. . . . .	„ Lords Justices.
L. M. & S. Ry. Co. .	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co. .	„ London, Tilbury & Southend Railway Co.
M. S. Act . . . .	„ Merchant Shipping Act.
M. S. & L. Ry. Co. .	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags. . . . .	„ Magistrates.
Man. . . . .	„ Manitoba.
Mentd. . . . .	„ Mentioned.
Met. Dist. Ry. Co. .	„ Metropolitan District Railway Co.
Met. Ry. Co. . . .	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co. .	„ Midland Great Western Railway Co.
Mid. Ry. Co. . . .	„ Midland Railway Co.
Mtge. . . . .	„ Mortgage.
Mtgee. . . . .	„ Mortgagee.
Mtgor. . . . .	„ Mortgagor.
N. B. . . . .	„ New Brunswick.
N. B. Ry. Co. . .	„ North British Railway Co.
N. E. Ry. Co. . .	„ North Eastern Railway Co.
N. F. . . . .	„ Not Followed.
N. P. . . . .	„ Nisi Prius.

N. S.	.	.	.	.	for Nova Scotia.
N. W. P.	.	.	.	.	„ North-West Provinces.
N. W. T.	.	.	.	.	„ North-West Territories.
Ont.	.	.	.	.	„ Ontario.
Ord.	.	.	.	.	„ Order.
Overd.	.	.	.	.	„ Overruled.
P. C.	.	.	.	.	„ Privy Council.
P. E. I.	.	.	.	.	„ Prince Edward Island.
Petn.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	„ <i>Quære</i> .
Que.	.	.	.	.	„ Quebec.
R. C.	.				Rural Council.
R. D. C.					Rural District Council.
R. S. A.					Rural Sanitary Authority.
R. S. C.					Revised Statutes of Canada.
R. S. C.					Rules of the Supreme Court, 1883.
Refd.	.				Referred.
Regn. of Trade Mk.					Registration of Trade Mark.
Regr. of Trade Mks					Registrar of Trade Marks.
Resp.	.				Respondent.
Restg.	.				Restoring.
Revsd.	.				Reversed.
Revsg.	.				Reversing.
Ry. Co.					Rail. Co. or Railway Co.
S. C.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.					South Eastern & Chatham Railway Co.
S. E. Ry. Co.					South Eastern Railway Co.
S. P.					Same Point.
S.S.					Steamship.
Sask.					Saskatchewan.
Sched.					Schedule.
<i>Sci. fa.</i>					<i>Scire facias</i> .
Sect.					Section.
Set. Land Act					„ Settled Land Act.
Settlmt.	.				„ Settlement.
Soc.	.				„ Society.
Soc. Anon.	.				„ Société Anonyme, etc.
Solr.	.				„ Solicitor.
Trade Mk.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	„ United States of America.
Union Assmt. Com.					„ Union Assessment Committee.
Urban S. A.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	„ Workmen's Compensation Act.
Y. T.	.	.	.	.	„ Yukon Territory.



## MEANING OF TERMS

### USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated; and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.





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<i>Infectious Diseases</i> . . . . .	„ ANIMALS ; PUBLIC HEALTH.	<i>Police</i> . . . . .	„ POLICE.
<i>Infirmaries</i> . . . . .	„ POOR LAW.	<i>Poor Law</i> . . . . .	„ POOR LAW.
<i>Insurance Committee</i> . . . . .	„ WORK AND LABOUR.	<i>Protection against Fire</i> . . . . .	„ PUBLIC HEALTH.
<i>Intoxicating Liquors</i> . . . . .	„ INTOXICATING LIQUORS.	<i>Public Authorities Protection</i> . . . . .	„ PUBLIC AUTHORITIES.
<i>Joint Burial Boards</i> . . . . .	„ BURIAL.	<i>Public Health</i> . . . . .	„ PUBLIC HEALTH.
<i>Justices of the Peace</i> . . . . .	„ CRIMINAL LAW ; MAGISTRATES.	<i>Public Libraries, Museums, Gymnasiums, etc.</i> . . . . .	„ PUBLIC HEALTH.
<i>Knacker's Yards and Slaughter Houses, Licencing of</i> . . . . .	„ PUBLIC HEALTH.	<i>Quarantine</i> . . . . .	„ PUBLIC HEALTH.
<i>Libraries</i> . . . . .	„ LITERARY AND SCIENTIFIC INSTITUTIONS ; PUBLIC HEALTH.	<i>Railways</i> . . . . .	„ RAILWAYS.
<i>Light</i> . . . . .	„ EASEMENTS.	<i>Rates and Rating</i> . . . . .	„ RATES AND RATING.
<i>Lighting</i> . . . . .	„ ELECTRIC LIGHTING ; GAS ; HIGHWAYS.	<i>Recreation Grounds</i> . . . . .	„ OPEN SPACES.
<i>Light Railways</i> . . . . .	„ TRAMWAYS AND LIGHT RAILWAYS.	<i>Refreshment Houses</i> . . . . .	„ INNS AND INN-KEEPERS ; INTOXICATING LIQUORS ; SALE OF GOODS.

<i>Roads</i> . . . . .	See HIGHWAYS.	<i>Theatres</i> . . . . .	See THEATRES.
<i>Sanitary Accommodation</i> . . . . .	„ PUBLIC HEALTH.	<i>Trades</i> . . . . .	„ ANIMALS ; FOOD AND DRUGS ; INTOXICATING LIQUORS ; TRADE AND TRADE UNIONS.
<i>Sanitation</i> . . . . .	„ PUBLIC HEALTH.		
<i>Scavenging and Cleansing</i> . . . . .	„ PUBLIC HEALTH.	<i>Traffic Control</i> . . . . .	„ STREET AND AERIAL TRAFFIC.
<i>Sewers and Drains</i> . . . . .	„ SEWERS AND DRAINS.	<i>Tramways</i> . . . . .	„ TRAMWAYS AND LIGHT RAILWAYS.
<i>Shop Hours</i> . . . . .	„ FACTORIES.	<i>Veterinary Surgeons</i> . . . . .	„ MEDICINE AND PHARMACY.
<i>Slaughter Houses</i> . . . . .	„ PUBLIC HEALTH.	<i>Water Supply</i> . . . . .	„ WATER SUPPLY.
<i>Small Holdings</i> . . . . .	„ SMALL HOLDINGS.	<i>Ways</i> . . . . .	„ EASEMENTS ; HIGHWAYS.
<i>Street Railways</i> . . . . .	„ TRAMWAYS AND LIGHT RAILWAYS.	<i>Weights and Measures</i> . . . . .	„ WEIGHTS AND MEASURES.
<i>Street Traffic</i> . . . . .	„ STREET AND AERIAL TRAFFIC.	<i>Workhouses</i> . . . . .	„ POOR LAW.
<i>Streets</i> . . . . .	„ HIGHWAYS.	<i>Working Classes, Housing of</i> . . . . .	„ PUBLIC HEALTH.
<i>Telegraphs and Telephones</i> . . . . .	„ TELEGRAPHS AND TELEPHONES.	<i>Workshops</i> . . . . .	„ FACTORIES.

NOTE.—This title deals with Local Authorities & their administration. For the law dealing with their rights & liabilities in connection with particular undertakings reference should be made to the appropriate titles, cross-references to which are given at the end of the Table of Contents ; the law relating to corporate bodies generally is dealt with in the title Corporations, Vol. XIII., pp. 263 et seq. Cases to which Local Authorities were parties but in which the principles specially affecting them were not involved are as a general rule excluded.

In this title Public Health Act, 1875 (c. 55), Municipal Corporations Act, 1882 (c. 50), & Local Government Acts, 1888 (c. 41), & 1894 (c. 73), are referred to as P. H. Act, 1875, 1882 Act, 1888 Act, & 1894 Act respectively.

## Part I.—The Ministry of Health.

See, generally, Ministry of Health Act, 1919 (c. 21).

**Powers.]—**See, generally, P. H. Act, 1875, ss. 293–304.

### Transfer from Local Government Board.]

See Ministry of Health Act, 1919 (c. 21), s. 3 (1) (a).

**1. — To suspend sale of surplus land—Whether power to vary uses included.]—**Land compulsorily acquired by a local authority under P. H. Act, 1875, s. 176, for a particular purpose, cannot be permanently used for another purpose inconsistent with that for which it was acquired.

The Local Government Board have no power under P. H. Act, 1875, s. 175, which gives them power to direct that land not required for the purpose for which it was acquired shall not be sold, to order land to be used for a purpose inconsistent with that for which it was acquired.—*A.-G. v. HANWELL URBAN COUNCIL*, [1900] 2 Ch. 377 ; 69 L. J. Ch. 626 ; 82 L. T. 778 ; 48 W. R. 690 ; 16 T. L. R. 452 ; 44 Sol. Jo. 572, C. A.

**Annotations :—***Apld.* *A.-G. v. Pontypridd U. C.*, [1905] 2 Ch.

441. *Refd.* *Herne Bay U. C. v. Payne & Wood*, [1907] 2 K. B. 130.

**2. Appeals to—Jurisdiction on—As to questions of law.]—***PEEBLES v. OSWALDTWISTLE URBAN DISTRICT COUNCIL*, No. 91, *post*.

**3. — Right of person aggrieved — Construction of local Act.]—**A local Act by sect. 31 gave to “any person deeming himself aggrieved by any order, determination, or decision of the corpn.” a right of appeal to quarter sessions” or to the Local Government Board under P. H. Act, 1875, s. 268 :—*Held* : the right of appeal to the Local Government Board under the sect. was limited to cases similar to those mentioned in P. H. Act, 1875, s. 268, & did not extend to an order, determination or decision not falling within that sect.—*LOCAL GOVERNMENT BOARD v. STREET* (1908), 98 L. T. 599 ; 72 J. P. 177 ; 6 L. G. R. 515 ; *sub nom.* *R. v. LOCAL GOVERNMENT BOARD*, *Ex p. STREET*, 52 Sol. Jo. 300, H. L.

**4. Provisional Orders—Costs of—What are.]—***BROOKS, JENKINS & Co. v. TORQUAY CORPN.*, No. 110, *post*.



## Part II.—Local Authorities generally.

## SECT. 1.—IN GENERAL.

**Alteration of name—Entry of securities in new name.]—**See Local Government (Stock Transfer) Act, 1895 (c. 32).

**Transfers of powers.]—**See 1894 Act, s. 67.

**Adjustment of property & liabilities.]—**See 1894 Act, s. 68.

**Liabilities—For negligence in performance of statutory duties.]—**See NEGLIGENCE.

**5. Acquisition of land—Restrictions on user—Land acquired for particular purpose.]—**It is *ultra vires* for a local authority who have obtained powers & acquired land for particular purposes under a special Act to use permanently the land so acquired, or any part thereof, for another purpose, although the same may be within powers given to them by some other Act.

It makes no difference whether the special Act confers power upon the local authority to acquire land by agreement only, or whether it also confers upon them compulsory powers of acquisition.—*A.-G. v. PONTYPRIDD URBAN COUNCIL*, [1906] 2 Ch. 257; 75 L. J. Ch. 578; 95 L. T. 224; 70 J. P. 394; 22 T. L. R. 576; 50 Sol. Jo. 525; 4 L. G. R. 791, C. A.

*Annotations:—*Reid. *Lambeth Corpn. v. South London Electric Supply Corpn.* (1907), 96 L. T. 440; *Stourcliffe Estate Co. v. Bournemouth Corpn.* (1910), 79 L. J. Ch. 455.

—— **Land compulsorily acquired.]—**See, generally, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 120 *et seq.*

## SECT. 2.—ELECTIONS.

See, generally, ELECTIONS, Vol. XX., pp. 119 *et seq.*

**County councils.]—**See ELECTIONS, Vol. XX., pp. 138, 139.

**Municipal corporations.]—**See ELECTIONS, Vol. XX., pp. 122 *et seq.*

**Parish councils.]—**See ELECTIONS, Vol. XX., pp. 140, 141.

**Rural district councils.]—**See ELECTIONS, Vol. XX., p. 140.

**Urban district councils.]—**See ELECTIONS, Vol. XX., pp. 139, 140.

**6. Duty to elect—Meeting adjourned to avoid election—Enforcement by mandamus.]—***R. v. NORMAN* (1865), 29 J. P. Jo. 407.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 314, 315.

**7. Duties of returning officer—Whether ministerial or judicial.]—**After the election of a local board under 11 & 12 Vict. c. 63, the chairman proceeded under sect. 27 to ascertain the number of valid votes for each candidate, & to cast up the votes; & he made his certificate as to who were the candidates elected. On the trial of a *quo warranto* information against one of the successful candidates, it appeared that the chairman had by

mistake (a) put down votes to one candidate which the voting papers showed had been given for another; (b) had omitted to reckon votes; & also (c) had received as valid votes which were invalid, but as to which he had made no examination:—*Held*: as to the first & second class of votes, the duty of the chairman was merely ministerial, viz. that of casting up the votes, & as to this his certificate could be impeached; but that as to the third class he had to exercise a judicial duty & as to this therefore his certificate was conclusive.—*R. v. COLLINS* (1876), 2 Q. B. D. 30; 46 L. J. Q. B. 257; 36 L. T. 192, C. A.

*Annotation:—*Mentd. *Stepney Petn.* (1886), 2 T. L. R. 559. —.]—See P. H. Act, 1875, sched. II., rr. 51, 53, 54.

**Declaration on acceptance of office.]—**See 1894 Act, s. 48; Part VII., Sect. 1, sub-sect. 7, B., *post*.

## SECT. 3.—QUALIFICATION AND DISQUALIFICATION OF COUNCILLORS AND ALDERMEN.

## SUB-SECT. 1.—QUALIFICATION.

**Alderman.]—**See Part VII., Sect. 2, sub-sect. 3; Part XII., Sect. 3, sub-sect. 2, *post*.

**Borough councillor.]—**See Part VII., Sect. 2, sub-sect. 2, B., *post*.

**County councillor.]—**See Part XII., Sect. 3, sub-sect. 2, *post*.

**Parish councillor.]—**See Part III., Sect. 5, sub-sect. 2, A., *post*.

**Rural district councillor.]—**See Part X., Sect. 2, sub-sect. 1, *post*.

**Urban district councillor.]—**See Part V., Sect. 2, sub-sect. 2, *post*.

## SUB-SECT. 2.—DISQUALIFICATION.

## A. In General.

See, generally, 1894 Act, ss. 23 (1), (2), 46.

**8. Receipt of relief—Relief to candidate's father.]—**Parochial relief given to a man's father is not relief to the man himself, within 5 & 6 Will. 4, c. 76, s. 9, so as to disqualify him under that sect. as a burgess of a borough, & so under sect. 23 as a town councillor.—*R. v. IRELAND* (1868), L. R. 3 Q. B. 130; 9 B. & S. 19; 37 L. J. Q. B. 73; 17 L. T. 466; 32 J. P. 726; 16 W. R. 358.

**9. — Relief by way of loan.]—**By 1894 Act, s. 46 (1), a person is disqualified for being elected or being a member or chairman of a council of a parish or of a district other than a borough or a board of guardians, "if he . . . has within twelve months before his election, or since his election, received union or parochial relief." Relief which is given by way of loan only is still relief within 1894 Act, s. 46 (1), & its receipt by way of loan acts as a disqualification as therein

## PART II. SECT. 1.

**a. Freedom from judicial interference.]—**The trend of modern judicial to depart from the practice of applying to bodies of a public representative character, intrusted by Parliament with delegated authority, the rules which were applied in the case of trading corps. & to recognise the right of such bodies, while acting

*vide* & within the limit of the powers conferred upon them by the legislature, to transact their business without interference by the cts.—*NORFOLK v. ROBERTS* (1913), 28 O. L. R. 593; 4 O. W. N. 1231; *affd.* 50 S. C. R. 285.—CAN.

## PART II. SECT. 3, SUB-SECT. 2.—A.

**b. Being concerned in any contract**

*with authority.]—*WOOD v. LITTLER (1921), 29 C. L. R. 564.—AUS.

**c. —.]—**O'CARROLL v. HASTINGS, [1905] 2 I. R. 590.—IR.

**d. —.]—**DEACON v. GREWAR (1898), 13 E. D. C. 132.—S. AF.

**e. Composition with creditors.]—**The disqualification enacted by Local Government Act, 1894 (c. 73), s. 46, is not limited to compositions &

**Sect. 3.—Qualification and disqualification of councillors and aldermen: Sub-sect. 2, A**

provided.—*CHARD v. BUSH*, [1923] 2 K. B. 849; 92 L. J. K. B. 1013; 130 L. T. 60; 87 J. P. 154; 39 T. L. R. 693; 68 Sol. Jo. 104; 21 L. G. R. 601; 27 Cox, C. C. 527, D. C.

**Bankruptcy.**—Compare **BANKRUPTCY**, Vol. IV., p. 177, Nos. 1644, 1647.

**10. Composition with creditors—Whether assignment for benefit of creditors included.]—**

A candidate for election as member of a local board of health had assigned all his property by deed to a trustee for the benefit of those of his creditors who should sign the deed, no sum being mentioned in it as a composition to be paid on the debts therein scheduled as due to them, & the creditors signing the deed thereby discharged him from all debts due to them by him:—*Held*: he was not disqualified under P. H. Act, 1875, Sched. II., r. 5, which provides that a person "who has entered into any composition with his creditors," shall be ineligible "so long as any proceedings in relation to such composition are pending," even though at the time of his election some of his creditors had signed the deed, while others did not sign it till after the election, for that the deed was not a "composition with creditors." The time specified by P. H. Act, 1875, Sched. II., r. 65, which provides that any casual vacancy on the board occurring "by failure duly to elect," shall be filled up by the board within six weeks, is to be computed from the day on which the retiring member goes out of office, & not from the day on which the election of a member to fill his place is held.—*R. v. COOBAN* (1886), 18 Q. B. D. 269; 56 L. J. M. C. 33; 51 J. P. 500; 3 T. L. R. 260, D. C.

*Annotation*:—*Consd. Corrigan v. Allison* (1900), 64 J. P. 678.

**11. — Member of arranging firm.]—**Within five years before an election of parish councillors, the firm of which one of the candidates at the election was then a member executed a deed of arrangement for the benefit of their creditors, which deed was duly registered under Deeds of Arrangement Act, 1887 (c. 57). By the deed the members of the firm assigned all their property, real & personal, to a trustee for the benefit of their creditors ratably in proportion to their respective debts. The candidate who had been a member of this firm was, with other candidates, returned as duly elected by a majority of lawful votes. No notice of disqualification was given before the poll was taken. After being returned & after a petition presented against his return, he did not oppose the petition, but affected to retire:—*Held*: the person in question was disqualified from being elected or from being a parish councillor, on the ground that he had made an arrangement with his creditors within five years before the election.—*WARD v. RADFORD* (1895), 59 J. P. 632; 11 T. L. R. 587, D. C.

*Annotation*:—*Consd. Corrigan v. Allison* (1900), 64 J. P. 678.

**12. — Debtor applying for administration order.]—**1894 Act, s. 46 (1) (c), which provides that a person shall be disqualified for being a parish or district councillor or guardian if he has made a composition or arrangement with his

creditors, applies to every composition, howsoever made, which the debtor has made with his creditors.

Where a judgment is recovered in a county ct. against a debtor whose total indebtedness does not exceed £50, & the debtor files a request in the county ct. for an administration order under Bkpcy. Act, 1883 (c. 52), s. 122, for the payment of his debts to the extent of 10s. in the pound by instalments, the debtor has made a "composition" with his creditors within 1894 Act, s. 46 (1) (c), & is disqualified.—*BRADFELD v. CHELTENHAM GUARDIANS*, [1906] 2 Ch. 371; 75 L. J. Ch. 618; 95 L. T. 78; 70 J. P. 371; 54 W. R. 611; 22 T. L. R. 639; 50 Sol. Jo. 560; 4 L. G. R. 961; 13 Mans. 207.

—*Compare* Nos. 290, 291, *post*.

**13. Holding paid office — Office held under committee.]—**By 1894 Act, s. 46, a person is disqualified for being a member of a district council if he holds any paid office under the council.

A distress committee established for an urban district under Unemployed Workmen Act, 1905 (c. 18), & the Urban Distress Committees (Unemployed Workmen) Order, 1905, is by virtue of that Act & Order constituted a committee of the council of the urban district for which it is established; & the person who holds a paid office under such a committee holds a paid office under the district council within 1894 Act, s. 46.—*CRUMP v. LEWIS*, [1908] 1 K. B. 858; 77 L. J. K. B. 478; 98 L. T. 864; 72 J. P. 149; 24 T. L. R. 321; 52 Sol. Jo. 282; 6 L. G. R. 588, D. C.

**14. — Office held under joint-committee.]—**By an agreement between the corpn. of a borough & the council of an urban district a joint committee was formed for the purpose of providing hospitals for the use of the inhabitants of the borough & district jointly, half the committee being appointed by the corpn. & half by the district council. Applt. was appointed by the committee as their salaried clerk, & was paid his salary by them out of funds which were in part derived from contributions by the corpn. & the district council respectively:—*Held*: applt. was the holder of "a paid office under the district council" within 1894 Act, s. 46, & consequently was disqualified from being a member of that council, none the less because the corpn. joined in his appointment & in the payment of his salary.—*GREVILLE-SMITH v. TOMLIN*, [1911] 2 K. B. 9; 80 L. J. K. B. 774; 104 L. T. 816; 75 J. P. 314; 9 L. G. R. 598, D. C.

*Compare* Part VII., Sect. 2, sub-sect. 2, C. *post*.

**15. Being concerned in any contract with authority — Sub-contractor.]—***TOMKINS v. JOYLIFFE* (1887), 51 J. P. Jo. 247.

*Annotations*:—*Refd. Nutton v. Wilson* (1889), 53 J. P. 644; *Everett v. Griffiths*, [1924] 1 K. B. 941; *Lapish v. Bralthwaite*, [1925] 1 K. B. 474.

**16. — —.]—**By P. H. Act, 1875, Sched. II., r. 64, a member of a local board who is in any manner concerned in any bargain or contract entered into by such board shall, except in certain cases, cease to be such member, & his office as such shall thereupon become vacant; & by P. H. Act, 1875, Sched. II., r. 70, a penalty is imposed on a person who acts as such member when disabled from acting by any provision of the Act. *Deft.*, a member of the local board, was employed by persons with whom the board had

arrangements made under Bkpcy. Acts, but applies also to arrangements & compositions entered into by debtors with creditors by deeds registered under Deeds of Arrangement Act,

**f. Absence from meetings — Absence through illness.]—***R. v. COUNTY KILKENNY JJ.*, [1912] 2 I. R. 1.—*IR.*

**g. Convicted felon.]—***Re HAY, LONGFORD v. RICHMOND CORPN.*, [1922] V. L. R. 186.—*AUS.*

**h. Selling liquor without license.]—**An unlicensed person who, under the colour of a license to his son, whether in collusion with the latter or on his own responsibility, sells liquor by retail, is not disqualified under Municipal Act, 1877, from holding



contracted for the performance of certain works on the premises of the board, to do portions of the works so contracted for:—*Held*: deft. had been concerned in contracts entered into by the board within the meaning of the Act, & was therefore disqualified; &, having acted as a member of such board since becoming so disqualified, he had incurred the penalty imposed by the Act.—*NUTTON v. WILSON* (1889), 22 Q. B. D. 744; 58 L. J. Q. B. 443; 53 J. P. 644; 37 W. R. 522; *sub nom.* *NULTON v. WILSON*, 5 T. L. R. 439, C. A.

*Annotations*:—*Apld.* *Barnacle v. Clark*, [1900] 1 Q. B. 279. *Distd.* *Holden v. Southwark Corpn.*, [1921] 1 Ch. 550. *Consd.* *Everett v. Griffiths*, [1924] 1 K. B. 941. *Refd.* *England v. Inglis*, [1920] 2 K. B. 636.

17. — **Supply of materials to contractor.**—By Elementary Education Act, 1870 (c. 75), s. 34, a member of a school board who (*inter alia*) “shall in any way share or be concerned in the profits of any bargain or contract with or any work done under the authority of such school board” is liable to a penalty, & his office becomes vacant.

*Resp.*, a member of a school board, sold sand & gravel to a builder who had entered into a contract with the board for the building of a school; at the time of the sale, *resp.* was aware that the sand & gravel were intended to be used, as they were in fact used, in the building of the school:—*Held*: *resp.* had been concerned in work done under the authority of the board, & had therefore been guilty of an offence under the sect.—*BARNACLE v. CLARK*, [1900] 1 Q. B. 279; 69 L. J. Q. B. 15; 81 L. T. 484; 64 J. P. 87; 48 W. R. 336.

*Annotations*:—*Refd.* *Norton v. Taylor*, [1906] A. C. 378; *Everett v. Griffiths*, [1924] 1 K. B. 941. *Walte*, [1925] 1 K. B. 474.

*Compare* No. 400, *post*.

18. — **Contract in name of another.**—*WALSH v. GRIMSLEY* (1900), 35 L. Jo. 663.

*Annotation*:—*Consd.* *Everett v. Griffiths*, [1924] 1 K. B. 941.

19. — **Collection of rent—Employment terminated before vacancy declared.**—A member of a board of guardians agreed with the board to collect on their behalf rent receivable by the board in respect of a certain house. There was no express agreement as to any fee or commission to be paid to the member for so doing. He collected the rent until the house was sold & then paid to the board the amount of the rent received by him less a sum which he claimed to be entitled to retain as commission, but he subsequently paid to the board the sum which he had retained. After receiving it the board declared the member's office of guardian to be vacant on the ground that by reason of charging commission for the collection of the rent he had become disqualified under 1894 Act, s. 46 (1) (*e*), for being a member of the board:—*Held*: the fact that before the declaration of vacancy the employment had terminated & the amount of commission had been paid by the member to the board did not prevent him from being disqualified & the office was, therefore, vacant.—*R. v. ROWLANDS*, [1906] 2 K. B. 202; 75 L. J. K. B. 501; 95 L. T. 502; 70 J. P. 463; *sub nom.* *R. v. ROWLANDS, Ex p. WYNNE*, 4 L. G. R. 983.

20. — **Rate compounding agreement.**—*HOLDEN v. SOUTHWARK CORPN.*, No. 381, *post*.

21. — **Evidence of interest—Invoice.**—A

of alderman, though he may have rendered himself liable to penalties for breach of Liquor License Acts.—*R. (CIANCY) v. CONWAY* (1881), 46 U. C. R. 85—CAN.

k. *Resignation—Necessity*

fact that the reeve who signed the bye-law & caused the corporate seal to be attached, had prior thereto purported to resign from the office, without the consent of the majority of the members present at a of the council, & without his

local Act incorporates Commissioners Clauses Act, 1847 (c. 16). By sect. 2 of the local Act, every male person of full age, rated to the relief of the poor in a certain amount shall be a comr. under that Act. By sect. 9 of the general Act, any person who after his “appointment as a comr.” shall “be concerned or participate in any manner in any contract shall thenceforth “cease to be a comr.” By sect. 15, every person who shall act as a comr. “after having become disqualified” shall be liable to a penalty of £50. In an action against deft. for the penalty for having acted as a comr. after he was disqualified, an invoice was produced in the handwriting of deft. addressed “to the Comrs. of St. Ives,” & charging them for lime supplied on several occasions during four months. Deft. became a comr. by reason of possessing the qualification required by the second sect. of the local Act:—*Held*: (1) deft. was “appointed” a comr. within Commissioners Clauses Act, 1847 (c. 16), s. 9; (2) deft., by being concerned in a contract, became “disqualified” to act as a commissioner within Commissioners Clauses Act, 1847 (c. 16), s. 15; (3) the invoice was evidence from which the jury might find that deft. was concerned or participated in a contract within Commissioners Clauses Act, 1847 (c. 16), s. 9.—*NICHOLSON v. FIELDS* (1862), 7 H. & N. 810; 31 L. J. Ex. 233; 10 W. R. 304; 158 E. R. 695.

*Annotations*:—*Consd.* *Lewis v. Carr* (1876), 1 Ex. D. 484. *Refd.* *Fletcher v. Hudson* (1881), 7 Q. B. D. 611.

*Compare* Part VII., Sect. 2, sub-sect. 2, C. (e), & Nos. 56, 57, 405, *post*.

22. — **Lease of lands—Sewage farm.**—A person is not disqualified for membership of a local board under P. H. Act, 1875, Sched. II., clause 64, by reason of a lease by the board to him of a sewage farm containing covenants on the part of the board to supply, & on his part to use on the premises, the sewage of the district.—*R. v. GASKARTH* (1880), 5 Q. B. D. 321; 49 L. J. Q. B. 509; 42 L. T. 688; 44 J. P. 507; 28 W. R. 596, D. C.

— — — — —]—*See* 1894 Act, s. 46 (2).

23. **Absence from meetings—From what date calculated.**—By 1894 Act, s. 46 (6), which is incorporated in London Government Act, 1899 (c. 14), by s. 2 (5), so far as relates to the offices of mayor & alderman, if a member of a council of a parish or district, including now an alderman, is absent from meetings of the council for more than six months consecutively, except in certain cases, his office shall, on the expiration of those months, become vacant.

*Pltf.*, who was an alderman of a metropolitan borough, was absent from a meeting of the council on June 6, 1905, & from each subsequent meeting until Nov. 21, when he was again present:—*Held*: the absence must begin to be reckoned from the first meeting at which *pltf.* was absent, viz., June 6, & as the six months from that date had not expired on Nov. 21, his office had not become vacant.—*KERSHAW v. SHOREDITCH CORPN.* (1906), 95 L. T. 55; 70 J. P. 190; 22 T. L. R. 302; 4 L. G. R. 302.

24. — **Absence through illness—Right of member to be heard—Before vacancy declared.**—

(1) Where, independently of Jud. Act, 1873

resignation having been entered on the minutes thereof, did not preclude him from afterwards acting as such.—*Re VANDYKE & GRIMSBY* (1906), 12 O. L. R. 211; 7 O. W. R. 739; 8 O. W. R. 81.—CAN.



**Sect. 3.—Qualification and disqualification of councillors and aldermen: Sub-sect. 2, A. & B. Sects. 4 & 5: Sub-sect. 1, A. & B.]**

(c. 66), s. 25 (8), there is a legal right which can be asserted either at law or in equity, a ct. of equity has jurisdiction under that sub-sect. to grant an injunction in protection of that right. For instance, where a member of a school board has been improperly declared disqualified for the office, he may apply for & obtain an injunction from a ct. of equity restraining the board from proceeding to elect a new member in his place, notwithstanding that he has a remedy at law by *quo warranto*.

(2) Elementary Education Act, 1870 (c. 75), Sched. II., Part I., r. 14, under which a member of a school board ceases to be a member "if he absents himself during six successive months from all meetings of the board, except from temporary illness or other cause to be approved by the board," does not entitle the board to proceed to the election of a new member in the place of a member who has absented himself on account of ill-health, without first giving the defaulting member an opportunity of explaining or excusing his absence.

**RICHARDSON v. METHLEY SCHOOL BOARD**, [1893] 3 Ch. 510; 62 L. J. Ch. 943; 69 L. T. 308; 42 W. R. 27; 9 T. L. R. 603; 37 Sol. Jo. 670; 1 R. 701.

*As to (1) Refd. Turnbull v. West Riding Athletic Club, Leeds (1894), 70 L. T. 92.*

**25. — Whether notice to council necessary.]—**(1) If a guardian or district [or parish] councillor is absent from meetings of the board or council for more than six months consecutively through illness, it is not necessary for him to give notice of his illness to the board or council in order that he may not be disqualified under 1894 Act, s. 46 (6).

(2) *Semble*: if his absence is not due to illness he is disqualified from acting, at all events until his excuse has been considered & accepted by the board or council, & he cannot by merely resuming attendance afterwards do away with the disqualification.—**R. v. HUNTON, Ex p. HODGSON** (1911), 75 J. P. 335; 9 L. G. R. 751, D. C.

**26. — For cause other than illness—Whether disqualification removed by subsequent attendance.]—****R. v. HUNTON, Ex p. HODGSON**, No. 25, *ante*.

**Duration of disqualification—Effect of statutory provision for re-eligibility.]—***Compare* No. 291, *post*.

#### *B. Penalties for Acting when Disqualified.*

*See* 1894 Act, ss. 46 (2) (c), (8), Sched. II.; 1882 Act, s. 41.

**27. Authority other than borough—Liability to penalty—"Acting"—Not confined to voting.]—**By a local Act for paving, watching, lighting, & improving the city of L., comrs. were appointed for carrying the Act into effect & a penalty was imposed upon such of them, as, being personally interested in the matter in question, should act as comrs. in the execution of the Act. One of the comrs., being personally interested in the construction of a footpath opposite his own house, attended a meeting of the comrs., & spoke upon the question of the mode of constructing such footpath:—*Held*: this was evidence to go to the jury of an acting as a comr.

The jury, not being satisfied that he had voted, found a verdict for deft. We think that there was other evidence of deft.'s acting as a comr. besides the voting; & that his having taken a part in the discussion respecting the mode of executing the work, should have been left to the

jury as evidence of acting within sect. 13 of the local Act. If deft. had appeared on that occasion merely in his private capacity, for the purpose of making representations to the comrs. upon the matter in question, as it regarded his own interest, he would not have incurred the penalty; but, if he attended as a comr., & gave his reasons to his brother comrs., & used his influence with them for the purpose of governing their decision, then it would have been otherwise, & the question ought to have been submitted to the jury in which of these capacities deft. did appear (**PARKE, B.**).—**CHARLESWORTH v. RUDGARD** (1834), 1 Cr. M. & R. 498; 4 Tyr. 824; 4 L. J. Ex. 89; 149 E. R. 1176. *Annotation*:—**Refd. Cobbett v. Warner** (1856), 1 H. & N. 388.

**28. — "Voting" on prohibited matter—Presence when unanimous resolution passed—Though votes not expressly recorded.]—**An action was brought by an inhabitant of a parish, who was not a ratepayer, against the chairman of a board of guardians claiming a declaration that he was disqualified under 1894 Act, s. 46 (1) because being a servant of a co. which had a contract to supply the guardians with milk he was concerned in or participated in the profit of the contract. It was also alleged that deft. was disqualified under 1894 Act, s. 46 (2) (c), because he had voted on the question of the giving of the contract to the co. in which he was an employee, & pltf. further claimed to recover penalties:—*Held*: (1) the action was not maintainable, as the proper procedure was by an information in the nature of a *quo warranto*; (2) the penalties could not be recovered by action, as the statute provided that the penalties should be recovered in a ct. of summary jurisdiction, & that remedy alone could be followed; (3) where a resolution was passed unanimously by a board every member present must be taken to have voted for the resolution, even although the votes were not expressly recorded.—**EVERETT v. GRIFFITHS**, [1924] 1 K. B. 941; 93 L. J. K. B. 583; 131 L. T. 405; 88 J. P. 93; 40 T. L. R. 477; 68 Sol. Jo. 562; 22 L. G. R. 330.

*Annotations*:—*As to (1) Refd. Everett v. Ryder* (1926), 135 L. T. 302. *As to (3) Consd. Laphin v. Braithwaite*, [1925] 1 K. B. 474.

**29. — Declaration of disqualification—Procedure to obtain—Quo warranto.]—****EVERETT v. GRIFFITHS**, No. 28, *ante*.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 355 *et seq.*

**30. — Recovery of penalties—Whether by action.]—****EVERETT v. GRIFFITHS**, No. 28, *ante*.

**Authority a borough.]—***See* Part VII., Sect. 1, sub-sect. 7, C., *post*.

#### **SECT. 4.—CONTRACTS OF LOCAL AUTHORITIES.**

**Contracts of corporations.]—***See, generally*, CORPORATIONS, Vol. XIII., pp. 378 *et seq.*

**Statutory requirements—Contracts of urban authority—Under Public Health Acts.]—***See* Part V., Sect. 2, sub-sect. 6, A. (b), *post*.

**Contracts with members, officers or servants—As disqualification.]—***See* Sub-sect. 2, A., *ante*.

**31. — Imposition of penalty—Whether contract void.]—**One of a board of paving comrs. having entered into a contract to do some work for the board, the ct. refused a *mandamus* directing them to advertise for fresh tenders to do the work.

As there is no provision in the [local] Act making such a contract void, I cannot interfere by *mandamus* as required (**PATTESON, J.**).—**R. v. ST.**

MARGARET & ST. JOHN WESTMINSTER PAVING COMRS. (1837), Will. Woll. & Dav. 48 ; 1 Jur. 104.

**32.** ————.]—(1) P. H. Act, 1875, s. 193, provides that officers or servants employed by a local authority shall not in any wise be concerned or interested in any contract with such authority for any of the purposes of the Act, & that, if any such officer or servant is so concerned or interested, he shall be incapable of afterwards holding or continuing in any office or employment under the Act, & shall forfeit the sum of £50 :—*Held* : the effect of this sect. is to render such a contract illegal, & to prevent an officer or servant of a local authority from suing on the contract.

(2) *Semble* : if, after the making of a contract with a local authority, an officer of the authority became interested in it, P. H. Act, 1875, s. 193, would not avoid the contract.—*MELLISS v. SHIRLEY LOCAL BOARD* (1885), 16 Q. B. D. 446 ; 55 L. J. Q. B. 143 ; 53 L. T. 810 ; 50 J. P. 214 ; 34 W. R. 187 ; 2 T. L. R. 360, C. A.

*Annotations* :—As to (1) *Consd.* *Anderson v. Daniel* (1924), 130 L. T. 418. *Refd.* *Whiteley v. Barley* (1887), 20 Q. B. D. 196.

—————.]—*See, generally*, CONTRACT, Vol. XII., pp. 272 *et seq.*

**33.** ————.]—*Interest acquired in existing contract.*—*MELLISS v. SHIRLEY LOCAL BOARD*, No. 32, *ante*.

*Resolution as offer.*—*See* CONTRACT, Vol. XII., p. 57, Nos. 317, 318.

*Presumption that seal duly affixed.*—*See* CORPORATIONS, Vol. XIII., pp. 286, 287, Nos. 174–182.

**34.** *Solicitor electing to be remunerated by items—Power of authority to assent.*—A local authority employing a solr. in respect of a sale, purchase, or mtge. of land may assent to the solr.'s election that his remuneration shall be regulated in accordance with Rule 6 of the General Order made under Solicitors Remuneration Act, 1881 (c. 44).—*Re EVANS*, [1905] 1 Ch. 290 ; 74 L. J. Ch. 204 ; 92 L. T. 151 ; 69 J. P. 104 ; 3 L. G. R. 169.

*Annotation* :—*Consd.* *Re Porter, Amphlett & Jones*, [1912] 2 Ch. 98.

**35.** *Whether assent of Board of Trade necessary—Agreement collateral to agreement requiring assent.*—In 1892 a local authority were empowered by a Provisional Order to supply electricity in their district, & were also thereby empowered, with the consent of the Board of Trade, by deed to be approved by the Board of Trade, to transfer their powers, duties, liabilities, & works to any co. In Mar. 1897, by deed approved by the Board of Trade, the powers, etc., under the Provisional Order were transferred to a co. By an agreement of even date, after reciting that in part consideration for the local authority assenting to the transfer the agreement was entered into, the co. undertook to erect & maintain a refuse destructor & to create or dispose thereby of the whole of the refuse to be supplied to them by the local authority. This agreement was not approved by the Board of Trade, they having intimated that they were not concerned with that matter. After the co. had begun to work the dust destructor, serious complaints were made by the inhabitants of the district to the local authority on account of the noxious smells thereby occasioned, with the result that the co. declined to perform their agreement to maintain a destructor & dispose of the refuse :—*Held* : the agreement was not *ultra vires* of the local authority, but was enforceable by them, their power to enter into it not having been taken away because the terms thereof were not contained in the deed of transfer, which had to be made with the approval of the Board of Trade.—

LAMBETH CORPN. *v.* SOUTH LONDON ELECTRIC SUPPLY CORPN., LTD. (1907), 96 L. T. 440 ; 71 J. P. 233 ; 23 T. L. R. 347 ; 5 L. G. R. 526, C. A.

*Annotation* :—*Refd.* *Southport Corpn. v. Birkdale District Electric Supply Co.*, [1925] Ch. 794.

## SECT. 5.—ACQUISITION OF LAND AND PAYMENT OF COMPENSATION.

### SUB-SECT. 1.—UNDER PUBLIC HEALTH ACTS.

#### A. Acquisition of Land.

*See* 1875 Act, s. 175 ; COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 291 *et seq.*

*Restrictions on land to be taken.*—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 117, 118.

*Restrictions on user of land taken.*—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 120, Nos. 133–135.

**36.** ———— *Power of Ministry of Health to set aside.*—*A.-G. v. HANWELL URBAN COUNCIL*, No. 1, *ante*.

#### B. Payment of Compensation.

*See, generally*, P. H. Act, 1875, s. 308 ; COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 291 *et seq.*

**37.** *Claim to compensation & right of action distinguished.*—By 11 & 12 Vict. c. 63, s. 45, local boards of health are authorised to make & maintain sewers, subject to the conditions in sect. 145 that they shall not use, injure, or interfere with any watercourse, stream, river, etc., in which the owner or occupier of any lands, mills, etc., was interested without consent in writing first had & obtained. 21 & 22 Vict. c. 98, having by sect. 68 repealed sect. 145 of 11 & 12 Vict. c. 63, by sect. 73 prohibits the local board from doing any act injuriously affecting any reservoir, river or stream, etc., or the supply, quality, or fall of water contained in any reservoir, river or stream “in cases where any co. or individuals would, if this Act had not been passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir, river, stream, etc.,” without their consent in writing. The local board of D. made certain sewers in execution of the power of 11 & 12 Vict. c. 63, & 21 & 22 Vict. c. 98, & in doing so injuriously affected the stream S. without having obtained the consent of T., who was the occupier of a mill on the S., & entitled to the flow of the S. to his mill. T. obtained a *mandamus* to the local board for compensation & made a claim (a) for damage sustained in consequence of the board opening the main sewer so as to allow the water of the S. to flow through it for forty-six hours ; (b) for a drain or trap-door being made out of the S., & water allowed to flow out of the S. into the trap-door :—*Held* : (1) 21 & 22 Vict. c. 98, s. 73, was not confined to cases in which a ct. of equity would grant an injunction against the local board & T. was in the position of a person who would, if the Act had not passed, have been entitled by law to prevent the injuriously affecting the S. ; (2) the works of the local board were not authorised by sect. 73, & therefore the claim of T. was not the subject of compensation, but ground of action.—*R. v. DARLINGTON LOCAL BOARD OF HEALTH* (1865), 6 B. & S. 562 ; 6 New Rep. 178 ; 35 L. J. Q. B. 45 ; 29 J. P. 419 ; 13 W. R. 789 ; 122 E. R. 1303, Ex. Ch.



**Sect. 5.—Acquisition of land and payment of compensation: Sub-sect. 1, B.; sub-sect. 2. Sect. 6.]**

**38. In respect of what damage—Must be actionable apart from statute.]—**A board of public health are not bound to give compensation, under 11 & 12 Vict. c. 63, s. 144, for any damage which they may cause, which would not have been actionable if they had not been acting under the authority of the Act.—**HALL v. BRISTOL CORPN.** (1867), L. R. 2 C. P. 322; 36 L. J. C. P. 110; 15 L. T. 572; 31 J. P. 376; 15 W. R. 404.

**Annotations:—****Consd.** *Rhodes v. Airedale Drainage Comrs.* (1876), 45 L. J. Q. B. 861. **Refd.** *Fairbrother v. Bury R. S. A.* (1889), 37 W. R. 544.

a well-settled principle that a person is not entitled to compensation for damage done to him by a public authority acting under the powers of an Act of Parliament unless he could have maintained an action for such damage if the statute had not authorised the acts causing the damage (**LINDLEY, J.**).—**BURGESS v. NORTHWICH LOCAL BOARD** (1880), 6 Q. B. D. 264; 50 L. J. Q. B. 219; 44 L. T. 154; 45 J. P. 256; 29 W. R. 931, D. C.

**Annotations:—****Refd.** *Wednesbury Corpn. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78. **Mentd.** *Brierley Hill L. B. v. Pearsall* (1884), 9 App. Cas. 595; *Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A.-G.*, [1915] A. C. 654.

**40. —Must arise from exercise of powers under Act.]—***R. v. DARLINGTON LOCAL BOARD OF HEALTH*, No. 37, *ante*.

**41. —**—**BURGESS v. NORTHWICH LOCAL BOARD**, No. 39, *ante*.

**42. —**—**The urban sanitary authority, owing to an attack of measles, ordered the board school to be closed for a fortnight, whereby the master lost his fees, amounting to 30s. per week. He claimed compensation under P. H. Act, 1875, s. 308:—Held: no claim was competent, the power to close being given by the Education Code, 1886, sect. 98, & not by P. H. Act, 1875.—ROBERTS v. FALMOUTH SANITARY AUTHORITY** (1888), 52 J. P. 741; 4 T. L. R. 294, D. C.

**Interference with property adjoining highway.]—**See **HIGHWAYS**, Vol. XXVI., pp. 332–336, Nos. 638, 654, 659–661.

**Food improperly condemned as unsound.]—**See **FOOD & DRUGS**, Vol. XXV., p. 113, Nos. 364–369.

**Assessment of compensation—Procedure.]—**See, generally, **COMPULSORY PURCHASE OF LAND**, Vol. XI., pp. 184 *et seq.*

**43. —Appointment of arbitrator—Effect of non-compliance with Public Health Act, 1875 (c. 55), s. 180.]—**In an arbn. under the Act one arbitrator was appointed by the local authority under their common seal, & another arbitrator was appointed by the claimant, but not in writing under his hand. The arbitrators disagreed & appointed an umpire who made an award in favour of the claimant:—**Held: the provisions of above sect. not having been complied with, the appointment of the arbitrators & consequently their appointment of the umpire, & his award were invalid, & neither the original submission nor the appointment of the umpire nor the award could be made an order of ct.—Re GIFFORD & BURY TOWN COUNCIL** (1888), 20 Q. B. D. 368; 57 L. J. Q. B. 181; 58 L. T. 522; 52 J. P. 119; 36 W. R. 468, D. C.

See, generally, **ARBITRATION**, Vol. II., pp. 401

*et seq.*; **COMPULSORY PURCHASE OF LAND**, Vol. XI., pp. 189, 190.

**44. —“Full compensation”—Whether solicitor & client costs included.]—**“Full compensation” for damage sustained by reason of the exercise of any of the powers of the Act under P. H. Act, 1875, s. 308, does not include extra costs of legal proceedings which have been incurred, over & above the taxed party & party costs, by a person against whom the local authority has unsuccessfully proceeded under the Act.

Proceedings having been taken under P. H. Act, 1875, ss. 94–96, by resps., a local authority, against applt. in respect of a nuisance, an order to abate the nuisance was made against applt. by the justices. He appealed against the order to quarter sessions, who dismissed the appeal subject to a case. On the hearing of the case a Div. Ct. ordered that the order of quarter sessions should be quashed with costs, & that resps. should pay to applt. his costs of the appeal to the High Ct. to be taxed. The costs of the two appeals were taxed & paid to applt. In prosecuting the appeals applt. reasonably incurred costs to a greater amount than the taxed costs which he received & he claimed from resps. the difference between the taxed costs & the amount so expended by him, as compensation under P. H. Act, 1875, s. 308:—**Held: he was not entitled to recover the amount so claimed by him.—BARNETT v. ECCLES CORPN.**, [1900] 2 Q. B. 423; 69 L. J. Q. B. 834; 83 L. T. 66; 64 J. P. 692; 16 T. L. R. 463, C. A.

**Annotations:—****Refd.** *Wiffen v. Bailey & Romford U. C.*, [1914] 2 K. B. 5. **Mentd.** *G. W. Ry. v. Fisher*, [1905] 1 Ch. 316; *Hobbs v. Winchester Corpn.* (1910), 79 L. J. K. B. 1123.

#### SUB-SECT. 2.—UNDER OTHER ACTS.

**For cemeteries.]—**See **BURIAL**, Vol. VII., pp. 539 *et seq.*

**For educational purposes.]—**See **COMPULSORY PURCHASE OF LAND**, Vol. XI., p. 294; **EDUCATION**, Vol. XIX., pp. 572 *et seq.*

**For highways & streets.]—**See **HIGHWAYS**, Vol. XXVI., pp. 386, 387, 519, 552 *et seq.*

**For housing schemes.]—**See **COMPULSORY PURCHASE OF LAND**, Vol. XI., pp. 293 *et seq.*; **PUBLIC HEALTH**.

**For isolation hospitals.]—**See **PUBLIC HEALTH**.

**For open spaces.]—**See **OPEN SPACES**.

**For removal of obstructive dwellings.]—**See **PUBLIC HEALTH**.

**For small holdings & allotments.]—**See **COMPULSORY PURCHASE OF LAND**, Vol. XI., p. 294; **SMALL HOLDINGS**.

**For unhealthy area schemes.]—**See **PUBLIC HEALTH**.

**45. Restrictions on user of land taken.]—***A.-G. v. PONTYPRIDD URBAN COUNCIL*, No. 5, *ante*.

—See, generally, **COMPULSORY PURCHASE OF LAND**, Vol. XI., pp. 120 *et seq.*

#### SECT. 6.—OFFICERS.

**Of borough.]—**See Part VII., Sect. 3, *post*.

**Of county.]—**See Part XII., Sect. 4, *post*.

**Of rural district.]—**See Part X., Sect. 2, sub-sect. 4, *post*.

#### PART II. SECT. 5, SUB-SECT. 1.—B.

**38 i. In respect of what damage—Must be actionable apart from statute.]—****LINGKE v. CHRISTCHURCH CORPN.** (1913), 47 L. L. T. Jo. 14.—**IR.**

**1. Interest on compensation—When payable.]—**Compensation for lands injuriously affected in the exercise of municipal powers is in the nature of damages, & interest should not be

allowed thereon before the time of the liquidation of the damages by the making of the award.—*Re LEAK & CITY OF TORONTO* (1899), 28 A. R. 351; 30 S. C. R. 321.—**CAN.**



**Of rural parish council.]—**See Part III., Sect. 5, sub-sect. 2, F., *post*.

**Of urban district.]—**See Part V., Sect. 3, *post*.

**46. Definition—Whether solicitor remunerated by professional charges included.]—**A local Act, by which a poor law union & rural district were dissolved, provided that any officer of the guardians or rural district council who should be in office at the commencement of the Act, & who by virtue thereof should sustain direct pecuniary loss, should be deemed to be an officer entitled to compensation within 1888 Act, s. 120, & that sect. should apply accordingly. By 1888 Act, s. 100, the expression "office" includes "any place, situation, or employment," & the expression "officer" is to be construed accordingly.

Solrs. were during a period of about twenty-six years next before the commencement of the Act from time to time employed by the board of guardians of the union & the rural district council to do such legal work as those bodies required to have done, receiving by way of remuneration for that work the usual professional costs & charges payable to solrs.; & during that period no other solr. was employed by the board of guardians or council:—*Held*: the solrs. so employed could not be considered as officers of or as holding any "place, situation or employment" under the board of guardians or rural district council within 1888 Act, ss. 100, 120.—*Re CARPENTER & BRISTOL CORPN.*, [1907] 2 K. B. 617; 76 L. J. K. B. 1145; 97 L. T. 461; 71 J. P. 417; 23 T. L. R. 654; 51 Sol. Jo. 589; 5 L. G. R. 977, C. A.

**47. Nature of office—Treasurer of district council—Whether a "public" office.]—**The office of treasurer to a district council is not one with respect to which the remedy of *quo warranto* will apply.

The duties of the treasurer to the district council are not of that "public & substantial" character which are required to support a *quo warranto* (WRIGHT, J.).—*R. v. WELLS* (1895), 43 W. R. 576; 11 T. L. R. 458; 39 Sol. Jo. 585, D. C.

**48. Remuneration—Payment for additional services—Beyond services contracted for—Whether allowed.]—**A. was engaged at a certain salary as surveyor to a local board of health; his duties were defined to be to take levels & prepare plans, sections, specifications & estimates of all works, etc.; to examine & report as to the supply of water, & to take measures for the laying on of water; to overlook the waterworks belonging to to city, & to be thereafter constructed, & that he "shall devote his whole time to the service of the board, it being declared that he shall on no account be paid for extra duties rendered to the said board, & not undertake any other employment save & except any engagement which may be made with him by the mayor, etc., as a municipal body." The salary was £50 a year as surveyor, & £100 for the duties connected with the waterworks. A. was employed in enlarging & improving certain old waterworks which were transferred to the corpn., & in laying down mains into the city, & he performed duties therein requiring the skill of an able engineer. For these services the corpn., acting as the local board of health, passed a resolution & order to pay him an extra sum of £100:—*Held*: such order was legal.—*R. v. GLOUCESTER CORPN.* (1859), 33 L. T. O. S. 145; 23 J. P. 709.

—**Payment of salary during military service.]—**See CONTRACT, Vol. XII., p. 57, Nos. 317, 318.

**49. — Recovery—Salary payable out of rates—Procedure.]—***Indebitatus assumpsit* will not lie against comrs. under a local paving Act, for

salary of officers whom the Act authorises them to appoint at a salary to be paid out of the rates to be raised thereunder. The proper remedy is, either by an action upon the case, or a *mandamus*.—*BOGG v. PEARSE* (1851), 10 C. B. 534; 2 L. M. & P. 21; 20 L. J. C. P. 99; 16 L. T. O. S. 462; 15 J. P. 436; 138 E. R. 212.

*Annotations*:—*N.F. Hall v. Taylor* (1858), E. B. & E. 107. *Consd. Bush v. Martin* (1863), 2 H. & C. 311.

**50. — — — — —.]—**Comrs. were appointed, to be annually elected, for executing a local Act. They had power to levy rates. By the Act they had power to appoint clerks & other officers, & to pay them salaries out of the money to be raised under the Act. They had power to execute many works. By the Act they might sue & be sued by their clerk; & the comrs. were exempted from personal liability for any contracts entered into by them as comrs.:—*Held*: (1) a clerk, appointed by the comrs. for one year, might maintain an action for his salary against the clerk of the comrs. in a subsequent year; (2) it was within the scope of the authority of the comrs. to employ an attorney & he might recover in an action against the clerk of the comrs. in a succeeding year.—*HALL v. TAYLOR* (1858), E. B. & E. 107; 27 L. J. Q. B. 311; 31 L. T. O. S. 151; 23 J. P. 20; 4 Jur. N. S. 877; 120 E. R. 447.

*Annotation*:—*Reid. Bush v. Beavan* (1862), 1 H. & C. 500.

**51. — — — — —.]—**The action of *mandamus*, like the writ of *mandamus*, does not lie where there is any other remedy.

Comrs. under a local improvement Act were empowered to appoint a clerk & other officers, & to pay them reasonable salaries out of the moneys to be collected under the Act; power was given to levy rates (*inter alia*), for the purpose of paying the salaries of officers. Pltfs., exors. of B., sued the comrs.' clerk, the declaration alleging that the comrs. were indebted to B. in debts, & moneys for his agreed salary for his services as the clerk to the comrs., & upon their retainer, & for other work & labour, etc., of B., as the attorney & solr. of, & otherwise for, the comrs., at their request, in & about the business of the comrs., & for money paid by him for their use & on accounts stated; & that the said debts & moneys were a charge upon any moneys & funds in the hands of the comrs. collected under the Act; & if they should not have in their hands any such moneys & funds, then the same debts, became & were a charge upon a rate & assessment leviable under the Act; & pltfs. being, as exors., personally interested therein within C. L. P. Act, 1854 (c. 125), demanded of the comrs. to pay the moneys due out of the funds in their hands, or to levy a rate under the Act; & alleging a neglect & refusal, & claiming a writ of *mandamus* commanding the comrs. to pay or assess a rate:—*Held*: the declaration was bad, it being consistent with the allegations that to part, at least, of the claim, the comrs. were personally liable, & the remedy by *mandamus* being therefore inapplicable.—*BUSH v. BEAVAN* (1862), 1 H. & C. 500; 32 L. J. Ex. 54; 7 L. T. 106; 8 Jur. N. S. 1015; 10 W. R. 845; 158 E. R. 982.

*Annotations*:—*Reid. Bush v. Martin* (1863), 9 L. T. 510; *Peebles v. Oswaldtwistle U. D. C.*, [1897] 1 Q. B. 384. *Mentd. Morgan v. Met. Ry.* (1868), L. R. 4 C. P. 97.

**52. — — — — —.]—****Plea that no funds available—Whether valid.]—**Pltfs., exors. of B., sued deft., as clerk to certain local comrs., for salary, due under a local Act, to testator, for work done for the comrs. as their clerk. The plea in effect set out, that the comrs. had not, either at the time of the accruing of the debts, or afterwards, any funds in hand, raised under the Act, applicable



**Sect. 8.—Committees. Sect. 9: Sub-sects. 1 & 2.]**

Order, 1887. Subsequently to such delegation, the executive committee, without expressly revoking the delegation, issued certain regulations under the Rabies Order, 1887, as to the muzzling of dogs, & keeping them under control; no regulations under the Rabies Order, 1887, had been issued by the local sub-committee:—*Held*: the delegation was not equivalent to a resignation by the executive committee of its own powers, the delegated authority was subject to resumption at any time, & the regulations were therefore valid.—*HUTH v. CLARKE* (1890), 25 Q. B. D. 391; 59 L. J. M. C. 120; 63 L. T. 348; 55 J. P. 86; 38 W. R. 655; 6 T. L. R. 373, D. C.

**69. — Whether power exercisable by committee.]—***HUTH v. CLARKE*, No. 68, *ante*.

**Of rural parish council.]—**See Part III., Sect. 5, sub-sect. 2, E., *post*.

**Of urban district council.]—**See Part V., Sect. 2, sub-sect. 4, *post*.

**Of borough council.]—**See Part VII., Sect. 2, sub-sect. 1, E., *post*.

**Of county council.]—**See Part XII., Sect. 3, sub-sect. 5, *post*.

**SECT. 9.—FINANCE.****SUB-SECT. 1.—BORROWING.**

See, generally, P. H. Act, 1875, ss. 233–243; Local Loans Act, 1875 (c. 83); Local Authorities (Financial Provisions) Act, 1921 (c. 67), ss. 3–7; CORPORATIONS, Vol. XIII., pp. 360, 361, Nos. 953–958.

**70. Overdraft at bank—Expenditure for authorised purpose—In excess of authorised amount.]—**Defts. in 1903 obtained the sanction of the Local Govt. Board to a loan for the erection of municipal buildings. They spent, over & above the amount of the loan, a further sum of £18,350, which was borrowed from their bankers, by way of overdraft. In 1907 defts. applied to the Local Govt. Board for leave to borrow the amount thus overspent, but as to £4,910, a portion thereof, sanction was refused. In Oct. 1908, defts. proposed to levy a general district rate to enable them to pay the £4,910, but were restrained by the ct. from doing so until the trial of this action. Before action brought, defts. had paid a sum of £855 for interest on their bank overdraft, & they proposed to pay a further sum of £900 for interest. The most recent of the items composing the £4,910 had been expended more than a year before the date of the proposed rate:—*Held*: the loan of the sum of £4,910 to defts. from the bank by way of overdraft, without the sanction of the Local Govt. Board, was illegal; defts. must be restrained from applying any part of the general district fund or rate or any other public fund or rate under their control in repayment of the loan or any part thereof; defts. were not entitled to make any payment of interest upon money borrowed without the sanction of the Local Govt. Board, whether such borrowing was by means of overdraft or otherwise; the payment by defts. of the £855 was unlawful & ought to be disallowed by the auditor on auditing defts.' accounts, but this declaration was in no way to affect the power of the Local Govt. Board to remit such disallowed payment, though unlawfully made, under any statute enabling them so to do; defts. must be perpetually restrained from making any further payments of interest upon money borrowed without the sanction of the Local Govt. Board or other statutory sanction, whether such borrowing be by way of overdraft

or otherwise.—*A.-G. v. TOTTENHAM URBAN DISTRICT COUNCIL* (1909), 73 J. P. 437; 8 L. G. R. 95.

**71. Issue of loan capital — What amounts to issue.]—**By Finance Act, 1899 (c. 9), s. 8 (1), (2), where any corpn. propose to issue any loan capital, they shall, before the issue thereof, deliver to the Comrs. a statement of the amount proposed to be secured by the issue, charged with an *ad valorem* stamp duty.

A corpn. proposing to issue loan capital by the creation of corpn. stock invited tenders on the terms that the stock was to be paid for by the allottees by instalments, the last of which became due on June 21, 1899, after which date the stock was to be inscribed. The stock was applied for & allotted, & prior to June 20, 1899, scrip certificates were delivered to the allottees which entitled the holders, on payment of the remaining instalments to have stock inscribed in their names. Finance Act, 1899 (c. 9), came into force on June 20, 1899:—*Held*: there had been an "issue" of the loan capital at the latest by the date when the scrip certificates were delivered, & that date being prior to the coming into force of the Act, the duty imposed by s. 8 was not payable.—*A.-G. v. LIVERPOOL CORPN.*, [1902] 1 K. B. 411; 71 L. J. K. B. 195; 86 L. T. 300; 66 J. P. 391; 50 W. R. 328; 46 Sol. Jo. 215.

**72. — Stamped certificate under Finance Act, 1899 (c. 9), s. 8—Time for delivery.]—***A.-G. v. LIVERPOOL CORPN.*, No. 71, *ante*.

**73. Whether security must be given.]—**The Local Govt. Board, in Apr. 1900, sanctioned the borrowing by the Bournemouth Corpn. of the sum of £600 on the credit of the rates, which the corpn. were entitled to mortgage, the amount to be repaid with interest within ten years. The corpn. borrowed this amount from the Wilts & Dorset Bank, & mortgaged a proportion of the rates as security. The corpn. afterwards transferred their account, in pursuance of an arrangement, to the National Provincial Bank, which repaid to the Wilts & Dorset Bank the principal & interest. The mtge. was not transferred to the National Provincial Bank, but a receipt was indorsed thereon. The arrangement provided that the corpn. should pay interest to the National Provincial Bank, that as soon as advances made by the bank reached £250,000 the corpn. should issue stock through the bank, that the banking account of the corpn. should be transferred to the National Provincial Bank, & that the bank should only charge interest on the excess of sums borrowed over balances standing to the credit of the corpn., £1,500 being allowed as a free balance. The auditor surcharged a payment of £2 12s. 6d. to the National Provincial Bank for interest upon the sum of £600 on the ground that a proper security for the sum advanced had not been executed:—*Held*: on the facts, it being the intention of the parties that there should be a transfer of the loan & of the mortgage securing it from the Wilts & Dorset Bank to the National Provincial Bank, there had, in fact, been no new borrowing on the part of the corpn., & there having been a sanction for the old loan & a security for the same there was no reason for the surcharge. *Qu.*: whether under P. H. Act, 1875, s. 233, the power of the local authority to borrow is a power to borrow on mtge. only.—*R. v. LOCKE*, [1911] 1 K. B. 680; 80 L. J. K. B. 358; 103 L. T. 790; 75 J. P. 145; 27 T. L. R. 148; 55 Sol. Jo. 139; 9 L. G. R. 103, O. A.; *reversg.*, [1910] 2 K. B. 201, D. C.

*Annotation:—**Reid. A.-G. v. West Ham Corpn.*, [1910] 2 Ch. 560.



74. Transfer of existing loan — Distinguished from borrowing.]—*R. v. LOCKE*, No. 73, *ante*.

75. Sanction of Minister of Health — Whether necessary for method of securing loan.]—*R. v. LOCKE*, No. 73, *ante*.

#### SUB-SECT. 2.—ACCOUNTS AND AUDIT.

Making up accounts.]—*See* P. H. Act, 1875, s. 245; Financial Statements Order, 1921.

Time for.]—*See* 1894 Act, s. 58 (1).

Annual reports.]—*See* P. H. Act, 1875, s. 206.

Audit—Duties of auditor.]—*See* District Auditors Act, 1879 (c. 6), s. 3.

Remuneration of auditor.]—*See* District Auditors Act, 1879 (c. 6), s. 2.

Expenditure sanctioned by Minister of Health.]—*See* Local Authorities (Expenses) Act, 1879 (c. 72), s. 3; No. 82, *post*.

Stamp duty on audit.]—*See* District Auditors Act, 1879 (c. 6), ss. 3, 6; Audit Stamp Duty (Local Authorities) Order, 1921.

76. — Appointment of solicitor as auditor—Whether allowed.]—(1) One of the partners in a firm, acting as attorneys for a parish, was duly appointed auditor of the union comprising that parish, & acted as such until, on the passing of Poor Law Amendment Act, 1844 (c. 101), he became auditor of the district comprising that parish. It was known that he was a partner in the firm; & for some time no objection was made to his acting as auditor, though in doing so he had to allow or disallow bills of costs of his own firm. The objection was at last taken. The auditor, after an unsuccessful attempt to have the audit, as to these bills, conducted by a stranger, which the Poor Law Comrs. would not sanction, held an audit himself, though with the assistance of a disinterested party: that party, however, not acting formally as assessor. The auditor, during such audit, allowed several bills of costs belonging to his own firm. The accounts & allowances being brought up by *certiorari*; on a motion to quash them:—*Held*: the auditor, being duly appointed & having accepted the office, was bound to fulfil its duties, & therefore the audit was not void, though the auditor had a direct interest in the accounts.

The appointment, however, of such a person to the office of auditor, is not looked upon by the ct. with approbation.

(2) Amongst the items allowed were the costs of a litigation, in support of rates irregularly made, which in the opinion of the ct., was unnecessary & improper, though the litigation was *bonâ fide*, carried on under the advice of counsel & sanctioned by the vestry:—*Held*: these items ought not to have been allowed: & the auditor's allowance of them was quashed.—*R. v. GREAT WESTERN RY. CO., Re BURNHAM RATES* (1849), 13 Q. B. 327; 3 New Mag. Cas. 133; 18 L. J. M. C. 145; 13 L. T. O. S. 45; 13 J. P. 198; 13 Jur. 652; 116 E. R. 1288.

Annotation:—*Generally*, *Mentd.* *R. v. Street* (1852), 18 Q. B. 682.

77. — Auditor also solicitor — Bills of costs allowed—Whether audit void.]—*R. v. GREAT WESTERN RY. CO., Re BURNHAM RATES*, No. 76, *ante*.

Accounts of officers.]—*See* P. H. Act, 1875, s. 250.

Taxation of solicitor's bill of costs—By clerk of the peace.]—*See* P. H. Act, 1875, s. 249.

78. — By master — Jurisdiction of court to order.]—*Re BLAKE, ETC. & CROYDON RURAL SANITARY AUTHORITY* (1886), 2 T. L. R. 336, D. C.

Solicitor employed at fixed salary—Whether work done in conduct of action included.]—*See* No. 90, *post*.

79. — Disallowance of items — Unnecessary litigation—Though undertaken on advice of council.]—*R. v. GREAT WESTERN RY. CO., Re BURNHAM RATES*, No. 76, *ante*.

80. — As unnecessary expenditure of public money—Whether for taxing master or auditor.]—An action was brought against an urban district council, who passed a resolution that prints of the speeches, evidence, & judgment be obtained & supplied to each member, & instructed their solrs. to carry out the resolution. The council lost the action, & besides paying pltf.'s taxed costs, had to pay the costs of their own solrs. The bill delivered to the council by their solrs. contained the usual & proper charges of obtaining prints of the speeches, evidence, & judgment which they had obtained in accordance with the council's instructions: but these charges were disallowed by the taxing master on taxation of the bill as between solr. & client under Solicitors Act, 1843 (c. 75), s. 37, on the ground that they were an unnecessary expenditure of public money. The council admitted that they gave the instructions, & that the charges were usual & proper, & were willing to pay them:—*Held*: the taxing master on taxation of the bill as between solicitor & client under Solicitors Act, 1843 (c. 73), s. 37, was not entitled to disallow usual & proper charges incurred by the instructions of the client, when there was no question of quantum, on the ground that they constituted an unnecessary expenditure of public money; but the question of unnecessary expenditure of public money was a matter for the auditor under P. H. Act, 1875, ss. 247, 249.—*Re PORTER, AMPHLETT & JONES*, [1912] 2 Ch. 98; 81 L. J. Ch. 544; 107 L. T. 40; 56 Sol. Jo. 521.

—*See, generally*, SOLICITORS.

81. Authorised expenditure — Opposition to bill in Parliament — Construction of local Act.]—Comrs. were empowered to cause to be paved, drained, & otherwise improved, the town & township comprised in the district, & to be the surveyors of highways within the same, & keep the same in repair; to "do all acts, matters, & things for promoting the health, comfort & convenience of the inhabitants" of the district, which they might deem or consider necessary. The ct. granted an injunction to restrain the Comrs. from applying any moneys produced by rates towards the promotion of a bill in Parliament the object of which was to obtain an extension of their district.—*A.-G. v. WEST HARTLEPOOL IMPROVEMENT COMRS.* (1870), L. R. 10 Eq. 152; 39 L. J. Ch. 624; 22 L. T. 510; 18 W. R. 685.

Annotations:—*Appld.* *A.-G. v. West Riding of Yorkshire Rivers Board* (1905), 69 J. P. 177. *Refd.* *A.-G. v. Merthyr Tydfil Grdns.*, [1900] 1 Ch. 506. *Mentd.* *Hood v. N. E. Ry.* (1870), 19 W. R. 266.

—*See, also*, No. 85, *post*, & compare No. 222, *post*.

82. — Expenditure authorised by Minister of Health—Whether restrained by interlocutory injunction.]—On Apr. 18, 1911, the Local Govt. Board in exercise of their powers under the Local Authorities (Expenses) Act, 1887 (c. 72), s. 3,



**Sect. 9.—Finance: Sub-sect. 2. Sects. 10 & 11:**  
[1, A.]

made a general order sanctioning any reasonable expenses to be incurred by a local authority in connection with the public local celebration of the Coronation of King George V. In May, 1911, defts. resolved to expend a sum not exceeding a certain amount upon the Coronation festivities in their district. On June 20, 1911, an action was commenced by the A.-G. on the relation of two ratepayers seeking to restrain defts. from making any order for payment out of the general district rates of this or any other sum towards the local Coronation festivities. On motion for an *interim* injunction in similar terms, it was contended that the only effect of the general order of the Local Govt. Board was to prevent the district auditor disallowing these expenses, & that notwithstanding that order the expenditure was illegal as being for purposes not authorised by statute:—*Held*: it was not a case in which the ct. would interfere by injunction before the trial of the action.

**A.-G. v. EAST BARNET VALLEY URBAN DISTRICT COUNCIL (1911), 75 J. P. 484; 9 L. G. R. 913.**

**[ 83. — Excessive expenditure on authorised object.]**—By Metropolis Management Act, 1855 (c. 120), s. 62, a metropolitan borough council, as the successors of the Board of Works, "shall . . . employ . . . such . . . servants as may be necessary, & may allow to such . . . servants . . . such . . . wages as (the Council) may think fit." By P. H. Act, 1875, s. 247 (1), as applied to the accounts of metropolitan borough councils, the district auditor "shall disallow any items of account contrary to law, & surcharge the same on the person making or authorising the making of the illegal payment."

In the year ending Mar. 31, 1922, a metropolitan borough council, as in the previous year, paid to its lowest grade of workers, whether men or women, a minimum wage of £4 per week, notwithstanding that the cost of living had fallen during that year from 176 per cent. to 82 per cent. above the pre-war level, the borough council being of opinion that £4 was the least wage which a local authority ought as a model employer to pay for adult labour. The district auditor found that these payments were not wages but gratuities to the employees, & were contrary to law, & starting with the pre-war rate of wages paid by the council, added on a bonus proportionate to the increase in the cost of living & a further £1 by way of margin, & disallowed the excess over that sum & surcharged the same upon the councillors responsible for the payments:—*Held*: an expenditure upon a lawful object might be so excessive as to be unlawful, & to the extent by which the amount exceeded legality the auditor was bound to disallow it & surcharge the excess upon the persons responsible, therefore the disallowance & surcharge were rightly made.—**ROBERTS v. HOPWOOD, [1925] A. C. 578; 94 L. J. K. B. 542; 133 L. T. 289; 89 J. P. 105; 41 T. L. R. 436; 69 Sol. Jo. 475; 23 L. G. R. 337, H. L.; revsg. S. C. sub nom. R. v. ROBERTS, Ex p. SCURR, [1924] 2 K. B. 695, C. A.**  
*Annotations*:—**Apld.** *Roberts v. Cunningham* (1925), 134 L. T. 421. **Foll.** *R. v. Roberts, Ex p. Woolwich B. C.* (1926), 90 J. P. 197. **Refd.** *R. v. Grain, Ex p. Wands-worth Grdns.* (1926), 43 T. L. R. 38. **Mentd.** *Howard-Flanders v. Maldon Corpn.* (1926), 135 L. T. 6; *Short v. Poole Corpn.*, [1926] Ch. 66.

**84. — — —.]**—Early in 1920 a conference was held which had been called by the borough council of Fulham for the purpose of considering the standardisation of wages of municipal employees other than those covered by trade union rates of wages, & was attended by twenty-two out of the

twenty-eight metropolitan boroughs. As the result of the inquiries made from all the borough councils, a scheme known as the Fulham Scheme was recommended, providing for the grading of the different classes of manual workers employed by councils of metropolitan boroughs, & suggesting that the minimum wage should not be less than £3 10s. 6d. per week. The scheme also provided that: "Nothing contained in the above scheme to operate to reduce the present wages of any employee in a borough where better conditions prevail." The Fulham Scheme was adopted by the borough council of Woolwich on May 12, 1920. In the same year there was also established a body known as "The Joint Industrial Council for Local Authorities' Non-Trading Services (Manual Workers)," which suggested in regard to the payment of the lowest grade of workers the fixing as a basic wage a sum of 30s. per week of forty-seven hours, to which should be added a bonus in accordance with a certain scheme then formulated to meet the cost of living. It also reproduced the saving clause in the Fulham Scheme under the heading: "Existing privileges to continue." The Woolwich borough council continued to pay wages based upon the Fulham Scheme, although the standard of living had fallen, & they said that such payments were reasonable & proper & within the discretion granted to the borough council by Metropolis Management Act, 1855 (c. 120), s. 62, & also that they were in accordance with the recommendations of the Fulham conference. At the audit of the accounts of the council for the year ending Mar. 31, 1924, the district auditor found that the council were continuing to pay the rates of wages which they adopted in 1920, although the extra cost of living had fallen to almost half of what it was when these rates were adopted. He accordingly disallowed the payments of wages in excess & surcharged the same upon the councillors responsible for the payments:—*Held*: the Joint Industrial Scheme was intended to supersede the Fulham Scheme as a guide to local authorities. It was on a wider basis, & was intended to provide for fluctuations in wages according to the changes in the cost of living. As regards the "Existing Privileges" clause which had been copied from the Fulham Scheme, it was not intended to provide for an immutable state of wages which would remain fixed for all time without regard to fluctuations in the cost of living.—**R. v. ROBERTS, Ex WOOLWICH BOROUGH COUNCIL (1926), 90 J. 197; 24 L. G. R. 517, C. A.**

**85. Whether individual members liable — Disallowance of rate to meet expenses.]**—Pltf. was engaged in preparing statistics & giving evidence before a committee in Parliament, on behalf of the local board of W. in opposition to a Gas bill which the board had resolved to oppose. The board made a rate to defray the expenses of the opposition, but this ct. held that such expenses were not a legitimate object to be defrayed by the rate. Pltf. then sued four members of the board who were parties to the resolution, authorising the opposition by the clerk to the board:—*Held*: they were not liable individually.—**BAILEY v. CUCKSON (1858), 32 L. T. O. S. 124; 7 W. R. 16, L. JJ.**

**86. — — — For costs of information on surcharge — Member opposing misapplication.]**—Where a local board of health misapplied the rates toward defraying the expenses of a bill in Parliament, the ct. granted an injunction to restrain the further prosecution of the bill, which, however, had been abandoned before the hearing. The auditor had surcharged some of defts., members of the board,



with the amount paid for such expenses, & no order was therefore made on that part of the prayer of the information which sought to make them personally liable; but costs were decreed against them.

A member of the board, who proved that he had opposed the scheme embodied in the bill, was held not to be personally liable, & the information was dismissed as against him, with costs against the relator.—*A.-G. v. TOTTENHAM LOCAL BOARD OF HEALTH* (1872), 27 L. T. 440.

#### SECT. 10.—DISPUTES.

Reference to Minister of Health—Power to state special case.—Under local Act.]—See ARBITRATION, Vol. II., p. 460, No. 1063.

Reference to arbitration—Use of sewers.]—See P. H. Act, 1875, s. 22; & generally, SEWERS & DRAINS.

—Use of water of undertakers.]—See P. H. Act, 1875, s. 52, & generally, SEWERS & DRAINS.

—Supply of water to adjoining district.]—See P. H. Act, 1875, s. 61, & generally, WATER SUPPLY.

Paving private streets.]—See P. H. Act, 1875, s. 150; HIGHWAYS, Vol. XXVI., pp. 530 *et seq.*

Paving, etc., expenses in Universities of Oxford & Cambridge.]—See P. H. Act, 1875, s. 228.

—Interference with rivers, canals, etc.]—See P. H. Act, 1875, s. 328, & generally, WATERS & WATERCOURSES.

Submission of special case.]—See 1888 Act, s. 29; 1894 Act, s. 70.

87. —Whether appeal lies—Case stated under 1888 Act, s. 29.]—The jurisdiction of the High Ct. of Justice upon questions submitted to it under above sect. is consultative only, & not judicial, & no appeal lies from its decision to the Ct. of Appeal.—*Ex p. KENT COUNTY COUNCIL & DOVER COUNCIL, Ex p. KENT COUNTY COUNCIL & SANDWICH COUNCIL*, [1891] 1 Q. B. 725; 60 L. J. Q. B. 435; 65 L. T. 213; 55 J. P. 647; 39 W. R. 465; 7 T. L. R. 487, C. A.

Annotations:—*Mentd. Re Knight & Tabernacle Permanent Bldg. Soc.*, [1892] 2 Q. B. 613; *Re Herefordshire County Council & Leominster Town Council* (1894), 15 R. 77; *Thetford Corp. v. Norfolk County Council*, [1898] 1 Q. B. 141.

—Case stated under 1894 Act, s. 70 (1).]—See 1894 Act, s. 70 (3).

#### SECT. 11.—LEGAL PROCEEDINGS.

##### SUB-SECT. 1.—AGAINST AUTHORITY.

###### A. In General.

88. Restraint of exercise of powers—Powers exercised for double purpose—One purpose ultra vires.]—The Brighton Corp. after a proposal had been made to them that the Automobile Club hold a meeting in the borough for the purpose of motor car trials, & they had been informed that, if the trials were to be held, it would be necessary that the road on which they were to take place should be paved with some suitable material such as tarmac, caused a public highway in the borough, which was at that time paved with

macadam, & as a macadam road in good repair, to be paved at great expense with tarmac. The proposed meeting of the Automobile Club was held, & the motor car trials took place on the road in question, which for three days was closed to the public & devoted to that purpose:—*Held*: under the circumstances, though the corp. had admittedly been influenced in their action by the desire that the motor car trials should take place in the borough, there was nothing to show they had not, *bonâ fide*, exercised the discretion as to the repair & improvement of highways, vested in them by P. H. Act, 1875, s. 149, the ct. could not interfere with their discretion.

The principal upon which the ct. will restrain a colourable exercise of statutory powers, that is to say an exercise of such powers for purposes foreign to those with which they were conferred, does not enable the ct. to interfere when powers are exercised with two purposes, one of which is foreign to the purposes for which they were conferred, but the other of which is within those purposes. Therefore, even had the fitting of the road for motor trials been a purpose foreign to those for which the powers of the corp. under P. H. Act, 1875, s. 149, were conferred on them, the ct. could not, under the circumstances have interfered; further, that purpose was not foreign to the purposes of the sect., for the improvement of highways with the object of attracting a particular class of traffic to the locality is a matter within the discretion of the local authority under that sect. (*BUCKLEY, L.J.*).—*R. v. BRIGHTON CORPN., Ex p. SHOOSMITH* (1907), 96 L. T. 762; 71 J. P. 265; 23 T. L. R. 440; 51 Sol. Jo. 409; 5 L. G. R. 584, C. A.

Stay of proceedings—Action on agreement providing for arbitration—Disqualification of arbitrator.]—See ARBITRATION, Vol. II., p. 369, Nos. 360, 361.

89. Costs—Of mandamus—For payment of money—Local authority not in default.]—Where, through the delay of pltf. it has been necessary for defts., a public board, to have the authority of a *mandamus* to justify them in paying a sum of money. The ct. refused to make a rule absolute calling on them to pay the costs of the *mandamus*.—*R. v. BURLEIGH BOARD OF HEALTH* (1859), 1 L. T. 92.

—.]—See, generally, CROWN PRACTICE, Vol. XVI., pp. 347 *et seq.*

90. —Of successful defendant—Clerk at a salary acting as solicitor—What costs allowed.]—A public body employed a solr. as their clerk at a fixed annual salary, for which (*inter alia*) he was to prosecute & defend all legal proceedings taken by or against them. Out of pocket expenses were to be paid for by them. In an action brought against them, judgment was entered for them with costs, to be taxed as between solr. & client. On taxation the registrar struck out all items, except out of pocket expenses paid by the solr., on the ground that all work done by him in the conduct of the action was covered by his salary:—*Held*: the taxation was wrong & ought to be reviewed.—*HENDERSON v. MERTHYR TYDFIL URBAN COUNCIL*, [1900] 1 Q. B. 434; 69 L. J. Q. B. 335; 48 W. R. 332, D. C.

Annotation:—*Mentd. Adams v. London Improved Motor Coach Builders*, [1921] 1 K. B. 495.

#### PART II. SECT. 11, SUB-SECT. 1.—A.

q. By whom brought.]—In an action against a shire council for misfeasance, pltf. must allege in his pleading that he is a ratepayer or a councillor, or has an interest in the

shire.—*DOBSON v. FERN TREE GULLY SHIRE* (1891), 17 V. L. R. 606.—AUS.

r. Costs—Allegation of misconduct.]—When misconduct in the performance of their duties is alleged against a public body, & it becomes necessary to take legal proceedings

against them, the individual members who are principally responsible ought to be made special defts. for the purpose of visiting them with the costs of the action.—*O'SHEA v. CORK RURAL DISTRICT COUNCIL*, [1914] 1 I. R. 16.—IR.



*Sect. 11.—Legal proceedings: Sub-sect. 1, B., C. D.; sub-sect. 2.]*

*B. Enforcement of Statutory Duties.*

*By complaint to Minister of Health.]—See P. H. Act, 1875, s. 299; Ministry of Health Act, 1919 (c. 21), s. 3 (1) (a).*

**91. — Complaint involving question of law—Jurisdiction of Ministers.]—**(1) Where a remedy for the breach of a statutory duty is provided by the Act which creates the duty, that remedy is the only remedy available in the case of an alleged default in the performance of that duty. (2) The Local Government Board have power to determine questions of law relating to matters within their jurisdiction; the fact, therefore, that the investigation of a complaint made against a local authority under the Act will involve the determination of a question of law, does not take away the jurisdiction of the Local Government Board under sect. 299 to deal with that complaint, or entitle the complainant to have the question of law determined by the High Ct.—*PEEBLES v. OSWALDTWISTLE URBAN DISTRICT COUNCIL*, [1897] 1 Q. B. 625; 66 L. J. Q. B. 392; 76 L. T. 315; 61 J. P. 308; 45 W. R. 454; 13 T. L. R. 297, C. A.; *affd. sub nom. PASMORE v. OSWALDTWISTLE URBAN DISTRICT COUNCIL*, [1898] A. C. 387; 67 L. J. Q. B. 635; 78 L. T. 569; 62 J. P. 628; 14 T. L. R. 368, H. L.

*Annotations:—As to (1) Apld. Jones v. Barking U. D. C.* (1898), 15 T. L. R. 92. *Distd. R. v. Stepney Corpn.*, [1902] 1 K. B. 317. *Consd. Harrington v. Derby Corpn.*, [1905] 1 Ch. 205. *Distd. R. v. Poplar B. C.* (No. 1), [1922] 1 K. B. 72. *Refd. Baron v. Portslade-by-Sea U. C.* (1899), 68 L. J. Q. B. 949; *St. Mary, Islington, Vestry v. Hornsey U. D. C.* (1899), 80 L. T. 746; *Devonport Corpn. v. Tozer*, [1902] 2 Ch. 182; *Haedicke v. Friern Barnet U. C.*, [1904] 2 K. B. 807; *Brook v. Meltham U. C.*, [1908] 2 K. B. 780; *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K. B. 832. *Generally, Mentd. Eastwood v. Honley U. C.*, [1900] 1 Ch. 781; *Southall Norwood U. D. C. v. Middlesex County Council* (1901), 83 L. T. 742; *West Riding of Yorkshire Rivers Board v. Gaunt* (1902), 67 J. P. 183; *West Riding of Yorkshire Rivers Board v. Preston* (1904), 92 L. T. 24; *West Riding Rivers Board v. Butterworth & Roberts* (1907), 98 L. T. 47; *Waltham Holy Cross U. D. C. v. Lee Conservancy Board* (1910), 103 L. T. 192; *Hulme v. Ferranti*, [1918] 2 K. B. 426; *Turner v. Kingsbury Collieries*, [1921] 3 K. B. 169; *Waghorn v. Collison* (1922), 127 L. T. 8.

*By mandamus.]—See CROWN PRACTICE, Vol. XVI., pp. 318, 319.*

*Where no remedy provided.]—See, generally, CROWN PRACTICE, Vol. XVI., pp. 316, 318.*

**92. Statutory remedy provided by statute imposing duty—Statutory remedy sole remedy.]—***PEEBLES v. OSWALDTWISTLE URBAN DISTRICT COUNCIL*, No. 91, *ante*.

*Whether notice of action necessary.]—See PUBLIC AUTHORITIES.*

*Particular duties—Provision of sewers.]—See SEWERS & DRAINS.*

*—Provision of water supply.]—See WATER SUPPLY.*

**93. — Consideration of application or plans—Enforceable by mandamus.]—**An action will not lie against a local authority for maliciously refusing to approve of building or drainage plans deposited with them. If the local authority in rejecting the plans has been actuated by improper motives, & has merely pretended to exercise its power without addressing its mind to the question before it, the remedy of the person aggrieved is by

a *mandamus* to the local authority to hear & determine his application.—*DAVIS v. BROMLEY CORPN.*, [1908] 1 K. B. 170; 77 L. J. K. B. 51; 97 L. T. 705; 71 J. P. 513; 24 T. L. R. 11; 51 Sol. Jo. 823; 5 L. G. R. 1229, C. A.

**94. — — — — —.]—**A *mandamus* will be granted to a local authority to hear & consider an application or to consider plans (*LORD ALVERSTONE, C.J.*).—*R. v. CHISWICK URBAN DISTRICT COUNCIL, Ex p. BRICKELL* (1908), 72 J. P. 165; 6 L. G. R. 605, D. C.

*— — — — — Bonâ fide refusal to approve.]—See CROWN PRACTICE, Vol. XVI., p. 290, Nos. 1023, 1024.*

*C. Injury arising from Exercise of Statutory Powers.*

**95. Whether action lies—Remedy provided by statute.]—**If in the execution of works authorised by Act of Parliament damage be sustained & the Act provides a special mode in which compensation for such damage may be recovered, no action will lie for it. But this only relates to works carefully & skilfully executed, & if there be a want of proper care & skill on the part of those executing the works an action for the negligence to recover damages for the injury thereby sustained will lie.—*CLOTHIER v. WEBSTER* (1862), 12 C. B. N. S. 790; 31 L. J. C. P. 316; 6 L. T. 461; 9 Jur. N. S. 231; 10 W. R. 624; 142 E. R. 1353.

*Annotations:—Refd. Ohrby v. Ryde Comrs.* (1864), 28 J. P. 663; *Mersey Dock Trustees v. Gibbs* (1866), L. R. 1 H. L. 93.

**96. — — — — — Statutory duty negligently performed.]—**Comrs. acting under statutable powers are liable for injuries arising from the execution of works which they order, & which are defective in proper precautions against danger.—*RUCK v. WILLIAMS* (1858), 3 H. & N. 308; 27 L. J. Ex. 357; 31 L. T. O. S. 167; 22 J. P. 420; 6 W. R. 622; 157 E. R. 488.

*Annotations:—Refd. Whitehouse v. Fellowes* (1861), 30 L. J. C. P. 305; *Young v. Davis* (1862), 7 H. & N. 760; *Coe v. Wise* (1864), 5 B. & S. 440; *Gordon v. St. James, Westminster, Vestry* (1865), 13 L. T. 511; *Mersey Dock Trustees v. Gibbs* (1866), L. R. 1 H. L. 93; *Stretton's Derby Brewery Co. v. Derby Corpn.*, [1894] 1 Ch. 431. *Mentd. Metcalfe v. Hetherington* (1860), 5 H. & N. 719; *Bagnall v. L. & N. W. Ry.* (1861), 7 H. & N. 423; *G. W. Ry. of Canada v. Braid* (1863), 1 Moo. P. C. C. N. S. 101; *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426.

**97. — — — — —.]—***CLOTHIER v. WEBSTER*, No. 95, *ante*.

*See, generally, NEGLIGENCE.*

**98. — — — — — Breach of condition imposed by statute—Allegation that condition unnecessary.]—**When the legislature imposed certain conditions on a public body, that body cannot break the conditions & plead in excuse that they are unnecessary for the protection of the public.—*A.-G. v. COCKERMOUTH LOCAL BOARD* (1874), L. R. 18 Eq. 172; 30 L. T. 590; 38 J. P. 660; 22 W. R. 619; *sub nom. WORKINGTON LOCAL BOARD v. COCKERMOUTH LOCAL BOARD, A.-G. v. COCKERMOUTH LOCAL BOARD*, 44 L. J. Ch. 118.

*Annotations:—Refd. A.-G. v. G. E. Ry.* (1879), 11 Ch. D. 449; *A.-G. v. Logan*, [1891] 2 Q. B. 100; *Durrant v. Branksome U. D. C.* (1897), 76 L. T. 739; *A.-G. v. L. & N. W. Ry.*, [1900] 1 Q. B. 78; *A.-G. v. Dorchester Corpn.* (1906), 94 L. T. 682; *A.-G. v. Birmingham, Tame & Rea District Drainage Board*, [1910] 1 Ch. 48. *Mentd. A.-G. v. Shrewsbury (Kingsland) Bridge Co.* (1882), 21 Ch. D. 752; *Brooks v. Terry* (1888), 4 T. L. R. 678.

**PART II. SECT. 11, SUB-SECT. 1.—C.**  
*t. Whether action lies—Absence of negligence.]—*At common law, a public body such as a municipal corpn., is, in the absence of negligence, not liable for damage arising from its doing that which the legislature has authorised it to do.—*WILKINSON v. RURAL MUNICIPALITY OF ST. ANDREWS*,

*DICKENSON v. RURAL MUNICIPALITY OF ST. ANDREWS (Man.)*, [1923] 4 D. L. R. 780; 3 W. W. R. 961.—CAN.

*]—PELLETIER v. SPRINGFIELD RURAL MUNICIPALITY, JOLIVET v. SPRINGFIELD RURAL MUNICIPALITY (Man.)*, [1924] 4 D. L. R. 1158; [1924] 3 W. W. R. 786; *affd.*

[1924] 1 W. W. R. 502.—CAN.

*b. — — — — — Statutory authority ceded.]—*A bridge over a stream was built under statutory authority by defts., a township corpn. The bridge & its approaches were so constructed that at certain times the flow of the stream was diverted & caused damage to pltf.'s land:—*Held: defts. had*



**99. — Question of construction of statute.]—**

The mere fact that the breach of a public statutory duty has caused damage does not vest a right of action in the person suffering the damage against the person guilty of the breach; whether the breach does or does not give such right of action must depend upon the object & language of the particular statute.—**ATKINSON v. NEWCASTLE & GATESHEAD WATERWORKS CO.** (1877), 2 Ex. D. 441; 40 L. J. Ex. 775; 36 L. T. 761; 25 W. R. 794, C. A.; *reversg.* (1871), L. R. 6 Exch. 404.

**Annotations:—****Consd.** Bathurst Borough v. Macpherson (1879), 4 App. Cas. 256. **Appld.** M'Colla v. Clacton-on-Sea Gas & Water Co. (1889), 5 T. L. R. 690. **Consd.** Cowley v. Newmarket L. B., [1892] A. C. 345; Saunders v. Holborn District Board of Works, [1895] 1 Q. B. 64; Clegg, Parkinson v. Earby Gas Co., [1896] 1 Q. B. 592; Goodson v. Sunbury Gas Consumers Co. (1896), 75 L. T. 251; Dawson v. Bingley U. C., [1911] 2 K. B. 149. **Refd.** Jones v. Pickering (1873), 29 L. T. 210; Gorris v. Scott (1874), L. R. 9 Exch. 125; Ross v. Rugge-Price (1876), Ex. D. 269; Great Northern Steamship Fishing Co. v. Edgehill (1883), 11 Q. B. D. 225; Vallance v. Falle (1884), 13 Q. B. D. 109; Groves v. Wimborne, [1898] 2 Q. B. 402; Johnston & Toronto Type Foundry Co. v. Toronto Consumers' Gas Co., [1898] A. C. 447; Gale v. Rhymney & Aber Valleys Gas & Water Co. (1903), 89 L. T. 399; Hartley v. Rochdale Corp., [1908] 2 K. B. 594; Simpson v. South Oxfordshire Water & Gas Co., [1908] 1 K. B. 917; Price v. Webb, [1913] 2 K. B. 367; R. v. Marshland Smooth & Fen District Comrs., [1920] 1 K. B. 155; Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K. B. 832. **Mentd.** Handley v. Moffat (1872), 21 W. R. 231; Cornell v. Hay, Same v. Massey, Same v. Torrens (1873), L. R. 8 C. P. 328; Pickering v. James (1873), L. R. 8 C. P. 489; Thorley v. Glossop (1876), 34 L. T. 169; Melliss v. Shirley & Freemantle L. B. of Health (1885), 54 L. J. Q. B. 408; R. v. Hall, [1891] 1 Q. B. 747; Barry Ry. v. Taft Vale Ry. (1894), 64 L. J. Ch. 230; Chartered Institute of Patent Agents v. Lockwood (1894), 63 L. J. P. C. 74; Patent Agents Institute v. Lockwood, [1894] A. C. 347; Butler (or Black) v. Fife Coal Co., [1912] A. C. 149; Neville v. London Express Newspaper, [1919] A. C. 368.

**100. — Matter actionable apart from statute.]—**

—A local board, under P. H. Act, 1875, causing a nuisance by any act which, independently of the statute, would have given a cause of action to any person, may be made liable in damages, or be restrained by injunction, unless they can show a justification under the powers of the statute. But if a local board do no act themselves to cause a nuisance, but neglect to perform their duty of providing a satisfactory & healthy system of drainage, it is no ground of action by an individual for damages or an injunction, but the remedy is by prerogative writ of *mandamus*; & *semble*; this jurisdiction, notwithstanding Jud. Act, 1873 (c. 66), s. 25, ought not to be exercised except by the Q. B. Div.—**GLOSSOP v. HESTON & ISLEWORTH LOCAL BOARD** (1879), 12 Ch. D. 102; 49 L. J. Ch. 89; 40 L. T. 736; 44 J. P. 36; 28 W. R. 111, C. A.

**Annotations:—****Appld.** A.-G. v. Dorking Union Grdns. (1882), 20 Ch. D. 595. **Consd.** Charles v. Finchley L. B. (1883), 23 Ch. D. 767; Warwick & Birmingham Canal Navigation Co. v. Burman (1890), 63 L. T. 670; Ogilvie v. Blything Union R. S. A. (1891), 65 L. T. 338. **Appld.** A.-G. v. St. James & St. John, Clerkenwell, Vestry (1891), 60 L. J. Ch. 788. **Consd.** Cowley v. Newmarket L. B., [1892] A. C. 345. **Distd.** Dent v. Bournemouth Corp., (1897), 66 L. J. Q. B. 395. **Appld.** Robinson v. Worthington

**Refd.** Jones v. Llanrwst U. C., [1911] Ch. 393. **Refd.** R. v. Staines L. B. (1888), 60 L. T. 261; R. v. Paribby (1889), 22 Q. B. D. 520; Ainley v. Kirk-  
J. Ch. 734; A.-G. v. GORRICHWOOD,  
; Yorkshire West Riding Council

Branksome U. D. C. (1897), 76 L. T. 739; R. v. St. Giles, Camberwell, Vestry (1897), 61 J. P. 217; Smith v. Chorley District Council, [1897] 1 Q. B. 532; Pasmore v. Oswaldtwistle U. C., [1898] A. C. 387; Leo District Board v. L. C. C. (1899), 82 L. T. 306; Harrington v.

Derby Corp., [1905] 1 Ch. 205; Wincanton R. C. v. Parsons (1905), 74 L. J. K. B. 533; Foster v. Warblington District Council, [1906] 1 K. B. 648; McClelland v. Manchester Corp., [1912] 1 K. B. 118; Hesketh v. Birmingham Corp., [1924] 1 K. B. 260; **Mentd.** A.-G. v. Manchester (Dean & Canons) (1881), 18 Ch. D. 598; Holland v. Dickson (1888), 37 Ch. D. 669; R. v. St. George-the-Martyr, Southwark, Vestry (1892), 61 L. J. Q. B. 398; Davies v. Gas Light & Coke Co., [1909] 1 Ch. 248.

**101. — Malfeasance distinguished from non-feasance.]—****GLOSSOP v. HESTON & ISLEWORTH LOCAL BOARD**, No. 100, *ante*.

— **Damnum absque injuria.]—***See, generally, ACTION*, Vol. I., pp. 29 *et seq.*

**102. Restraint by injunction—Matter actionable apart from statute.]—****GLOSSOP v. HESTON & ISLEWORTH LOCAL BOARD**, No. 100, *ante*.

**103. — Whether granted in all circumstances —At instance of Attorney-General.]—**In an action by the A.-G. complaining of a breach of a public statute by a public body the ct. is not bound, on proof of the breach, to grant an injunction, but may allow defts. a reasonable time within which to comply with the statute (**LORD ROBSON**).—**A.-G. v. BIRMINGHAM, TAME & REA DISTRICT DRAINAGE BOARD**, [1912] A. C. 788; 82 L. J. Ch. 45; 107 L. T. 353; 76 J. P. 481; 11 L. G. R. 194, H. L.

**Annotations:—****Refd.** A.-G. v. Kerr & Ball (1914), 79 J. P. 51. **Mentd.** Countess Warwick S.S. Co. v. Le Nickel Soc. Anon., Anglo-Northern Trading Co. v. Emlyn, Jones & Williams (1917), 87 L. J. K. B. 309; Metropolitan Water Board v. Dick, Kerr, [1917] 2 K. B. 1; Robinson v. R., [1921] 3 K. B. 183.

— *See, generally, INJUNCTION*, Vol. XXVIII., pp. 468 *et seq.*

**Powers as highway authority—Damage caused by nonfeasance.]—***See* **HIGHWAYS**, Vol. XXVI., pp. 398 *et seq.*

— **Damage caused by misfeasance.]—***See* **HIGHWAYS**, Vol. XXVI., pp. 404 *et seq.*

— **Of employees, contractors & agents.]—***See* **HIGHWAYS**, Vol. XXVI., pp. 408 *et seq.*

**Removal of overhead wires.]—***See* **TELEGRAPHS & TELEPHONE**.

**Construction of sewers.]—***See* **SEWERS & DRAINS**.

**Pollution of water.]—***See* **SEWERS & DRAINS; WATERS & WATERCOURSES**.

**D. Enforcement of Orders of Court.**

**By writ of *elegit*.]—***See* **EXECUTION**, Vol. XXI., p. 565.

**By writ of sequestration.]—***See* **EXECUTION**, Vol. XXI., p. 593, Nos. 1741–1747.

**SUB-SECT. 2.—BY AUTHORITY.**

**Recovery of penalties, costs & expenses—Before court of summary jurisdiction.]—***See* P. H. Act, 1875, ss. 251, 257.

— **Whether service of fire brigade included.]—***See* **PUBLIC HEALTH**.

— **Demands below £50—Recovery in county court.]—***See* P. H. Act, 1875, s. 261.

— **Application of penalty.]—***See* P. H. Act, 1875, s. 254.

— **Under Harbours Act, 1814 (c. 159).]—***See* **WATERS & WATERCOURSES**.

**Recovery of rates.]—***See* P. H. Act, 1875, s. 256, *generally, RATES & RATING*.

exceeded their statutory authority & were liable in an action for damages for the injury done.—**CAMPBELL v. MORRIS TOWNSHIP** (1923), 54 O. L. R. 358.—**CAN.**

**PART II. SECT. 11, SUB-SECT. 2.**

**c. Officer authorised to prosecute in own name.]—****STEANE v. WHITCHELL**, [1906] V. L. R. 704.—**AUS.**

**d. Action for recovery of licence fees—By municipality against receiver—Fees paid to receiver.]—****TOWNSHIP OF KING MUNICIPALITY v. HUGHES** (1858), 17 U. C. R. 253.—**CAN.**



**Sect. 11.—Legal proceedings: Sub-sect. 2. Sect. 12: Sub-sects. 1, 2**

**104. Abatement of nuisance—Local authority acting as relator—Right to sue for damage to property.]—**A local board in the name of the A.-G. sued L., the owner of smelting works, alleging the works to be a public nuisance, & claiming an injunction to prevent the works on that ground, & also as co-pltfs. claiming damages for loss as owners of a public park. L. set up as defence a prescriptive right:—*Held*: the local board was entitled to act as relators on the ground of nuisance, & also to sue in their own behalf as owners of property injured.—*A.-G. v. LOGAN*, [1891] 2 Q. B. 100; 65 L. T. 162; 55 J. P. 615; 7 T. L. R. 279, D. C.

*Annotations*:—*Consd. A.-G. & Spalding R. C. v. Garner*, [1907] 2 K. B. 480. *Refd. Wednesbury Corpn. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78.

**Appearance by clerk or authorised officers.]—***See P. H. Act, 1875, s. 259.*

**105. — Who may be authorised—Whether constable.]—**A local board acting under P. H. Act, 1875, s. 259, passed a resolution to authorise the superintendent of police to prosecute offences under the local Act:—*Held*: the local board could only delegate the authority to their officer, but not to a constable.—*KYLE v. BARBOR* (1888), 58 L. T. 229; 52 J. P. 725; 4 T. L. R. 206; 16 Cox, C. C. 378, D. C.

*Annotation*:—*Refd. Foster v. Fyfe*, [1896] 2 Q. B. 104.

**106. — Time for giving authority—Before proceedings begun.]—**The authority required by P. H. Act, 1875, s. 259, must be given by the local authority to their officer or member before proceedings are instituted, & cannot be given subsequently by the local authority passing a resolution purporting to confirm what their officer has done in instituting proceedings.—*BOWYER, PHILPOTT & PAYNE, LTD. v. MATHER*, [1919] 1 K. B. 419; 88 L. J. K. B. 377; 120 L. T. 346; 83 J. P. 50; 17 L. G. R. 222, D. C.

**107. — Whether appearance at hearing essential.]—**Where an information is laid before justices by the local board of health, the clerk of the board, or his attorney, or counsel ought to attend the hearing, & it is in the discretion of the justices whether or not they will hear a police superintendent as his representative.—*Ex p. LEAMINGTON LOCAL BOARD* (1862), 5 L. T. 637; 26 J. P. 84.

**Information laid under Harbours Act, 1814 (c. 159).]—***See WATERS & WATERCOURSES.*

**108. Undertaking in damages—On grant of interim injunction—By whom given.]—**Where an interim injunction is granted at the instance of a pltf. corpn., the ct. will, in a proper case, allow the usual undertaking in damages to be given by the corpn. itself, & not require the undertaking to be given by some responsible individual on behalf of the corpn.; & the same practice may apply where pltf. is a local board (*KEKEWICH, J.*).—*EAST MOLESEY LOCAL BOARD v. LAMBETH WATERWORKS CO.*, [1892] 3 Ch. 289; 62 L. J. Ch. 82; 67

L. T. 493; 2 R. 88; *on appeal*, [1892] 3 Ch. 300, O. A.

**Whether Attorney-General necessary party.]—***See, generally, CROWN PRACTICE*, Vol. XVI., pp. 488 *et seq.*

**Whether consent of Attorney-General necessary.]—***See, generally, CROWN PRACTICE*, Vol. XVI., p. 490, Nos. 3726, 3727.

## SECT. 12.—ALTERATION OF AREAS.

### SUB-SECT. 1.—IN GENERAL.

*See, generally, P. H. Act, 1875, s. 270; 1888 Act, ss. 54, 57, 59, 60; 1894 Act, ss. 36, 42.*

**109. Provisional Order—Liability for costs.]—***TORQUAY CORPN. v. COCKINGTON URBAN DISTRICT COUNCIL* (1900), 44 Sol. Jo. 760.

*Annotation*:—*Folld. Brooks, Jenkins v. Torquay Corpn. & Newton Abbot R. D. C.* (1901), 85 L. T. 785.

**110. — —.]—**An urban district council, by resolutions not under seal, retained pltfs., a firm of solrs., to represent them at a local inquiry as to the proposed inclusion of their district in adjoining areas, and to oppose in Parliament a bill for the confirmation of a Provisional Order made by the Local Government Board for carrying the proposed scheme into effect. Subsequently, after work had been done by pltfs. under the retainers, the seal of the council was affixed to the resolutions by which pltfs. were retained as solrs., & sealed copies of these resolutions were sent to pltfs.; the retainer was not accepted in writing by pltfs. The confirming Act having passed, pltfs. delivered their bill of costs to the urban district council & afterwards, upon the dissolution of the council, to defts., between whom the district had been divided:—*Held*: (1) the confirmation under seal of the original retainers was binding on the district council without a new consideration, & the requirements of P. H. Act, 1875, s. 174, & of the common law had been complied with; the costs were costs properly incurred under P. H. Act, 1875, ss. 297, 298, as being the reasonable costs of a local authority in respect of a Provisional Order made in pursuance of the Act & of the inquiry preliminary thereto; that they were not subject to the requirements of Borough Funds Act, 1872 (c. 91), but came within the exception contained in sect. 8 of that Act; & therefore the urban district council were before their dissolution under a liability, subject to taxation & to the sanction of the Local Government Board, to pay pltfs.' bill of costs; (2) upon the true construction of Torquay Order, 1900, Art. 18, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 14) Act, 1900 (c. clxxxiii), the liability of the urban district council had been transferred to defts.—*BROOKS, JENKINS & CO. v. TORQUAY CORPN.*, [1902] 1 K. B. 601; 71 L. J. K. B. 109; 85 L. T. 785; 66 J. P. 293; 18 T. L. R. 139.

**Alterations of unions.]—***See POOR LAW.*

### PART II. SECT. 12, SUB-SECT. 1.

**e. Notice of alteration—To parties interested.]—**Before any alteration can be made in the limits of a school section, notice must be given to the parties interested in the proposed alteration.—*GRIFFITHS v. GRANTHAM TOWNSHIP* (1855), 6 C. P. 274.—CAN.

**f. — —.]—**Under 13 & 14 Vict. c. 48, the municipality may alter the boundaries of sections within their township, by taking from one & adding to another, without any previous request of the freeholders &

householders & notwithstanding their disapprobation of the change, provided that those affected by the alteration have notice of the intention to make it.—*Re LEY & CLARKE TOWNSHIP* (1856), 13 U. C. R. 433.—CAN.

**g. Alteration of school districts—Authority to sanction.]—**Under 7 Vict. c. 29, the township council & not the district council has authority to sanction any alteration made in school districts.—*McFEE v. DUNDAR* (1859), 10 C. P. 94.—CAN.

**h. Power to alter boundaries—**

*Annexation of part of township to village.]—*On the application of the council of the village of H. an order was made by the Ontario Railway & Municipal Board directing that a defined strip of land adjoining the village of B. should be detached from the town of N. & annexed to the village of B.:—*Held*: the Board had power under Municipal Act to make such a change in boundaries.—*BELL v. BURLINGTON TOWN* (1915), 9 O. W. N. 44, 182; 34 O. L. R. 410, 619.—CAN.



## SUB-SECT. 2.—THE LOCAL INQUIRY.

See 1888 Act, ss. 54 (1), (2), 57 (1); 1894 Act, s. 36 (7).

**111. Costs—Fee of person holding inquiry—What fees allowed.]**—A county council held an inquiry under 1888 Act, s. 57 (1). The inquiry was conducted by a barrister, who charged certain fees:—*Held*: a fee of ten guineas a day was a proper fee to be paid to the barrister for his services, but the fees of five guineas for an application in chambers & twenty guineas for his report were excessive.—**MIDDLESEX COUNTY COUNCIL v. KINGSBURY URBAN DISTRICT COUNCIL** (1908), 99 L. T. 17; 72 J. P. 322; 24 T. L. R. 612; 6 L. G. R. 952; *on appeal*, [1909] 1 K. B. 554, C. A.

**112. — Liability for.]**—**MIDDLESEX COUNTY COUNCIL v. KINGSBURY URBAN DISTRICT COUNCIL**, No. 710, *post*.

## SUB-SECT. 3.—FINANCIAL ADJUSTMENTS.

See 1888 Act, ss. 32, 62; 1894 Act, s. 68; Local Government (Adjustments) Act, 1913 (c. 19), as amended by Local Government (County Boroughs & Adjustments) Act, 1926 (c. 38), s. 5.

## A. In General.

**113. What are matters for adjustment—Jurisdiction of court to decide.]**—*Re SALOP COUNTY COUNCIL*, No. 706, *post*.

**114. — Within 1894 Act, s. 68—Severed area formed into new district.]**—By an order made by a county council under 1888 Act, s. 57, a part of a rural district was severed from the district & constituted a new urban district, & all necessary adjustments were to be made in accordance with 1894 Act, s. 68. An adjustment of accounts was then made & an agreement entered into between the councils providing for the payment of certain sums in respect of matters therein specified, & these sums were paid. Subsequently, the rural council, finding that the severance was a pecuniary loss to them, requested the urban council to come to an agreement as to the amount to be paid for such loss, but the councils were unable to agree & an arbitrator was appointed to determine the question of adjustment of the financial loss sustained by the rural district by the severance of the urban district, in so far as such loss was not determined by the prior agreement. No claim for such loss was included in the prior agreement:—*Held*: (1) the adjustment claimed by the rural council was an adjustment within 1894 Act, s. 68, although the severed portion had been formed into an urban district of itself & had not been transferred to an existing district; (2) the claim to have such adjustment was not barred by the prior agreement between the councils.—*Re ST. RURAL DISTRICT COUNCIL & HEAVITREE DISTRICT COUNCIL* (1902), 86 L. T. 153; J. P. 597.

**115. — On creation of county borough—Exchequer contributions.]**—The borough of H. in the county of D. was constituted a county borough by a Provisional Order duly confirmed. The provided for an adjustment

respecting financial relations between the county & the borough, & for that purpose applied 1888 Act, s. 32, with the substitution of the Local Government Board or an arbitrator appointed by them for the comrs. referred to in the sect.

In an arbitration held for the purpose of effecting such adjustment the county council made claims against the borough council on the ground that, as regards certain of the county council's expenses, the contributions from the area of the borough which had ceased to be payable exceeded the proportion, if any, of such expenses from which the county council had been relieved; & the borough council made claims against the county council on the ground that, as regards certain expenses, the burden cast on the borough exceeded the amount of contributions from which the borough had been relieved:—*Held*: on the construction of 1888 Act, s. 32, the claims were matters in respect of which the arbitrator had no jurisdiction to make an adjustment.—**WEST HARTLEPOOL COUNTY BOROUGH CORPN. v. DURHAM COUNTY COUNCIL**, [1907] A. C. 246; 76 L. J. K. B. 859; 97 L. T. 114; 71 J. P. 385; 23 T. L. R. 576; 5 L. G. R. 854; *sub nom. Re DURHAM COUNTY COUNCIL & WEST HARTLEPOOL CORPN.*, 51 Sol. Jo. 550, H. L.; *reversg. S. C. sub nom. Re DURHAM COUNTY COUNCIL & WEST HARTLEPOOL COUNTY BOROUGH*, [1906] 2 K. B. 186, C. A.

*Annotations*:—**Consd. Birmingham Union v. Tamworth Union, Birmingham Union v. Meriden Union, Birmingham Union v. Bromsgrove Union** (1916), 116 L. T. 342. **North Riding County Council v. Middlesborough County B. C.** (1912), 11 L. G. R. 125. **Mentd Glamorgan County Council v. Cardiff & Swansea Corpn.** (1914), 110 L. T. 1009.

See, also, No. 120, *post*.

**116. Right to adjustment—Effect of prior agreement.]**—*Re ST. THOMAS RURAL DISTRICT COUNCIL & HEAVITREE URBAN DISTRICT COUNCIL*, No. 114, *ante*.

**117. — Readjustment—Original adjustment no longer equitable.]**—Before 1888 Act, the borough of Hull & the city of York were counties of themselves. By 1888 Act, s. 31, each of the boroughs named in the third schedule, which either had a population of not less than 50,000 or was a county of itself, was made, for the purposes of the Act, an administrative county of itself, & was in the Act referred to as a county borough. Hull & York were among the boroughs named in the schedule, & Hull was therein stated to be deemed, for the purpose of the Act, to be situate in the East Riding, & York in the North, East & West Ridings. By sects. 20, 21 & 22, the proceeds of the local taxation licences & part of the probate duty grant were to be distributed among the counties in certain proportions. Sect. 32 (1), provided that an equitable adjustment respecting the distribution of the proceeds of the local taxation licences & probate duty grant & all other financial arrangements, if any, between each county & each county borough specified in the schedule as being deemed for the purposes of the Act to be situate in that county should be made, in default of agreement, by the comrs. appointed under the Act; & sect. 32 (6) provided that, if after the expiration of five years from the date

## PART II.

*are matters for adjustment fund.]*—City of W. on to recover part of a surplus found standing to the credit of deft., county of O., at the time of the separation of the city from the county. There had been an adjustment of assets & liabilities between the municipalities, but this surplus fund had not been taken into consideration

nor dealt with in any way:—*Held*: the surplus formed part of the general county fund & ptl. city was not entitled to share in the fund.—**WOODSTOCK CITY v. OXFORD COUNTY** (1910), 17 O. W. R. 176; 2 O. W. N. 134.—CAN.

**1. — School fund of divided township.]**—On the erection of two village municipalities out of a township:—*Held*: the moneys derived

from the Ontario Municipalities Fund, which had some years previously been appropriated by bye-law to the school purposes of the township, were assets properly divisible between the township & the new village municipalities.—**VILLAGE OF EAST TORONTO CORPN. v. TOWNSHIP OF YORK CORPN.** (1889), 16 O. R. 566.—CAN.

**m. — Tramway dues.]**—**LANARK COUNTY COUNCIL v. MOTHERWELL**



**Sect. 12.—Alteration of areas: Sub-sect. 3, A. & B.]**

of an award adjusting the financial relations of any county & borough the Local Govt. Board was satisfied that the adjustment had become inequitable, the Board was to appoint an arbitrator to make a new equitable adjustment. In 1891 the comrs. made an award adjusting the distribution of the proceeds of the local taxation licences & the probate duty grant as between the county of the East Riding & the county boroughs of Hull & York, the award reciting that there were no other financial relations between the county & the two county boroughs. In 1918 the Local Govt. Board, on the application of Hull & York, held a local inquiry, & as the result informed the East Riding county council that they were satisfied that the existing adjustment had become inequitable, & intended to appoint an arbitrator to make a new equitable adjustment. The county council contended that the Board had no jurisdiction to appoint an arbitrator to make a readjustment, as Hull & York had been, before the 1888 Act, counties of themselves & still remained so, & had never for administrative purposes formed part of the East Riding, & the financial relations ordinarily existing between a county & a county borough situate therein did not exist. They applied for a writ of prohibition to restrain the Minister of Health, the successor of the Local Govt. Board, from appointing an arbitrator:—*Held*: the Minister of Health had jurisdiction to appoint an arbitrator to make a new equitable adjustment upon being satisfied that the original adjustment had become inequitable.—*R. v. MINISTER OF HEALTH*, [1921] 1 K. B. 1; 123 L. T. 802; 85 J. P. 49; 18 L. G. R. 543; *sub nom.* *R. v. MINISTER OF HEALTH, Ex p. EAST RIDING OF YORKSHIRE COUNTY COUNCIL*, 90 L. J. K. B. 1, C. A.

**118. Appointment of arbitrator—Jurisdiction of Ministry of Health to appoint—Scheme providing for adjustment by county council—Whether a mode of adjustment under 1888 Act, s. 62 (2).]**—In the case of differences between district councils a provision in the order or scheme, under 1888 Act, s. 57, that such differences may be adjusted by the county council is not another mode of adjustment within 1888 Act, s. 62 (2). The mode of adjustment contemplated in 1888 Act, s. 59 (4), is adjustment by the order or scheme itself.—*Re SOWERBY URBAN DISTRICT COUNCIL & MYTHOLMROYD URBAN DISTRICT COUNCIL* (1896), 74 L. T. 313; 12 T. L. R. 300, D. C.

**119. Jurisdiction of arbitrator—Whether question pending—Scheme transferring property & providing for adjustment.]**—*Re LLANWONNO SCHOOL BOARD & YSTRADYFODWG SCHOOL BOARD*, No. 145, *post*.

**120. Basis of adjustment—Exchequer contributions—Respective assessable values of areas.]**—*Re NORTHUMBERLAND COUNTY COUNCIL & TYNE-MOUTH CORPN. & NEWCASTLE-UPON-TYNE CORPN.* (1915), 80 J. P. Jo. 17, D. C.

*See, also*, No. 115, *ante*.

**121. Readjustment—Original adjustment no longer equitable—Jurisdiction of Minister of Health to order.]**—*R. v. MINISTER OF HEALTH*, No. 117, *ante*.

**122. Costs of reference—Not mentioned in**

**award—Whether recoverable.]**—By a local govt. board order part of the R. District was transferred to the district of the D. Council, & the parties being unable to agree to an arbitrator to adjust a difference between them, one was appointed by the Local Government Board, under 1888 Act, s. 62 (2). By his award he directed defts. to pay pltfs. a certain sum, & directed the costs of the award, viz. £10 10s., to be paid by both in equal shares. No mention was made of the costs of the reference. Subsequently he determined the costs of the reference to be £34 2s. 10d., and the costs of the taxation £4 4s. In an action to recover these sums from defts.:—*Held*: they could not be recovered.—*SOUTH MIMMS RURAL DISTRICT COUNCIL v. BARNET URBAN DISTRICT COUNCIL* (1900), 82 L. T. 421.

**Adjustment of licenses compensation fund.]**—*See INTOXICATING LIQUORS*, Vol. XXX., p. 52, No. 407.

*B. Assessment of Compensation.*

**123. What arbitrator may consider—Loss of revenue-producing area—Area not involving expenditure.]**—By an order made under 1888 Act, part of the county of B. was transferred to the county of H. The portion so transferred contained no county bridges & no main roads:—*Held*: the arbitrator appointed by the Local Govt. Board under 1888 Act, s. 62, had power to award to the county of B. a sum of money in respect of the loss to that county of an area which contributed to expenditure on bridges & main roads without involving the county in any corresponding outlay on its own account.—*Re BUCKINGHAMSHIRE COUNTY COUNCIL & HERTFORDSHIRE COUNTY COUNCIL*, [1899] 1 Q. B. 515; 68 L. J. Q. B. 417; 80 L. T. 85; 63 J. P. 356; 15 T. L. R. 138, D. C.

*Annotations*:—*Overd. Caterham U. D. C. v. Godstone R. D. C.*, [1904] A. C. 171. *Expld. Re Durham County Council & West Hartlepool County Borough*, [1906] 2 K. B. 186.

**124. — — —.]**—By order of a county council under 1888 Act, s. 57, a parish which was part of a rural district was separated from that district & made an urban district, & the parish ceased to be rated for the highway expenses of the rural district:—*Held*: the loss of this contribution was not a matter which required to be adjusted between the rural district & the new urban district under 1888 Act, s. 62. That sect. does not give compensation for any such loss of profit. The word "income" in s. 62 means existing income, & does not include income which may afterwards be derived from making rates.

*Re Rochdale Union & Haslingden Union*, No. 127, *post*, & *Re Buckinghamshire County Council & Hertfordshire County Council*, No. 123, *ante*, *overd.* on the above point.—*CATERHAM URBAN DISTRICT COUNCIL v. GODSTONE RURAL DISTRICT COUNCIL*, [1904] A. C. 171; 73 L. J. K. B. 589; 90 L. T. 653; 52 W. R. 625; 20 T. L. R. 481; 48 Sol. Jo. 456; 2 L. G. R. 596; *sub nom.* *Re GODSTONE RURAL DISTRICT COUNCIL & CATERHAM URBAN DISTRICT COUNCIL*, 68 J. P. 429, H. L.; *reversg.* S. C. *sub nom.* *Re GODSTONE RURAL DISTRICT COUNCIL & CATERHAM URBAN DISTRICT COUNCIL*, [1903] 1 K. B. 554, C. A.

*Annotations*:—*Apld.* *West Hartlepool County Borough*

*MAGISTRATES*, [1912] S. C. 1251.—*SCOT*.

*n.* — *Loans secured on rates.]*—*MIDLOTHIAN COUNTY COUNCIL v. MUSELBURGH MAGISTRATES*, [1911] S. C. 463.—*SCOT*.

*o.* *Acceptance of settlement of debts*

*& liabilities—By bye-law.]*—*VILLAGE OF GRAVENHURST v. TOWNSHIP OF MUSKOKA* (1882), 29 Gr. 439.—*CAN.*

*p.* *Money due to district council—Debt due to locality—Right of township council to receive.]*—Under 12 Vict. c. 81, township councils, & not county

councils, are entitled to receive moneys due to the old district councils where the debt is due to the locality, as for making roads in a township, etc.—*MUNICIPAL COUNCIL OF THE UNITED COUNTIES OF NORTHUMBERLAND & DURHAM v. BULL & MEYERS* (1851), 8 U. C. R. 375.—*CAN.*



Corpn. v. Durham County Council, [1907] A. C. 246.  
 Expld. Queenborough Corpn. v. Sheppey R. D. C., [1915]  
 1 K. B. 356; Birmingham Union v. Tamworth Union,  
 Birmingham Union v. Meriden Union, Birmingham  
 Union v. Bromsgrove Union (1916), 116 L. T. 922.  
 A.-G. v. Essex County Council (1907), 71 J. P. 557.  
 Holworthy U. D. C. v. Holworthy R. D. C., [1907] 2 Ch.  
 62.

125. ——— Creation of county borough.]—  
 WEST HARTLEPOOL COUNTY BOROUGH CORPN. v.  
 DURHAM COUNTY COUNCIL, No. 115, *ante*.

———.]—*See, now*, Local Government (Ad-  
 justments) Act, 1913 (c. 19), as amended by Local  
 Government (County Boroughs & Adjustments)  
 Act, 1926 (c. 38), s. 5.

126. ——— Increased burden thrown on severed  
 area.]—WEST HARTLEPOOL COUNTY BOROUGH  
 CORPN. v. DURHAM COUNTY COUNCIL, No. 115,  
*ante*.

——— Increased burden thrown on remaining  
 area.]—*See, now*, Local Government (Adjust-  
 ments) Act, 1913 (c. 19), as amended by Local  
 Government (County Boroughs & Adjustments)  
 Act, 1926 (c. 38), s. 5.

127. ———.]—By an order under 1888 &  
 1894 Acts part of a township within the area of a  
 union was detached from it & transferred to another  
 union. On a claim by the union from which the  
 transfer had been made for an adjustment under  
 1894 Act, s. 68, of the property, debts & liabilities  
 affected by the transfer:—*Held*: any considera-  
 tion which bore on the question whether & to  
 what extent, the union from which the area had  
 been taken had been injured financially by the  
 change, would be properly taken into consideration  
 in making an adjustment.—*Re* ROCHDALE UNION  
 & HASLINGDEN UNION, [1899] 1 Q. B. 540; 68  
 L. J. Q. B. 531; 80 L. T. 146; 47 W. R. 322; 15  
 T. L. R. 223; 43 Sol. Jo. 277, C. A.

*Annotations*:—*Consd.* *Re* Buckinghamshire County Council  
 & Hertfordshire County Council, [1899] 1 Q. B. 515;  
*Re* St. Thomas R. D. C. & Heavitree U. D. C. (1902) 86  
 L. T. 153. *Overd.* Caterham U. D. C. v. Godstone R. D. C.,  
 [1904] A. C. 171. *Reid.* *Re* Durham County Council &  
 West Hartlepool Corpn. (1905), 3 L. G. R. 738.

128. ——— Additional rate for repayment  
 of loan.]—By Local Government Board's Pro-  
 visional Orders Confirmation (No. 7) Act, 1912,  
 s. 2, which is practically identical with Local  
 Government (Adjustments) Act, 1913 (c. 14), s. 1,  
 it is enacted that on any adjustment made other-  
 wise than by agreement for the purposes of the  
 Act under 1888 Act, s. 32 or s. 62, or under those  
 sects. as modified or adapted by the particular  
 provisional order, "provision shall be made for  
 the payment to any council or other authority  
 affected by the Order of such sums as seems  
 equitable . . . in respect of any increase of burden  
 which will properly be thrown on the ratepayers  
 of the area of that council or other authority in  
 meeting the cost incurred by that council or other  
 authority in the execution of any of their powers  
 & duties as a consequence of any alterations of  
 boundaries effected by the Order or other change  
 in relation to which the adjustment takes place":  
 —*Held*: where, in consequence of an alteration of  
 boundaries, the council of the district from which  
 a portion of its area has been taken has to levy  
 an extra rate in the pound upon its ratepayers in  
 order to carry out its duties, as for example in  
 paying off a loan debt, there was an "increase of  
 burden" within the meaning of the sect. in respect  
 of which there had to be an adjustment.—*QUEEN-*  
*BOROUGH CORPN. v. SHEPPEY RURAL DISTRICT*  
*COUNCIL*, [1915] 1 K. B. 356; 84 L. J. K. B.  
 337; 112 L. T. 305; 79 J. P. 155; 13 L. G. R. 184.

129. ——— Main road expenditure.]—In

1914 an arbitrator was appointed by the Local  
 Govt. Board to make an equitable adjustment of  
 the financial relations between the county of  
 Southampton & the borough of Bournemouth  
 consequent upon Bournemouth being constituted  
 a county borough under the Borough of Bourne-  
 mouth Order, 1899, & the Bournemouth (Ex-  
 tension) Order, 1901. The arbitrator awarded  
 (a) that in making an adjustment between the  
 parties of the Exchequer Contribution Account he  
 ought, after making provision for the priority  
 payments mentioned in 1888 Act, s. 23 (2) (i), (ii),  
 & (iii), & before dividing the balance, to allocate to  
 each area one-half of the actual cost year by year  
 of its main roads, but excluding the cost of roads  
 declared main roads since the appointed day &  
 (b) that Bournemouth was not entitled to be  
 allotted a share in the net value of the county  
 offices at Winchester:—*Held*: (1) the arbitrator  
 was entitled in making the adjustment to take  
 into consideration the liability for the maintenance  
 of main roads; (2) he was wrong in refusing to  
 allot Bournemouth a share in the net value of the  
 county offices at Winchester.—*Re* SOUTHAMPTON  
 COUNTY COUNCIL & BOURNEMOUTH BOROUGH  
 COUNCIL, [1922] 2 K. B. 314; 91 L. J. K. B. 844;  
 86 J. P. 125; 20 L. G. R. 445.

*See, also*, Nos. 130, 131, *post*.

130. Main road expenditure — Whether a  
 priority payment.]—An arbitrator appointed under  
 1888 Act, to make a new equitable adjustment of  
 the financial relations of the county of Glamorgan  
 & the county boroughs of Cardiff & Swansea, by  
 his award apportioning the aggregate proceeds  
 of the local taxation licences & the estate duty  
 grant between these authorities directed that out  
 of such proceeds priority payments should be made  
 to the authorities representing the payments which  
 they were required to make under 1888 Act,  
 ss. 23, (2), (i), (ii), (iii), 34, & the remainder of  
 such proceeds should be divided among them in  
 the proportion of their respective ratable values.  
 There were many main roads in the county, few  
 in the county borough of Swansea, & none in the  
 county borough of Cardiff, & on appeal by case  
 stated it was contended on behalf of the county  
 that the arbitrator should have taken into account  
 among the priority payments the annual sums  
 expended by the authorities in respect of mainte-  
 nance of their main roads. The Comrs. under the  
 Act in making the original adjustment had taken  
 into account as priority payments these last-  
 mentioned sums. There was no evidence that if  
 these sums were not taken into account the  
 county would be placed in a worse financial  
 position within 1888 Act, s. 32 (3):—*Held*: the  
 duty of the arbitrator was to make what he himself  
 considered to be an equitable adjustment, & he was  
 not bound to follow the original adjustment of the  
 Comrs.; it could not be said that the adjustment  
 made by the arbitrator was not an equitable  
 adjustment because it did not take the main road  
 expenditure into account as a priority payment,  
 & the appeal should be dismissed.—*GLAMORGAN*  
*COUNTY COUNCIL v. CARDIFF CITY COUNCIL &*  
*SWANSEA BOROUGH COUNCIL*, [1915] 3 K. B. 438;  
 84 L. J. K. B. 2073; 113 L. T. 356; 79 J. P. 505;  
 13 L. G. R. 1039, C. A.

*Annotation*:—*Consd.* *Re* Southampton County Council &  
 Bournemouth B. C., [1922] 2 K. B. 314.

131. ———.]—*Re* NORTHUMBERLAND  
 COUNTY COUNCIL & TYNEMOUTH CORPN. & NEW-  
 CASTLE-UPON-TYNE CORPN. (1915), 80 J. P. Jo. 17,  
 D. C.

*See, also*, No. 129, *ante*.



**Sect. 12.—Alteration of areas: Sub-sect. 3, B. Sects. 13, 14, 15 & 16. Part III. Sects. 1, 2 & 3.]**

**132. Effect of prior adjustment—Whether binding on arbitrator.]—GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL & SWANSEA BOROUGH COUNCIL, No. 130, ante.**

#### SECT. 13.—LOCAL INQUIRIES.

**For acquisition of land by parish council.]—See 1894 Act, s. 9 (3).**

**In connection with alteration of areas.]—See Sect. 12, sub-sect. 1, ante.**

#### SECT. 14.—PROMOTION OF OR OPPOSITION TO BILLS IN PARLIAMENT.

**See, generally, Borough Funds Acts, 1872 (c. 91), & 1903 (c. 14).**

**133. Assent to application obtained on condition—Grant of benefits—Effect of alteration of date of commencement of Act.]—Where the promotion of a bill in Parliament had been consented to in accordance with Borough Funds Act, 1872 (c. 91), s. 4, in consideration of certain benefits being conferred upon the owners of property in a borough by such bill upon its becoming an Act of Parliament, & the promoters of the bill caused the coming into operation of the Act at a later date than that at which the bill, as drawn at the time such consent thereto was given, intended:—*Held*: the ct. could not allow advantage to be taken by the owners of the benefits under the Act previously to its coming into operation upon grounds of equity, & no breach of faith had been committed by the promoters of the bill.—*BIRKENHEAD CORPN. v. CROWE* (1882), 46 J. P. 551, D.C.**

**Costs of promotion or opposition—Whether payable out of local funds.]—See Part V., Sect. 4, sub-sect. 1; Part VII., Sect. 5, sub-sect. 1, B. (a) iii.; Part X., Sect. 4, sub-sect. 1; Part XII., Sect. 5, sub-sect. 1, post.**

**134. — Grounds for disallowing—Interests of authority protected by statute.]—Where a bill is rejected by Parliament it will be assumed, in the absence of evidence to the contrary, to have been rejected on its merits. The ct. therefore refused to entertain an application for power to grant building leases under 19 & 20 Vict. c. 120, it appearing that an application to Parliament for the same purpose had been rejected. The costs of the vestry of H. in appearing to oppose the application were not allowed, the ct. being of opinion that they were mere volunteers, & that their rights were sufficiently protected by 19 & 20 Vict. c. 120, s. 21.—*Re WILSON'S ESTATE BILL* (1859), 1 L. T. 25; 24 J. P. 84.**

**—.]—See, generally, PARLIAMENT.**

#### PART II. SECT. 13.

**q. Inquiry by judge for guidance of municipality—Matters must be within municipal council's jurisdiction.]—*Re BERLIN CORPN. & WATERLOO COUNTY COUNTY COURT JUDGE* (1914), 7**

**O. W. N. 588; 33 O. L. R. 73.—CAN. r. —.]—A municipal corpn. has no right to initiate an inquiry before a county ct. judge under Municipal Act, 1914 (c. 192), concerning a matter which is not**

#### SECT. 15.—ADOPTION OF ACTS.

**See P. H. Act, 1875, s. 10; Public Health Acts Amendment Act, 1890 (c. 59); 1894 Act, ss. 7, 53, 62.**

**Particular Acts—Baths & Washhouses Acts.]—See PUBLIC HEALTH.**

**— Burial Acts.]—See BURIAL, Vol. VII., pp. 540 et seq.**

**— Health Resorts & Watering Places Act, 1921 (c. 27).]—See PUBLIC HEALTH.**

**— Infectious Disease (Prevention) Act, 1890 (c. 34).]—See PUBLIC HEALTH.**

**— Museums & Gymnasiums Act, 1891 (c. 22).]—See PUBLIC HEALTH.**

**— Private Street Works Act, 1892 (c. 57).]—See HIGHWAYS, Vol. XXVI., p. 539.**

**— Public Health Acts Amendment Act, 1890 (c. 59).]—See PUBLIC HEALTH.**

**— Public Improvements Act, 1860 (c. 30).]—See OPEN SPACES.**

**Public Libraries Acts.]—See PUBLIC HEALTH.**

#### SECT. 16.—MEETINGS OF RATEPAYERS.

**See P. H. Act, 1875, ss. 166, 216, 272, sched. III.**

**135. Demand for poll—What amounts to.]—By P. H. Act, 1875, sched. III., r. 6, which schedule contains the rules as to resolutions of owners & ratepayers under the Act, it is provided that the chairman shall propose the resolution, & the meeting shall decide for or against its adoption, "provided that if any owner or ratepayer demands that such question be decided by a poll of owners & ratepayers," the poll is to be taken in the manner therein provided. A resolution having been declared carried at a meeting of owners & ratepayers, one of the ratepayers present demanded a poll, & another rose & seconded it, "if necessary"; the latter was told by the town clerk that it was unnecessary to second the demand, which had been acceded to; the meeting then separated. Subsequently the original demand for a poll was withdrawn by its proposer, & the mayor refused to treat the action of the seconder as a demand of a poll by him. Upon an application by the second ratepayer for a *mandamus* to the mayor:—*Held*: the action of appct. was in substance a demand of a poll by him within sched. III., r. 6.**

**Qu.: whether the original demand for a poll could be withdrawn after the close of the meeting.—*R. v. DOVER (MAYOR)*, [1903] 1 K. B. 668; 88 L. T. 296; *sub nom.* *R. v. DOVER (MAYOR)*, *Ex p.* *BRADLEY*, 72 L. J. K. B. 210; 67 J. P. 81; 19 T. L. R. 255; 47 Sol. Jo. 299; 1 L. G. R. 266, D. C.**

**136. — Right to withdraw.]—*R. v. DOVER (MAYOR)*, No. 135, ante.**

**under the control of the municipal council, but is handed over to another statutory body to manage.—*CAMPBELL FLOUR MILLS CO. v. PETERBOROUGH CORPN.*, [1925] 4 D. L. R. 23; 57 O. L. R. 458.—CAN.**



## Part III.—The Parish.

## SECT. 1.—IN GENERAL.

**137. "Parish" — Meaning.]**—The primary meaning of the word "parish" is the ancient ecclesiastical parish.—*Re* **SANDBACH SCHOOL & ALMSHOUSE FOUNDATION, A.-G. v. CREWE (EARL)**, [1901] 2 Ch. 317; 70 L. J. Ch. 604; 84 L. T. 815; 49 W. R. 647.

—*See, generally*, Interpretation Act, 1889 (c. 63), s. 5.

**Ecclesiastical parish.]**—*See* ECCLESIASTICAL LAW, Vol. XIX., pp. 252 *et seq.*

—**Poor law parish.]**—*See* POOR LAW.

**Under Inclosure Acts.]**—*See* Inclosure Act, 1852 (c. 70), s. 28.

—**For formation of burial board.]**—*See* BURIALS, Vol. VII., p. 540, No. 202.

—**Accretions.]**—*See* WATERS & WATERCOURSES.

**Extra-parochial places—As to ecclesiastical parish.]**—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 252, Nos. 357–361.

—**Absorption of.]**—*See* Land Drainage (Rating) Act, 1744 (c. 37), ss. 1, 2; Extra-Parochial Places Act, 1857 (c. 19), ss. 1–8, 11; Poor Law Amendment Act, 1868 (c. 122), s. 27.

## SECT. 2.—BOUNDARIES.

**What is included—Parish bounded by water.]**—*See* WATERS & WATERCOURSES.

**138. Evidence — Award of Inclosure Commissioners—How far conclusive.]**—The determination of the Comrs. under an Inclosure Act, as to the boundaries of a parish to be inclosed, is not conclusive of the fact as to what were the boundaries antecedently to such determination.—*R. v. ST. MARY, BURY ST. EDMUNDS (INHABITANTS)* (1821), 4 B. & Ald. 462; 106 E. R. 1006.

*Annotation*:—*Reid. R. v. Madeley* (1850), 15 Q. B. 43.

**139. — Acquiescence by parish.]**—When a parish has for several hundred years acquiesced in the notion, that a particular place is not within it, a very strong case should be made out, before a jury can be called upon to find that such place is within the parish (*BEST, C.J.*).—*KING v. BUTTERWORTH* (1826), 2 C. & P. 391, N. P.

**140. — Perambulations — How far conclusive — Necessity for notice to adjoining parish.]**—There was a common on which the inhabitants of the parishes of A. & B. had, from time immemorial, intercommoned & those of B. had always repaired part of a road across it. Under an Act of Parliament to inclose the lands in A. a part F. of the common was set off for the inhabitants of B. which under an Act to enclose the lands in B. was allotted amongst them. The church rates, poor rates, land tax for the part F., after the inclosure, were paid by the inhabitants of B. A question arose, whether the part F. was not within the parish of A.; because by reputation the whole of the common had been considered as being in A., & its inhabitants had in their perambulations, taken it in as belonging to them, & it was also described in old terriers as being in A. The jury found that the part F. was in the parish B. & the ct. refused to grant a new trial; observing that perambulations were no evidence, unless the adjoining parish had notice of them.—*WARREN v. SHUTTLEWORTH* (1823), 1 L. J. O. S. K. B. 214.

**141. — — — Parish bounded by navigable river.]**—A wet dock had been made in the bed of a tidal navigable river, partly including what was above low water mark. The perambulations of the parish went along the high water mark; but a part of the same ooze or shore between high & low water mark had been reclaimed, built upon, & rated to the poor for the last fifty years without opposition:—*Held*: the evidence of acts of ownership outweighed that derived from perambulations, & the parish boundary extended to the *medium filum* of the tidal channel.—*IPSWICH DOCK COMRS. v. ST. PETER, IPSWICH, OVERSEERS* (1866), 7 B. & S. 310; 30 J. P. 820.

*Annotation*:—*Mentd. Swansea Harbour Trustees v. Swansea Union Assmt. Com. & Swansea Overseers* (1906), 94 L. T. 627.

*See, further*, WATERS & WATERCOURSES.

—*See, generally*, BOUNDARIES, Vol. VII., p. 321.

**142. — Long user.]**—The S. Co. were occupiers of a harbour which had been rated for one hundred & fifty years as in parish of P. Along the quay the S. co. had made a tramway which was rented from them by a railway co. Disputes arose as to whether the harbour was within the parish:—*Held*: the fact of long user was sufficient evidence that the harbour was within the parish.—*SUTTON HARBOUR IMPROVEMENT CO. v. PLYMOUTH TOWN GUARDIANS* (1890), 63 L. T. 772; 55 J. P. 232; 6 T. L. R. 400, D. C.

*Annotation*:—*Mentd. Blyth Harbour Comrs. v. Newsham & South Blyth Churchwardens, etc. & Tynemouth Union Assmt. Com.*, [1894] 2 Q. B. 293.

**143. Delimitation — By judicial authority — Jurisdiction of Court of Chancery.]**—Bill will not lie to have an issue to ascertain boundaries between two parishes.—*WARING v. HOTHAM, ST. LUKE, OLD STREET v. ST. LEONARD, SHOREDITCH* (1779), 1 Bro. C. C. 40; 2 Dick. 550; cited 2 Anstr. at p. 395; 28 E. R. 972, L. C.

*Annotations*:—*Consd. Atkins v. Hatton* (1794), 2 Anst. 386. *Reid. York Corpn. v. Pilkington* (1737), West temp. Hard. 293; *A.-G. to Prince of Wales v. St. Aubyn* (1811), Wight. 167; *Speer v. Crawter* (1817), 2 Mer. 410.

—*See, generally*, BOUNDARIES, Vol. VII., pp. 270 *et seq.*

**Alteration of boundaries—By county council.]**—*See* Part XII., Sect. 3, sub-sect. 3, D. (b), *post*.

—**Effect of alteration—On Parliamentary division.]**—*See* ELECTIONS, Vol. XX., p. 14, Nos. 75–77.

## SECT. 3.—DIVISION, UNION AND TRANSFERS OF AREAS.

*See, generally*, Divided Parishes & Poor Law Amendment Act, 1876 (c. 61), ss. 1–9; Poor Law Act, 1879 (c. 54), ss. 4–7; Divided Parishes & Poor Law Amendment Act, 1882 (c. 58), s. 4; 1888 Act & 1894 Act, ss. 26–42, 69; & *generally*, Part II., Sect. 12, *ante*.

**144. Union of parishes — Effect of Divided Parishes Act, 1882 (c. 58), s. 2—On detached part of parish.]**—*DAVIS v. WINCHELSEA (CHURCHWARDENS)* (1885), 1 T. L. R. 470, D. C.

*In Metropolis.]*—*See* METROPOLIS.

**Effect of union.]**—*See* 1894 Act, sect. 55.

**For poor law administration purposes.]**—*See* POOR LAW.

**Transfer of area—To parish in another poor law**

*Sect. 3.—Division, union and transfers of areas.*  
*Sects. 4 & 5: Sub-sects. 1 & 2, A., B., C., D., E., F. & G.]*

*union—Whether union boundaries unaffected.]—See POOR LAW.*

145. — Order providing for adjustment of claims under 1894 Act, sect. 68—Whether claim in respect of transferred school included.]—An order by the Local Govt. Board for the transfer to another parish of part of the parish of L., on which part was situate the board school, provided that the powers, duties, & liabilities of the school board of L. in respect of the part transferred should cease, & that the school should vest in the school board of the other parish, & all contracts & liabilities attaching to the L. school board in respect of such school should vest in & attach to the school board of the other parish. The order further provided that any question between the two school boards with regard to their interests in the school, or in any debts & liabilities, whether on account of capital or income incurred by the L. school board in respect of the school, & any other question between them, arising in consequence of the order, should be dealt with in an adjustment under above sect. The L. school board claimed compensation for the cost of having enlarged the school out of income in several years. On a case stated by an arbitrator:—*Held*: the order had not effected an adjustment, but there was a question pending proper for adjustment by the arbitrator.—*Re LLANWONNO SCHOOL BOARD & YSTRADYFODWG SCHOOL BOARD* (1898), 62 J. P. 644; 14 T. L. R. 432, D. C.

*Powers of county councils.]—See Part XII., Sect. 3, sub-sect. 3, D. (b), post.*

#### SECT. 4.—THE URBAN PARISH.

*Administration of parish—By borough & urban district councils.]—See 1894 Act, s. 33.*

146. *Officers—Auditor—Whether disqualified for overseer.]—In a parish or township within the limits of any borough under the Municipal Corporation Act, there is no objection to the same person filling the offices of overseer & auditor at the same time. Qu.: whether there is any objection to the same person filling the offices of overseer & town councillor.—R. v. LANCASHIRE JJ.* (1840), 4 J. P. 72.

*Overseers.]—See POOR LAW.*

#### SECT. 5.—THE RURAL PARISH.

##### SUB-SECT. 1.—DEFINITION.

*See 1894 Act, s. 1 (2).*

##### SUB-SECT. 2.—THE PARISH COUNCIL.

###### A. Constitution.

*See, generally, 1894 Act, s. 3; Parish Councillors (Tenure of Office) Act, 1899 (c. 10), s. 1.*

*Councillors & chairman—Qualification.]—See 1894 Act, ss. 3 (1) (2), 47 (2), sched. I., Part II., r. 2, & Local Government Act, 1897 (c. 1), s. 1.*

*—Disqualification.]—See Part II., Sect. 3, sub-sect. 2, ante.*

PART III. SECT. 5, SUB-SECT. 2.—A. *t. Chairman—Tenure of office.]—The chairman of a parish council remains in office for all purposes until his successor has been elected, & he has a right to give both an original vote &*

*a casting vote at the election of his successor.—R. v. JACKSON, Ex p. PICK* (1914), 48 I. L. T. Jo. 58.—*IR.*

PART III. SECT. 5, SUB-SECT. 2.—B. *a. Right to prosecute under Chil-*

*— Election.]—See ELECTIONS, Vol. XX., pp. 140, 141.*

*— Tenure of office.]—See Parish Councillors (Tenure of Office) Act, 1899 (c. 10), s. 1.*

*Appointment & powers of vice-chairman.]—See 1894 Act, s. 3 (10), sched. I., Part II. (11).*

###### B. Powers, Duties and Liabilities.

*See, generally, 1894 Act, ss. 5–10, 13, 16.*

*Powers as burial board.]—See BURIAL, Vol. VII., p. 547.*

###### C. Finance.

*Restrictions on expenditure.]—See, generally 1894 Act, s. 11.*

147. — Consent of parish meeting—When presumed.]—An action was brought by the parish council in which they were unsuccessful, & they incurred costs to the successful deft. amounting to £92 14s. 10d. A rate of 3d. would realise £54 12s. 0d. & since Mar. 1899, when the financial year began, precepts had been issued for £52, £25 of which went to defray the council's costs, & the balance in parish expenses. After a rule nisi for a *mandamus* to the council to issue their precept to the overseers to pay the sum due to defts. for costs, two parish meetings were called, but the necessary resolutions were not passed to raise the extra 3d. owing to the small attendances:—*Held*: as no information was forthcoming as to the proceedings before the action was commenced, it must be assumed consent was given, & the rule must be made absolute.—*R. v. STOKE PARISH COUNCIL, Ex p. PRICE* (1900), 82 L. T. 198; 64 J. P. 343, D. C.

148. What expenditure authorised—Costs of action for benefit of parish.]—Parish may tax themselves to carry on a suit for the public good of the parish.—*R. v. EVERARD* (1701), 12 Mod. Rep. 440.

*Borrowing.]—See 1894 Act, ss. 12, 68 (4).*

149. — Repayment of loan secured on rates—Enforcement—By *mandamus* to levy rate.]—The ct. will grant a *mandamus* to comrs. entrusted by Act of Parliament with the regulation of the expenditure of a parish, to compel them to levy a rate for the purpose of paying off a sum borrowed on the rates by former comrs. without pledging their personal responsibility, where the liabilities created under the former Act are reserved by the new Act, although the latter directs that the comrs. shall be sued in the name of their clerk, & no interest has been paid within twenty years.—*R. v. ST. PAUL, SHADWELL COMRS.* (1828), 1 Man. & Ry. K. B. 591; 1 Man. & Ry. M. C. 226; *sub nom. R. v. SHADWELL PAVING ACT COMRS.*, 6 L. J. O. S. M. C. 57.

*Annotation:—Reid. R. v. St. Pancras* (1841), 6 Jur. 391.

###### Necessary parties.]

(1) Comrs. were authorised, by Act of Parliament, to raise a sum of money for parish purposes, & to secure it by debenture or assignment of the rates. The comrs. gave a debenture for £1,000 to A., who was treasurer & also comr. A. advanced nothing at the time, but he subsequently advanced the amount, & from that time only he received interest. By subsequent receipts of rates the balance was turned, & A. had funds in hand:—*Held*: the transaction was not invalid, & A. was entitled to charge full interest on his debenture until he had been formally paid off.

*dren's Act.]—A parish council has no title to prosecute a complaint charging a contravention of Children Act, 1908, Part I.—GLASGOW PARISH COUNCIL v. EDWARD, [1914] S. C. (J.) 159. SCOT.*



(2) In a suit against comrs. to enforce debentures on parish rates, it was insisted that the ratepayers were necessary parties; because the validity of pltf.'s security was contested; &, because they ought to be present at the taking of the accounts. The objection was overruled, on the ground that the validity of pltf.'s security had been determined in a former suit, in which the A.-G. was a party, & because the ratepayers would be sufficiently represented, in taking the accounts, by the comrs. who were defts. Some only of many comrs., appointed under an Act to raise money on the rates, for parish purposes, were made defts. to a suit by a bondholder to enforce payment. It was objected that all the comrs. ought to be parties. The objection was removed, by the ct. ordering the decree to be served on the absent comrs., with notice that they might attend the taking of the accounts.—*FLETCHER v. GIBBON* (1856), 23 Beav. 212; 53 E. R. 83.

*Annotation*:—*Generally*, *Reid*. *Preston v. Great Yarmouth Corp.* (1872), 7 Ch. App. 657, n.

151. — **Payment of interest — Parish funds in hands of lender.**—*FLETCHER v. GIBBON*, No. 150, *ante*.

152. — **Arrears of interest — Whether court will enforce payment—Delay by borrower in claiming.**—A ct. of equity will not interfere to enable an incumbrancer of parish rates to obtain payment of arrears of interest, which he neglected to claim at the time when they became due.—*DREWRY v. BARNES* (1826), 3 Russ. 94; 5 L. J. O. S. Ch. 47; 38 E. R. 511.

*Annotations*:—*Reid*. *Preston v. Great Yarmouth Corp.* (1872), 7 Ch. App. 657, n. *Mentd.* *A.-G. v. Pearson* (1846), 2 Coll. 581; *Delarue v. Church* (1851), 20 L. J. Ch. 183.

**Inspection of accounts—By parochial electors.**—*See* 1894 Act, s. 58 (4) (5).

**Audit.**—*See* 1894 Act, s. 58 (1), (3).

153. — **Payments wrongly allowed—Whether prohibition lies for future payments.**—Quarter sessions having allowed certain trustees' accounts, which it was suggested had not been audited by the parish auditors under Vestries Act, 1831 (c. 60), pursuant to the provisions of that Act, a prospective prohibition to quarter sessions, forbidding them to allow future accounts in similar circumstances was refused.—*Ex p. ST. PANCRAS AUDITORS* (1838), 6 Dowl. 534; 2 Jur. 920; *sub nom.* *R. v. MIDDLESEX JJ.*, *Ex p. ST. PANCRAS AUDITORS*, 1 Will. Woll. & H. 183.

*See, generally*, *CROWN PRACTICE*, Vol. XVI., p. 384, Nos. 2212–2216.

#### Meetings.

*See, generally*, 1894 Act, s. 3 (10), sched. I., Part II., Part III., rr. 3, 5.

**Place of meeting.**—*See* 1894 Act, ss. 4, 61, 75 (2).

**Time for holding.**—*See* Parish Councillors (Tenure of Office) Act, 1899 (c. 10), s. 1 (5).

**Notice of meeting.**—*See* 1894 Act, s. 3 (10), sched. I., Part II., rr. 4, 6.

154. — **Adequacy of notice.**—A resolution, passed by a parish council in meeting, to dismiss its assistant overseer & clerk, is not effective unless the notice convening the meeting specified that such resolution would be considered at the meeting. A resolution duly passed at a subsequent meeting of the council appointing a temporary assistant overseer & clerk must be treated either as a confirmation of the previous resolution or as a separate & distinct resolution to dismiss the assistant overseer & clerk.—*LONGFIELD PARISH COUNCIL v. WRIGHT* (1918), 88 L. J. Ch. 119; 16 L. G. R. 865.

**Minutes.**—*See* 1894 Act, s. 3 (10), sched. I., Part III., rr.

#### E. Committees.

*See, generally*, 1894 Act, s. 56, sched. I., Part IV. **Joint committees.**—*See* 1894 Act, s. 57.

#### F. Parish Officers.

**Meaning of "officer."**—*See* 1888 Act, s. 100; 1894 Act, s. 75 (1).

155. **Proof of appointment—For purposes of action of ejectment—Proof of acting.**—In an action of ejectment brought by parish officers, proof that they have acted as parish officers is sufficient *prima facie* proof of their title, without proof of their actual appointment.—*DOE d. BOWLEY v. BARNES* (1846), 8 Q. B. 1037; 1 New Pract. Cas. 401; 15 L. J. Q. B. 293; 7 L. T. O. S. 139; 10 Jur. 520; 10 J. P. Jo. 309; 115 E. R. 1164.

*Annotations*:—*Reid*. *McMahon v. Lennard* (1858), 6 H. L. Cas. 970. *Mentd.* *R. v. Roberts* (1878), 38 L. T. 690.

**Existing officers—Effect of transfer of powers of authorities.**—*See* 1894 Act, s. 81 (1)–(4).

— **Effect of division of areas of authorities.**—*See* 1894 Act, s. 81 (5).

**Performance of duties—Liability of sureties for.**—*See, generally*, *GUARANTEE*, Vol. XXVI., pp. 165–169, Nos. 1248, 1250, 1253, 1258, 1261, 1267, 1269, 1270.

**Enforcement by mandamus—Procedure.**—*See* *CROWN PRACTICE*, Vol. XVI., p. 323, Nos. 1352–1355.

**Clerk—Appointment.**—*See* 1894 Act, ss. 17 (1)–(3), 81 (2).

156. — **Appointed assistant overseer—Fidelity guarantee for duties as assistant overseer—Whether duties as clerk included.**—The offices of assistant overseer & clerk to the parish council are separate; accordingly where the two offices are held by the same man, & a guarantee association have given the guardians a bond for the due & faithful discharge of his duties as assistant overseer, they are not liable on the bond for his defalcations as clerk to the parish council.—*GOSFORD UNION v. POOR LAW & LOCAL GOVERNMENT OFFICERS' MUTUAL GUARANTEE ASSOCN., LTD.* (1910), 103 L. T. 463; 75 J. P. 30; 8 L. G. R. 995, D. C.

**As ecclesiastical official.**—*See* *ECCLESIASTICAL LAW*, Vol. XIX., pp. 295 *et seq.*

**Overseers & assistant overseers.**—*See, generally*, *POOR LAW*; *RATES & RATING*.

**Treasurer — Appointment.**—*See* 1894 Act, s. 17 (6).

#### G.

**Transfer of property formerly vested in churchwardens & overseers.**—*See* 1894 Act, ss. 5 (2) (c), 6 (1) (c) (iii), (d), 52 (4).

157. **Property formerly vested in churchwardens & overseers—Under Poor Relief Act, 1819 (c. 12), s. 17—"Lands belonging to the parish"—How construed.**—*DOE d. HIGGS v. TERRY*, No. 178, *post*.

158. — **Not confined to property held for poor relief.**—Above sect. vests in the churchwardens & overseers of the parish all buildings, lands & hereditaments belonging to such parish, not merely where the profits thereof are applicable to the relief of the poor, but where they are applicable to those purposes for which church rates are levied; & that although such buildings, lands & hereditaments had originally been vested in trustees for the benefit of the parish.—*DOE d. JACKSON v. HILEY* (1830), 10 B. & C. 885; 5 Man. & Ry. K. B. 706; 3 Man. & Ry. M. O. 105; 8 L. J. O. S. M. C. 105; 109 E. R. 677.

*Annotations*:—*Fold*. *Doe d. Higgs v. Terry* (1835), 4 Ad. &



**Sect. 5.—The rural parish: Sub-sect. 2, G.]**

**Distd.** *Re* Paddington Charities (1837), 7 L. J. Ch. 44.  
**Consd.** Gouldsworth v. Knights (1843), 11 M. & W. 337;  
 Rumball v. Munt (1846), 8 Q. B. 382; Deptford Church-  
 wardens v. Sketchley (1847), 8 Q. B. 394; A.-G. v.  
 Stephens (1855), 1 Jur. N. S. 1039. **Reid.** *Re* Stratford  
 Bridge Improvement Act, *Ex p.* Annesley, (1836), 2 Y & C.  
 Ex. 350; Allason v. Stark (1838), 9 Ad. & El. 255; Alderman  
 v. Neate (1839), 4 M. & W. 704; Doe d. Robinson v.  
 Hird (1843), 1 L. T. O. S. 58; *Re* Hackney Charities  
 (1864), 4 New Rep. 530; Haigh v. West, [1893] 2 Q. B.  
 19.

**159. ——— Property held for church rate purposes included.]—DOE d. JACKSON v. HILEY, No. 158, ante.**

**160. ——— Property held for general parochial purposes—Jointly with corporation.]—**Where lands have been held jointly by the churchwardens & overseers of a parish & by the corpn. of a borough in which it lies, the latter holding as trustees, not on any special trust but for general parochial purposes, the churchwardens & overseers may bring ejectment for such lands as vested in them by above sect.—**DOE d. EDNEY v. BILLETT** (1845), 7 Q. B. 976, 983; 14 L. J. Q. B. 343; 5 L. T. O. S. 408; 10 J. P. 39; 9 Jur. 662; 115 E. R. 756.

**Annotations:—Reid.** Rumball v. Munt (1846), 10 Jur. 539; St. Nicholas, Deptford v. Sketchley (1846), 17 L. J. M. C. 17.

**161. ——— Property held for benefit of poor.]—**(1) Above sect. does not operate to vest in the churchwardens & overseers lands held in trust for the general benefit of the parish, if there are known existing trustees.

(2) A trust for the use & benefit of the poor of a parish is sufficiently general to bring it within the operation of that sect.; for land held upon such trust may properly be said to "belong to the parish."—**DEPTFORD (CHURCHWARDENS) v. SKETCHLEY** (1847), 8 Q. B. 394; 2 New Mag. Cas. 336; 17 L. J. M. C. 17; 10 L. T. O. S. 285; 11 J. P. 887; 12 Jur. 38; 115 E. R. 925.

**Annotation:—Consd.** Westminster Corpn. v. St. Martin-in-the-Fields (1906), 96 L. T. 491.

**162. ———.]—**Lands given for the benefit of the poor of a parish generally, or to trustees to permit the churchwardens to distribute the rents among the poor of the parish generally, as directed by two or more of the inhabitants of the parish:—**Held:** to be vested in the churchwardens & overseers as a corpn., under above sect., & therefore the Charity Comrs. had no jurisdiction to make an order vesting the legal estate in the lands in the official trustee of charities without the consent of the churchwardens & overseers.—**Re HACKNEY CHARITIES** (1864), 4 New Rep. 530; 34 L. J. Ch. 169; 11 L. T. 35; 28 J. P. 692; 10 Jur. N. S. 941; 12 W. R. 1129; *on appeal, sub nom.* *Re* HACKNEY CHARITIES, *Ex p.* NICHOLLS (1865), 4 De G. J. & Sm. 588, L. JJ.

**Annotation:—Reid.** *Re* Burnham National Schools (1873), L. R. 17 Eq. 241.

**163. ——— Property held for special charitable purpose—Other than poor or church rate.]—**(1) Above Act does not extend to charity lands which are devoted to other purposes besides those to which poor rates & church rates are applicable.

(2) As far as the copyholds are concerned, I am clearly of opinion that the legislature could not intend, by the Act that has been referred to, to vest lands of that tenure in the churchwardens & overseers of a parish (SHADWELL, V.-C.).—**A.-G. v. LEWIN** (1837), 8 Sim. 366; Coop. Pr. Cas. 51; 6 L. J. Ch. 204; 1 J. P. 123; 1 Jur. 234; 59 E. R. 145.

*Re* Paddington Charities (1843), 11 7 Q. B.

976; Deptford Churchwardens v. Sketchley (1847), 8 Q. B. 394; *Re* Hackney Charities (1864), 28 J. P. 692. **As to (2)** **Reid.** *Re* Paddington Charities (1837), 7 L. J. Ch. 44.

**164. ———.]—**Above sect. does not apply to copyholds, nor to freeholds held upon any special trust for a parish.—**Re PADDINGTON CHARITIES** (1837), 8 Sim. 629; 7 L. J. Ch. 44; 2 Jur. 344; 59 E. R. 249.

**Annotations:—Reid.** Doe d. Edney v. Billett (1845), 7 B. Q. 976; Deptford Churchwardens v. Sketchley (1847), 8 Q. B. 394.

**165. ——— Partially in aid of parish funds.]—**Above sect. does not vest the legal estate of charity lands in the parish officers, where there are known feoffees in existence, & where the trust funds are applicable only to certain specified objects partially in aid of the parish funds.

Where lands were vested in trustees under a charitable bequest, on trust to apply half the rents towards the relief of poor people of good life & conversation in the parish, & half for apprenticing poor boys of the parish:—**Held:** the legal estate was not transferred to the parish officers under above sect., although by a local Act, a portion of the rents was applied to the expense of erecting the parish workhouse, & paying off moneys borrowed for that purpose.—**ALLASON v. STARK** (1838), 9 Ad. & El. 255; 1 Per. & Dav. 183; 1 Will. Woll. & H. 719; 8 L. J. M. C. 13; 3 J. P. 178; 112 E. R. 1208.

**Annotations:—Reid.** Doe d. Norton v. Webster (1840), 4 Per. & Dav. 270; Gouldsworth v. Knights (1843), 11 M. & W. 337; Doe d. Edney v. Billett (1845), 7 Q. B. 976; Deptford Churchwardens v. Sketchley (1847), 8 Q. B. 394. **Mentd.** Cornish v. Cleife (1864), 11 L. T. 606.

**166. ———.]—Qu.: whether the words "all other buildings, lands & hereditaments belonging to such parish" in above sect. extends to trusts for special parochial purposes.—GOULDSWORTH v. KNIGHTS** (1843), 11 M. & W. 337; 12 L. J. Ex. 282; 8 J. P. 8; 152 E. R. 833.

**Annotations:—Reid.** Doe d. Edney v. Billett (1845), 7 Q. B. 976; A.-G. v. Stephens (1855), 1 K. & J. 724. **Mentd.** Webb v. Austin (1844), 7 Man. & G. 701; Pargeter v. Harris (1845), 7 Q. B. 708; Hickman v. Machin (1859), 4 H. & N. 716; Cuthbertson v. Irving (1860), 6 H. & N. 135; Ritchings v. Cordingley (1868), L. R. 3 A. & E. 113; R. v. White (1883), 11 Q. B. D. 309; *Ex p.* Sibley (1883), 31 W. R. 811.

**167. ——— Copyholds.]—Re PADDINGTON CHARITIES, No. 164, ante.**

**168. ———.]—A.-G. v. LEWIN, No. 163, ante.**

**169. ———.]—**Above sect. does not apply to copyholds.—**DOE d. BAILEY v. FOSTER** (1846), 3 C. B. 215; 15 L. J. C. P. 263; 7 L. T. O. S. 208; 136 E. R. 86.

**Annotation:—Mentd.** Ford v. Ager (1863), 8 L. T. 546.

**170. ——— Leasehold.]—**By a written instrument, stamped with a lease stamp, & dated Feb. 25, 1782, E., being seised in fee of a house & premises, agreed to demise & let them to a committee for the parish of H., & the committee agreed to accept & take them, for the purpose of converting them into a poorhouse for the use of the parish of H.; to hold to the said committee, in trust as aforesaid, from Mar. 25, then next coming for the term of ninety-nine years, at the clear yearly rent of £27 payable half-yearly; & the committee agreed to pay the rent, & to keep the premises in good & sufficient repair during the term. It was also agreed that a lease & counterpart of the premises should be prepared & executed on or before Jan. 1, then next, with covenants & agreements pursuant to that contract, & such other general clauses as are usually contained in leases; & there was a proviso, that in case the committee or their successors should think it a more eligible plan to purchase the premises in fee



at the price of £420, that then he, the lessor, should convey them accordingly. No lease was ever executed, but the premises, from the date of the instrument, were used as a poorhouse for the parish of H., & the churchwardens & overseers for the time being of that parish paid the rent to E. & his representatives. In an action of *assumpsit* against the parish officers for the time being of the parish of H., for non-repair of the premises:—*Held*: the lease vested in the overseers of the poor by force of above sect. & defts. were liable.—**ALDERMAN v. NEATE** (1839), 4 M. & W. 704; 1 Horn & H. 165; 8 L. J. Ex. 89; 3 Jur. 171; 150 E. R. 1604.

*Annotations*:—**Reid**. Doe d. Robinson v. Hird (1843), 1 L. T. O. S. 58; Gouldsworth v. Knights (1843), 11 M. & W. 337; Uthwatt v. Elkins (1845), 14 L. J. Ex. 131; Rumball v. Munt (1846), 8 Q. B. 382; Deptford Churchwardens v. Sketchley (1847), 8 Q. B. 394.

**171. — — — — — Whether acceptance under seal necessary.**—Churchwardens & overseers are not, by above sect., made a complete body corporate, but are only empowered "to accept, take, & hold in the nature of a body corporate," & therefore that it is not necessary to show the acceptance of a demise by an instrument under a common seal.—**SMITH v. ADKINS** (1841), 1 Dowl. N. S. 129; 8 M. & W. 362; 11 L. J. Ex. 83; 151 E. R. 1078.

*Annotations*:—**Reid**. Doe d. Lunsdell v. Gower (1851) 18 L. T. O. S. 135. **Mentd.** Chislin v. Gregory (1848), 11 L. T. O. S. 124; *Re* Leeds Institute of Science, Art & Literature & Leeds City Council, [1909] 1 Ch. 500.

**172. — — — — — Trust property vested in known trustees.**—Under above Act, lands belonging to the parish are vested in the churchwardens & overseers of the parish, as a corpn. Therefore, where feoffees to charitable uses were empowered to sell & convey their lands to the comrs. under an improvement Act:—*Held*: the petition for the investment of the purchase-money should be presented in the names of the churchwardens & overseers of the parish in which the charity was established.—*Re* STRATFORD BRIDGE IMPROVEMENT ACT, *Ex p.* ANNESLEY (1836), 2 Y. & C. Ex. 350; 6 L. J. Ex. Eq. 81; 160 E. R. 431.

*Annotation*:—**Reid**. *Re* Paddington Charity (1838), 2 Jur. 314.

**173. — — — — —.] — ALLASON v. STARK**, No. 165, *ante*.

**174. — — — — —.] — Certain trust property**, including T. Farm, was, in 1831, conveyed to new trustees, upon trust, to apply the rents for & towards the repair of the parish church of P., & for the benefit of the poor of the said parish, in such manner as the same have heretofore been usually applied, & according to the intention of the several charitable persons who devised the same. Among other property, conveyed in the same deed, were some cottages, described as four cottages in C. Lane, wherein poor families are permitted to live rent free:—*Held*: (1) the legal estate in all these lands vested in the parish officers, under above sect., although there were trustees in existence; (2) it was imperative that an action for the use & occupation of T. Farm should be brought by the parish officers.—**RUMBALL v. MUNT** (1846), 8 Q. B. 382; 15 L. J. Q. B. 180; 6 L. T. O. S. 344; 10 J. P. 10 Jur. 539; 17 E. R. 920.

*Annotations*:—**Consd.** Deptford Churchwardens v. Sketchley (1847), 8 Q. B. 394. **Distd.** A.-G. v. Parr, [1920] 1 Ch. 339.

**175. — — — — —.] — DEPTFORD (CHURCHWARDENS) v. SKETCHLEY**, No. 161, *ante*.

**176. — — — — — Effect of Union & Parish Pro-**  
**perty Act, 1835 (c. 69)—Whether property divested.]**  
buildings, lands, & hereditaments belonging  
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to a parish, remain vested in the churchwardens & overseers, under Poor Relief Act, 1819 (c. 12), s. 17, notwithstanding the subsequent enactments of Poor Law Amendment Act, 1834 (c. 76), & Union & Parish Property Act, 1835 (c. 69).—**DOE d. NORTON v. WEBSTER** (1840), 12 Ad. & El. 442; 4 Per. & Dav. 270; 9 L. J. Q. B. 373; 4 Jur. 1010; 113 E. R. 879.

*Annotations*:—**Reid**. Worge v. Relf (1842), 11 L. J. M. C. 125. **Mentd.** Doe d. Hemming v. Willetts (1849), 7 C. B. 709; Watcham v. A.-G. of the East Africa Protectorate, [1919] A. C. 533.

**177. — — — — —.] — (1) Union & Parish Property Act, 1835 (c. 69)**, does not transfer the legal estate in parish property from the churchwardens & overseers to the guardians of the union, of which the parish forms a part. Where a title, not complete in the parish officers at the time of the passing of that Act, is afterwards completed by a twenty years' possession, the legal estate so obtained vests in the churchwardens & overseers, & not in the guardians.

(2) The possession of the agent of the guardians is the possession of the churchwardens & overseers.—**WORGE v. RELF** (1842), 11 L. J. M. C. 125.

**178. Presumption that property parish property**  
**—Property let on lease—Rent paid to parish officers.] — (1) Evidence of payment of rent to parish officers in their character as such, is evidence to show that the property for which it is paid is parish property within the operation of Poor Relief Act, 1819 (c. 12), s. 17, so as to enable the parish officers for the time being to maintain ejectment against a person holding under a lease granted by the parish officers previously to the statute. A person holding under a lease granted by parish officers before the statute, is a tenant from year to year.**

(2) The words "land belonging to the parish" in Poor Relief Act, 1819 (c. 12), must be taken in a popular sense, & not in the strictly legal sense (**COLERIDGE, J.**).—**DOE d. HIGGS v. TERRY** (1835), 4 Ad. & El. 274; 1 Har. & W. 547; 5 Nev. & M. K. B. 556; 3 Nev. & M. M. C. 385; 5 L. J. M. C. 27; 111 E. R. 790.

*Annotations*:—**Folld.** Doe d. Hobbs v. Cockell (1836), 4 Ad. & El. 478. **Reid.** Allason v. Stark (1838), 9 Ad. & El. 255; Doe d. Robinson v. Hird (1843), 1 L. T. O. S. 58; Rumball v. Munt (1846), 8 Q. B. 382; Deptford Churchwardens v. Sketchley (1847), 8 Q. B. 394; Haigh v. West, [1893] 2 Q. B. 19. **Mentd.** Grayes v. Colby (1838), 9 Ad. & El. 356.

**179. — — — — —.] — In ejectment by churchwardens & overseers, on demises laid after Poor Relief Act, 1819 (c. 12)**, it appeared that defts., before & since the statute, had paid rent to the successive churchwardens, & that the late churchwardens & overseers, appointed since the statute, had given a proper notice to quit. Defts. produced a lease, made before the statute, for fifty-nine years, to parties under whom they claimed, purporting to be made with the consent of the vicar, the majority of the aldermen and burgesses or the borough of R. & of others the inhabitants of the parish, whose names were subscribed to a memorandum on the back of the lease expressing such consent. The churchwardens were the demising parties, & the rent was made payable to them & their successors for the time being. The premises were described as belonging to the parish church. On a special case stating these facts:—*Held*: notwithstanding the consent expressed as above, the premises must be taken to have been parish property, demised by the churchwardens as such: & consequently the lease passed no legal interest in the term, & the present churchwardens & overseers might treat the lessees as tenants from year to year.—**DOE d. HOBBS v. COCKELL** (1836), 4 Ad.



**Sect. 5.—The rural parish: Sub-sect. 2, G., H. & I.; sub-sect. 3. Parts IV. & V. Sects. 1 & 2; Sub-sects. 1, 2, 3, 4 & 5.]**

& El. 478; 6 Nev. & M. K. B. 179; 3 Nev. & M. M. C. 581; 5 L. J. M. C. 81; 111 E. R. 866.

**Annotation:—***Reid. Deptford Churchwardens v. Sketchley* (1847), 8 Q. B. 394.

*See, also, No. 180, post.*

**Herbage on private road made on inclosure of common—Surveyor authorised to let herbage—Whether property vested in parish or district council.]—***See* COMMONS, Vol. XI., p. 82, No. 1018.

**Spring on roadside.]—***See* No. 182, *post.*

**180. Acquisition of title—Under Statute of Limitations—Presumption of lawful origin.]—**By an award made under an inclosure Act passed in the year 1774 certain lands were allotted & certain roads set out as public highways. From a short time after the passing of the Act the pasturage of one of the roads set out was let annually by the inhabitants of the parish in vestry assembled. The money received from the tenants was devoted to different parochial purposes, & there had been no interference or claim by the lords of the manor until the present action, in which pltf., as lord of the manor claimed damages from deft., who was tenant to the vestry, for trespass in pasturing his sheep in the road. There was no evidence in whom the soil of the road was vested before the passing of the inclosure Act. No grant of the road was produced, & there was no evidence of the enrolment of any such grant:—**Held:** a lawful origin must be presumed from the long usage, & the presumption was that the road was vested in some person or persons as trustees for the parishioners; the churchwardens & overseers, as trustees under Poor Relief Act, 1818 (c. 12), s. 17, of lands belonging to the parish, had gained a title to the road under the Statute of Limitations, subject to the public right of way.—

**HAIGH v. WEST**, [1893] 2 Q. B. 19; 62 L. J. Q. B. 532; 69 L. T. 165; 57 J. P. 358; 4 R. 396, C. A. **Annotations:—***Reid. Wimbledon & Putney Commons Conservators v. Nicol* (1894), 10 T. L. R. 247; *Elliot v. Bristol Corpn.* (1895), 72 L. T. 752; *Reynolds v. Prestelgn U. D. C.* (1896), 65 L. J. Q. B. 400; *Neaverson v. Peterborough R. C.*, [1902] 1 Ch. 557; *A.-G. & Spalding R. C. v. Garner*, [1907] 2 K. B. 480. **Mentd.** *Brown v. Dunstable Corpn.*, [1899] 2 Ch. 378; *Chesterfield v. Harris*, [1908] 2 Ch. 397; *Foley's Charity Trustees v. Dudley Corpn.* (1909), 8 L. G. R. 320; *C. L. Ry. v. City of London Land Tax Comrs.*, [1911] 2 Ch. 467; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *White v. Williams*, [1922] 1 K. B. 727.

*See, generally, LIMITATION OF ACTIONS.*

#### H. Parish Books and Documents.

**Transfer of documents to council & custody.]—***See, generally, 1894 Act, s. 17 (7)–(9).*

**Tithe apportionment deed.]—***See* ECCLESIASTICAL LAW, Vol. XIX., p. 491.

**As evidence.]—***See* EVIDENCE, Vol. XXII., pp. 330, 331, 334 *et seq.*

**Of boundaries.]—***See* BOUNDARIES, Vol. VII., p. 318, Nos. 379–384.

**Inspection.]—***See* 1894 Act, s. 58 (4); CORPORATIONS, Vol. XIII., p. 424, Nos. 1451, 1453, 1455, 1457; DISCOVERY, Vol. XVIII., p. 111; ECCLESIASTICAL LAW, Vol. XIX., p. 307.

**Enforcement of right.]—***See* CROWN PRACTICE, Vol. XVI., p. 316, Nos. 1283, 1284.

**181. Recovery of — By custodian — Whether trover lies.]—**(1) An officer in whom a right to the

custody of chattels is vested by Act of Parliament has not, in respect of such right merely, such property in them as will enable him to maintain an action for the wrongful detention of them.

(2) Parish officers, or other persons, by whom parish books, etc., are appointed by the inhabitant vestry assembled, to be kept, cannot be liable in trover against an ex-waywarden for the books, accounts, assessments, etc., kept by him during the period in which he was in office, & with possession of which he has never parted. **ADDISON v. ROUND** (1836), 4 Ad. & El. 799 C. & P. 285; 6 Nev. & M. K. B. 422; 3 Ne M. M. C. 629; 5 L. J. K. B. 152; 111 E. R. 9

**Annotations:—***As to (2) Reid. R. v. Reynolds* (1839), 3 752; *Moss v. Thornley* (1856), 37 L. T. O. S. 101.

**From former officer.]—***See* CROWN PRACTICE, Vol. XVI., pp. 315, 316, Nos. 1276–1279

**Documents not transferred to parish council**  
*See, generally, ECCLESIASTICAL LAW, Vol. X pp. 256, 257.*

#### I. Legal Proceedings.

**182. Right to sue — On behalf of inhabitants Claiming right to use spring.]—**The S. parish council alleged that a spring or well abutted on a high road in the parish of S., & that the inhabitants of S. were entitled under either a lost grant, or prescription from time immemorial or by enjoyment for twenty years, to the free use of the spring or well, & that such user had been obstructed by the Deft. took the preliminary objection that the parish council was not entitled to sue, for the right was public, in which case the action could not be brought by the A.-G., or if the action was brought by the parish council as owner of the spring or well the action was misconceived. **Held:** the effect of 1894 Act, s. 25, was to vest the spring or well in the district council:—**Held:** the objection was good & 1894 Act vested no right in a parish council to sue on behalf of a number of persons & on plaintiffs' own showing, the soil was vested in the district council.—**STOKE PARISH COUNCIL v. PRICE**, [1899] 2 Ch. 277; 68 L. J. Ch. 447; 74 L. T. 643; 63 J. P. 502; 47 W. R. 663.

**Annotations:—***Reid. Sheringham U. D. C. v. Holsey* (1911), 91 L. T. 225; *A.-G. & Spalding R. C. v. Garner*, [1907] 2 K. B. 480.

**183. Parties—Whether ratepayers necessary**  
**FLETCHER v. GIBBON**, No. 150, *ante.*

**Appearance by clerk.]—***See* 1894 Act, schedule Part II., r. 16.

**Liability to indictment—For non-repair of ways.]—***See* HIGHWAYS, Vol. XXVI., p. 376, Nos. 1012–1014, 1016.

#### SUB-SECT. 3.—THE PARISH MEETING.

**Constitution.]—***See* 1894 Act, ss. 2 (1), 49.

**Meetings.]—***See* 1894 Act, ss. 2 (2)–(7), 4, (2), 45, 48 (1), 49, 51, sched. I., Parts I., III.

**Refusal of poll—Meeting held under C Burial Act, 1819 (c. 134).]**—*See* BURIAL ACT, Vol. VII., p. 540, No. 201.

**Powers & duties.]—***See* 1894 Act, ss. 52, 53

**In relation to adoptive Acts.]—***See* 1894 Act, s. 7, & *generally, PUBLIC HEALTH.*

**In parish having no parish council.]**  
*See* 1894 Act, ss. 19, 53 (2).

**Expenses.]—***See* 1894 Act, ss. 11 (4), (5), 1



## Part IV.—The Vestry.

See, generally, ECCLESIASTICAL LAW, Vol. XIX.,

**Select vestries.]—See ECCLESIASTICAL LAW, Vol. XIX., pp. 275 et seq.**

**Vestry of rural parish—Transfer of powers to parish council.]—See 1894 Act, s. 6 (1) (a).**

**Vestry clerk—Appointment.]—See 1894 Act, s. 17 (4).**

**Recovery of vestry books.]—Mandamus to the churchwardens, to deliver a vestry-book to the vestry clerk, refused.—ANON. (1816), 2 Chit. 255.**

**185. — Payment of gratuity.]—The clerk to the trustees of a parish [& vestry clerk] acting under a local Act of Parliament having discharged certain onerous duties in connection with legal proceedings in which the parish was engaged, the trustees passed a resolution giving him a sum beyond his usual stipend as a gratuity. [The statute provided for payment of "such reasonable salary as the vestry shall appoint to be paid to [the] clerk"]:—*Held*: there was no power to give gratuities out of the rates, & the ct. refused to grant a *mandamus* directing the treasurer of the parish to sign & pay a cheque for such gratuity.—*Ex p. MELISH* (1863), 8 L. T. 47.**

—*See, generally, ECCLESIASTICAL LAW, Vol. XIX., p. 277.*

**186. Legal proceedings—Resolution to defend.]—At a special vestry it was resolved "that an indictment preferred against the parish for non-repair of a highway, be opposed, & that the**

surveyor be desired to take the necessary steps for carrying this resolution into effect":—*Held*: the inhabitants who had signed the resolution were not personally responsible for the costs of the attorney employed by the surveyor for this purpose.—*SPROTT v. POWELL* (1826), 3 Bing. 478; 4 Dow. & Ry. M. C. 377; 11 Moore, C. P. 398; 4 L. J. O. S. C. P. 161; 130 E. R. 598.

*Annotation*:—*Reid. Klenck v. Farris* (1904), 68 J. P. 321.

**187. — Power to take — For disturbance of right of way.]—The dedication by the owner of the soil of a right of way from continuous user can only be presumed in favour of the public, not of the inhabitants of a particular parish. The vestry of a parish cannot sustain a suit to restrain the infringement of a public right of way, except as relators, on an information by the A.-G., even though they are expressly authorised by Act of Parliament to indict any person stopping a right of way within the parish, " & to take such other proceedings for the opening thereof as to them should seem expedient."—*BERMONDSEY VESTRY v. BROWN* (1865), L. R. 1 Eq. 204; 35 Beav. 226; 13 L. T. 574; 30 J. P. 118; 11 Jur. N. S. 1031; 14 W. R. 213; 55 E. R. 882.**

*Annotations*:—*Apld. Wallasey L. B. v. Gracey* (1887), 36 Ch. D. 593. *Reid. Nuneaton L. B. v. General Sewage Co.* (1875), L. R. 20 Eq. 127; *Sheringham U. D. C. v. Holsey* (1904), 91 L. T. 225. *Mentd. A.-G. v. Biphosphated Guano Co.* (1879), 11 Ch. D. 327; *Vernon v. St. James, Westminster Vestry* (1880), 16 Ch. D. 449.

*See, generally, EASEMENTS, Vol. XIX., pp. 120 et seq.*

## Part V.—The Urban District.

## SECT. 1.—IN GENERAL.

**Former urban sanitary districts.]—See 1894 Act, s. 21 (1).**

**188. Includes county borough.]—KIRKDALE BURIAL BOARD v. LIVERPOOL CORPN., No. 337, post.**

**189. — For purpose of transfer of powers—Under 1894 Act, s. 62.]—KIRKDALE BURIAL BOARD v. LIVERPOOL CORPN., No. 337, post.**

**"County district."—See 1894 Act, s. 21 (3).**

**190. "Local government district"—Within Metropolitan Commons Act, 1866 (c. 122).]—R. v. BARNES, *Ex p. RATCLIFF* (1896), 13 T. L. R. 25, D.**

**Councillors.]—See Sub-sect. 2, post.**

## SECT. 2.—THE URBAN DISTRICT COUNCIL.

## SUB-SECT. 1.—CONSTITUTION.

**Chairman—Disqualification for office.]—See 1894 Act, s. 46.**

**— Election.]—See ELECTIONS, Vol. XX., pp. 139, 140, Nos. 1143, 1144.**

**Vice-chairman—Appointment.]—See 1894 Act, s. 59 (2).**

## SUB-SECT. 2.—COUNCILLORS.

**— 1894 Act, s. 23 (2).**

**Disqualification.]—See Part II., Sect. 3, sub-sect. 2, A., ante.**

## Penalties for acting when disqualified.]

*See Part II., Sect. 3, sub-sect. 2, B., ante.*

**Election.]—See ELECTIONS, Vol. XX., pp. 139, 140.**

**Term of office.]—See 1894 Act, s. 23 (6); District Councillors & Guardians (Term of Office) Act, 1900 (c. 16), s. 1 (1), (2).**

**Resignation of office.]—See Urban District Councillors Election Order, 1898, r. 26 (1) & sched. V.**

## SUB-SECT. 3.—MEETINGS.

*See, generally, Part II., Sect. 7, ante.*

**Holding of meetings.]—See P. H. Act, 1875, s. 199, sched. I.; 1894 Act, s. 59 (1).**

## SUB-SECT. 4.—COMMITTEES.

**Appointment.]—See 1894 Act, s. 56.**

**Joint committees.]—See 1894 Act, s. 57**

**Conduct of meetings.]—See 1894 Act, sched. I., Part 4.**

*See, further, Part II., Sect. 8, ante.*

## SUB-SECT. 5.—POWERS, DUTIES AND LIABILITIES.

**191. Duties — Delegate of State for certain public duties—Distinguished from company.]—A local board stands in a very different position**

**Sect. 5.—The rural parish: Sub-sect. 2, G., H. & I.; sub-sect. 3. Parts IV. & V. Sects. 1 & 2: Sub-sects. 1, 2, 3, 4 & 5.]**

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*See, also, No. 180, post.*

**Herbage on private road made on inclosure of common—Surveyor authorised to let herbage—Whether property vested in parish or district council.]—***See* COMMONS, Vol. XI., p. 82, No. 1018.

**Spring on roadside.]—***See* No. 182, *post*.

**180. Acquisition of title—Under Statute of Limitations—Presumption of lawful origin.]—**By an award made under an inclosure Act passed in the year 1774 certain lands were allotted & certain roads set out as public highways. From a short time after the passing of the Act the pasturage of one of the roads set out was let annually by the inhabitants of the parish in vestry assembled. The money received from the tenants was devoted to different parochial purposes, & there had been no interference or claim by the lords of the manor until the present action, in which pltf., as lord of the manor claimed damages from deft., who was tenant to the vestry, for trespass in pasturing his sheep in the road. There was no evidence in whom the soil of the road was vested before the passing of the inclosure Act. No grant of the road was produced, & there was no evidence of the enrolment of any such grant:—*Held*: a lawful origin must be presumed from the long usage, & the presumption was that the road was vested in some person or persons as trustees for the parishioners; the churchwardens & overseers, as trustees under Poor Relief Act, 1818 (c. 12), s. 17, of lands belonging to the parish, had gained a title to the road under the Statute of Limitations, subject to the public right of way.—

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**From former officer.]—***See* CROWN PRACTICE, Vol. XVI., pp. 315, 316, Nos. 1276–1279.

**Documents not transferred to parish council.]—***See, generally, ECCLESIASTICAL LAW, Vol. XIX., pp. 256, 257.*

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**Appearance by clerk.]—***See* 1894 Act, sched. I., Part II., r. 16.

**Liability to indictment—For non-repair of highways.]—***See* HIGHWAYS, Vol. XXVI., p. 376, Nos. 1012–1014, 1016.

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**Meetings.]—***See* 1894 Act, ss. 2 (2)–(7), 4, 7, 19 (2), 45, 48 (1), 49, 51, sched. I., Parts I., III.

**Refusal of poll—Meeting held under Church Building Act, 1819 (c. 134).]—***See* BURIAL, Vol. VII., p. 540, No. 201.

**Powers & duties.]—***See* 1894 Act, ss. 52, 53 (1).

**In relation to adoptive Acts.]—***See* 1894 Act, s. 7, & *generally, PUBLIC HEALTH.*

**In parish having no parish council.]—***See* 1894 Act, ss. 19, 53 (2).

**Expenses.]—***See* 1894 Act, ss. 11 (4), (5), 10 (9).



## Part IV.—The Vestry.

*See, generally, ECCLESIASTICAL LAW, Vol. XIX., pp. 265 et seq.*

**Select vestries.]—See ECCLESIASTICAL LAW, Vol. XIX., pp. 275 et seq.**

**Vestry of rural parish—Transfer of powers to parish council.]—See 1894 Act, s. 6 (1) (a).**

**Vestry clerk—Appointment.]—See 1894 Act, s. 17 (4).**

**184. — Recovery of vestry books.] — Mandamus to the churchwardens, to deliver a vestry-book to the vestry clerk, refused.—ANON. (1816), 2 Chit. 255.**

**Payment of gratuity.] — The clerk to the trustees of a parish [& vestry clerk] acting under a local Act of Parliament having discharged certain onerous duties in connection with legal proceedings in which the parish was engaged, the trustees passed a resolution giving him a sum beyond his usual stipend as a gratuity. [The statute provided for payment of "such reasonable salary as the vestry shall appoint to be paid to [the] clerk"]:]—*Held*: there was no power to give gratuities out of the rates, & the ct. refused to grant a *mandamus* directing the treasurer of the parish to sign & pay a cheque for such gratuity.—*Ex p. MELLISH* (1863), 8 L. T. 47.**

*See, generally, ECCLESIASTICAL LAW, Vol. XIX., p. 277.*

**186. Legal proceedings—Resolution to defend.]**

At a special vestry it was resolved "that an indictment preferred against the parish for non-repair of a highway, be opposed, & that the

surveyor be desired to take the necessary steps for carrying this resolution into effect":—*Held*: the inhabitants who had signed the resolution were not personally responsible for the costs of the attorney employed by the surveyor for this purpose.—*SPROTT v. POWELL* (1826), 3 Bing. 478; 4 Dow. & Ry. M. C. 377; 11 Moore, C. P. 398; 4 L. J. O. S. C. P. 161; 130 E. R. 598.

*Annotation*:—*Reid. Klenck v. Farris* (1904), 68 J. P. 321.

**187. — Power to take — For disturbance of right of way.]—The dedication by the owner of the soil of a right of way from continuous user can only be presumed in favour of the public, not of the inhabitants of a particular parish. The vestry of a parish cannot sustain a suit to restrain the infringement of a public right of way, except as relators, on an information by the A.-G., even though they are expressly authorised by Act of Parliament to indict any person stopping a right of way within the parish, " & to take such other proceedings for the opening thereof as to them should seem expedient."—*BERMONDSEY VESTRY v. BROWN* (1865), L. R. 1 Eq. 204; 35 Beav. 226; 13 L. T. 574; 30 J. P. 118; 11 Jur. N. S. 1031; 14 W. R. 213; 55 E. R. 882.**

*Annotations*:—*Apld. Wallasey L. B. v. Gracey* (1887), 36 Ch. D. 593. *Reid. Nuneaton L. B. v. General Sewage Co.* (1875), L. R. 20 Eq. 127; *Sheringham U. D. C. v. Holsey* (1904), 91 L. T. 225. *Mentd. A.-G. v. Biphosphated Guano Co.* (1879), 11 Ch. D. 327; *Vernon v. St. James, Westminster Vestry* (1880), 16 Ch. D. 449.

*See, generally, EASEMENTS, Vol. XIX., pp. 120 et seq.*

## Part V.—The Urban District.

### SECT. 1.—IN GENERAL.

**Former urban sanitary districts.]—See 1894 Act, s. 21 (1).**

**188. Includes county borough.] — KIRKDALE BURIAL BOARD v. LIVERPOOL CORPN., No. 337, post.**

**189. — For purpose of transfer of powers—Under 1894 Act, s. 62.]—KIRKDALE BURIAL BOARD v. LIVERPOOL CORPN., No. 337, post.**

**"County district." ]—See 1894 Act, s. 21 (3).**

**190. "Local government district" — Within Metropolitan Commons Act, 1866 (c. 122).]—R. v. BARNES, *Ex p. RATCLIFF* (1896), 13 T. L. R. 25, D. C.**

**Councillors.]—See Sub-sect. 2, post.**

**Penalties for acting when disqualified.]**

*See Part II., Sect. 3, sub-sect. 2, B., ante.*

**Election.]—See ELECTIONS, Vol. XX., pp. 139, 140.**

**Term of office.]—See 1894 Act, s. 23 (6); District Councillors & Guardians (Term of Office) Act, 1900 (c. 16), s. 1 (1), (2).**

**Resignation of office.]—See Urban District Councillors Election Order, 1898, r. 26 (1) & sched. V.**

### SUB-SECT. 3.—MEETINGS.

*See, generally, Part II., Sect. 7, ante.*

**Holding of meetings.]—See P. H. Act, 1875, s. 199, sched. I.; 1894 Act, s. 59 (1).**

### SUB-SECT. 4.—COMMITTEES.

**Appointment.]—See 1894 Act, s. 56.**

**Joint committees.]—See 1894 Act, s. 57**

**Conduct of meetings.]—See 1894 Act, sched. I., Part 4.**

*See, further, Part II., Sect. 8, ante.*

### SUB-SECT. 5.—POWERS, DUTIES AND LIABILITIES.

**191. Duties — Delegate of State for certain public duties—Distinguished from company.]—A local board stands in a very different position**

### 2.—THE URBAN DISTRICT COUNCIL.

#### SUB-SECT. 1.—CONSTITUTION.

**Chairman — Disqualification for office.] — See 1894 Act, s. 46.**

*See ELECTIONS, Vol. XX., pp. 139, 140, Nos. 1143, 1144.*

**Vice-chairman—Appointment.]—See 1894 Act, s. 59 (2).**

#### SUB-SECT. 2.—COUNCILLORS.

**Qualification.]—See 1894 Act, s. 23 (2).**

**Disqualification.]—See Part II., Sect. 3, sub-sect. 2, A., ante.**



**Sect. 2.—The urban district council: Sub-sects. 5 & 6, A. (a) & (b) i., ii., iii. & iv.]**

from a joint stock co. It is a delegate of the State for the purpose of performing certain public duties (JAMES, L.J.).—A.-G. v. GREAT EASTERN Ry. Co. (1879), as reported in 11 Ch. D. 449; 40 L. T. 265; 27 W. R. 759, C. A.; *on appeal* (1880), 5 App. Cas. 473, H. L.

**Annotations:—***Reid*. L. C. C. v. A.-G., [1902] A. C. 165. **Mentd.** A.-G. v. Shrewsbury (Kingsland) Bridge Co. (1882), 21 Ch. D. 752; Guinness v. Land Corp. of Ireland (1882), 22 Ch. D. 349; L. & N. W. Ry. v. Price (1883), 11 Q. B. D. 485; Small v. Smith (1884), 10 App. Cas. 119; Wenlock v. River Dee Co. (1885), 10 App. Cas. 354; Harris v. De Pinna (1886), 33 Ch. D. 238; Henderson v. Bank of Australasia (1888), 40 Ch. D. 170; Johns v. Balfour (1889), 1 Meg. 191; Sheffield & South Yorkshire Permanent Bldg. Soc. v. Aizlewood (1889), 44 Ch. D. 412; Foster v. L. C. & D. Ry., [1895] 1 Q. B. 711; A.-G. v. L. & N. W. Ry., [1900] 1 Q. B. 78; A.-G. v. Mersey Ry. (1907), 51 Sol. Jo. 624; *Re* Kingsbury Collieries, Moore's Contract, [1907] 2 Ch. 259; Peel v. L. & N. W. Ry., [1907] 1 Ch. 5; Metropolitan Water Board v. Solomon (1908), 77 L. J. Ch. 517; A.-G. v. West Gloucestershire Water Co., [1909] 2 Ch. 338; Amalgamated Soc. of Ry. Servants v. Osborne, [1910] A. C. 87; Vacher v. London Soc. of Compositors, [1912] 3 K. B. 547; *Re* Woking Urban Council (Basingstoke Canal) Act, 1911, [1914] 1 Ch. 300; Dundee Harbour Trustees v. Nicol, [1915] A. C. 550; County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251; R. v. Bedfordshire County Council, *Ex p.* Sear, [1920] 2 K. B. 465; A.-G. v. Fulham Corp., [1921] 1 Ch. 440; A.-G. v. Westminster City Council, [1924] 2 Ch. 416; Deuchar v. Gas Light & Coke Co., [1925] A. C. 691.

**Powers & duties—As sanitary authority.]—See** 1894 Act, s. 21 (1); PUBLIC HEALTH; SEWERS; WATER SUPPLY.

**—As highway authority.]—See** HIGHWAYS, Vol. XXVI., pp. 279 *et seq.*, 386 *et seq.*, 529, 530.

**Appointment of overseers.]—See** POOR LAW.

**In relation to particular matters.]—See** the cross references at the head of this Title.

**—Transfer of powers of other authorities.]—See** 1894 Act, ss. 33, 62.

**Delegation of powers by county council.]—See** 1888 Act, s. 28 (2); 1894 Act, s. 64.

**Exercise of powers outside district.]—See** P. II. Act, 1875, s. 285.

**SUB-SECT. 6.—CONTRACTS.**

**A. Under Public Health Acts.**

**(a) In General.**

**192. What are contracts under Public Health Acts—Agreement restraining interference with highway.]—An agreement between a local board & a person against whom an action to restrain his interference with a public highway had been commenced by the local board, that the action should be settled by his paying the costs of the board, which exceeded £50, & undertaking not to build on the unbuilt land, the board agreeing not to proceed further as to pulling down the obstruction, is not a contract within the P. H. Act, 1875, s. 173, necessary for carrying the Act into execution so as to require to be sealed with the common seal of the local board under sect. 174; & therefore such agreement though not under seal, is capable of being enforced by the board.—A.-G. v. GASKILL (1882), 22 Ch. D. 537; 52 L. J. Ch. 163; 47 L. T. 566; 31 W. R. 135.**

**Annotations:—***Expld.* Williams v. Barmouth U. D. C. (1897), 77 L. T. 383. *Reid.* British Insulated Wire Co. v. Prescott U. D. C. (1895), 64 L. J. Q. B. 811.

**193. —Agreement with contractor for compromise of claims.]—An agreement between an urban authority & a contractor employed to con-**

struct works for them, as a compromise & in full settlement of all claims by him against the urban authority, is not a contract within P. H. Act, 1875, s. 173, necessary for carrying that Act into execution, so as to require to be sealed with the common seal of the urban authority under sect. 174; & therefore, such agreement, though not under seal, is capable of being enforced against the urban authority.—WILLIAMS v. BARMOUTH URBAN DISTRICT COUNCIL (1897), 77 L. T. 383, C. A.

**Annotations:—***Reid.* Hunt v. Acton U. D. C. (1908), 72 J. P. 345; Leicester Grdns. v. Trollope (1911), 75 J. P. 197.

**194. —Contract relating to housing scheme.]—NIXON v. ERITH URBAN DISTRICT COUNCIL, No. 195, post.**

*See, generally, PUBLIC HEALTH.*

**(b) Statutory Requirements.**

**i. Necessity for Seal.**

**Necessity for seal.]—See** CORPORATIONS, Vol. XIII., pp. 384 *et seq.*

**Contract of employment at weekly salary—Whether “exceeding £50 in value.”]—See** Nos. 209, 210, post.

**—Whether contract not under seal enforceable.]—See** CORPORATIONS, Vol. XIII., pp. 394, 395.

**195. —Contract under Housing of the Working Classes Act, 1890 (c. 70).]—By** above Act, sect. 56, the carrying into execution of which Act is now made compulsory on all local authorities under Housing, Town Planning, etc., Act, 1919 (c. 35), s. 1, the local authority may, for the purpose of carrying it into execution, “exercise the same powers whether of contract or otherwise as in the execution of their duties . . . in the case of sanitary authorities under the Public Health Acts . . .”:—*Held*: the words of that sect. must be read distributively, & as meaning that if the local authority's district is an urban district it shall have the same power of contracting that an urban sanitary authority has under the Public Health Acts, & if its district is a rural district the power which a rural sanitary authority has under those Acts, with the result that in the former case the authority cannot, when acting under above Act, contract otherwise than under its common seal if the value or amount of the contract exceeds £50.—NIXON v. ERITH URBAN DISTRICT COUNCIL, [1924] 1 K. B. 819; 93 L. J. K. B. 756; 131 L. T. 303; 88 J. P. 115; 40 T. L. R. 373; 68 Sol. Jo. 537; 22 L. G. R. 448, C. A.

**196. —.]—Pltfs. claimed to have a written contract dated Mar. 17, 1921, under which they agreed to erect fifty-eight concrete workmen's dwellings for deft. borough, rectified so as to give effect to what was alleged to have been the common intention “of the parties” when the contract was drawn up. The contract was entered into between H. & deft. borough & was under their seal. H. subsequently assigned the contract to pltfs. H., in entering into the contract, was labouring under a serious mistake. The evidence showed that there was not a common mistake:—*Held*: pltfs. had not shown that deft. borough was under any mistake when they entered into the contract, but even if there were a common mistake the contract of Mar. 17, 1921, could not be rectified because, having regard to P. H. Act, 1875, s. 174, deft. borough were incapable of entering into a contract with H. other than a contract under seal, so that when a tender was made by H. & accepted, there was no contract come to.**



—HIGGINS (W.), LTD. v. NORTHAMPTON COUNTY BOROUGH (1926), 90 J. P. 82.

**Ratification under seal.]—**See CORPORATIONS, Vol. XIII., p. 390, Nos. 1164, 1165.

ii. *Matters to be Specified.*

See P. H. Act, 1875, s. 174 (2).

**197. Penalty—To what contracts applicable.]—**SOOTHILL UPPER URBAN DISTRICT COUNCIL v. WAKEFIELD RURAL DISTRICT COUNCIL, No. 199, *post*.

**198. — Whether provision directory or imperative.]—**It is imperative that a contract by an urban authority, whereof the value exceeds £50, shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed, & in the absence of such provision the contract cannot be enforced against the urban authority.—BRITISH INSULATED WIRE CO. v. PRESCOT URBAN DISTRICT COUNCIL, [1895] 2 Q. B. 463; 64 L. J. Q. B. 811; 73 L. T. 383; 59 J. P. 552; 44 W. R. 224; 11 T. L. R. 557; 39 Sol. Jo. 691; 15 R. 633, D. C.; *on appeal*, [1895] 2 Q. B. 538, C. A.

*Annotation:—*Reid. Soothill Upper U. D. C. v. Wakefield R. D. C., [1905] 1 Ch. 53.

**199. —.]—**P. H. Act, 1875, s. 174 (2), provides that every contract made by an urban authority whereof the value or amount exceeds £50 "shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed":—*Held*: this provision is directory only, not imperative, so that the omission to specify a penalty does not render such a contract invalid.—SOOTHILL UPPER URBAN DISTRICT COUNCIL v. WAKEFIELD RURAL DISTRICT COUNCIL, [1905] 2 Ch. 516; 74 L. J. Ch. 703; 93 L. T. 711; 69 J. P. 447; 21 T. L. R. 766; 3 L. G. R. 1208, C. A.

iii. *Surveyor's Estimate and Report.*

See P. H. Act, 1875, s. 174 (3).

**200. How far necessary—Whether directory or imperative.]—**11 & 12 Vict. c. 63, which creates local boards of health for particular districts, by sect. 85, empowers the local board to enter into such contracts as are necessary for carrying the Act into execution; & the contract when exceeding £10 is to be under the common seal of the board, & to specify the work, price, etc.; & every contract so entered into is binding upon the board, provided, "that, before contracting for the execution of any works under the provisions of this Act, the said local board shall obtain from the surveyor an estimate in writing, as well as of the probable expense of executing the work in a substantial manner, as of the annual expense of repairing the same; also, a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work or for executing & also maintaining the same in repair during a term of years, or otherwise." By sect. 37, the surveyor is to be appointed by the local board. By sect. 86, expenses incurred or to be incurred by the local board for works done under the Act, the board is to levy a rate in the district benefited or to be benefited thereby; & by sect. 87, a separate account is to be kept, to be called "the district fund account," to be applied to carrying the Act into execution. By sect. 140, persons acting in the execution of the Act are not to be personally liable:—*Held*: (1) the matters mentioned in the proviso to sect. 85 are directory only as respects contracts entered into by the board with third parties; (2) a contract under seal entered into

between the board & a third party for the execution of certain works was valid, although no estimate or report by the surveyor had been previously obtained; (3) an action lay upon the deed itself for non-payment of the sum agreed thereby to be paid, & *pltf.* was not driven to see to his remedy by *mandamus*, or bill in equity, or by any such collateral proceeding.

(4) There is nothing in that sect. [sect. 140] to prevent a *corp.* being liable on this contract, as they would in any ordinary case. All that sect shows is, that the expense incurred by the *corp.* is to be repaid by a rate. . . . So in this case a *corp.* contracting under their common seal may be reimbursed out of the rates (PARKE, B.).—NOWELL v. WORCESTER CORPN. (1854), 9 Exch. 457; 2 C. L. R. 981; 23 L. J. Ex. 139; 22 L. T. O. S. 244; 18 J. P. 88; 18 Jur. 64; 156 E. R. 195.

*Annotations:—*As to (1) & (2) *Consd.* Cunningham v. Wolverhampton L. B. of Health (1857), 7 E. & B. 107; Hunt v. Wimbledon L. B. (1878), 3 C. P. D. 208. *Reid.* Payne v. Brecon Corpn. (1858), 27 L. J. Ex. 495; R. v. Worksop Board of Health (1864), 10 L. T. 297; Andrews v. Ryde Corpn. (1874), L. R. 9 Exch. 502; Dryden v. Putney Overseers (1876), 1 Ex. D. 223; Young v. Leamington Corpn. (1882), 8 Q. B. D. 579. As to (3) *Reid.* Smart v. West Ham Union Grdns. (1856), 25 L. J. Ex. 210.

**201. — Execution of works & maintenance distinguished.]—**A local board of health required the owners of property adjoining a street, not being a highway, to level it; & they having made default, the local board caused the work to be done by contract. Before making the contract, no estimate was made of the annual expense of repairing the work when done; nor was any report obtained as to whether it would be more advantageous to contract only for the execution of the work, or for the execution & maintenance thereof. In other respects the directions of 11 & 12 Vict. c. 63, s. 85, were followed. On a special case:—*Held*: as the work when complete would not be repaired & maintained under the Act, or out of the rates, no such estimate or report was required; & the local board might enforce payment of the expenses from the owners, notwithstanding the absence of the estimate & report.

The sect. begins by enabling the board to enter into all such contracts as may be necessary for carrying the Act into execution. If no repairs are authorised, no contract comprising repairs would be within the Act, as necessary for carrying it into execution; & the proviso for the estimate & report is confined to works under the provisions of the Act. If a work may be both executed & repaired under the provisions of the Act, there must be an estimate & report on the execution & the repair; but, if the work may be only executed or only repaired according to the provisions of the Act, the estimate & report need not extend to a work not within the provisions of the Act, & not necessary for carrying it into execution (LORD CAMPBELL, C.J.).—CUNNINGHAM v. WOLVERHAMPTON LOCAL BOARD OF HEALTH (1857), 7 E. & B. 107; 26 L. J. M. C. 33; 21 J. P. 262; 3 Jur. N. S. 385; 119 E. R. 1187.

**202. Effect of omission — On right to contract.]—**NOWELL v. WORCESTER CORPN., No. 200, *ante*.

**203. — On right to levy rates for purpose of contract.]—**NOWELL v. WORCESTER CORPN., No. 200, *ante*.

iv. *Necessity for Tender and Security.*

See P. H. Act, 1875, s. 174 (4).

**204. Security — Effect of failure to furnish— Giving security on condition of acceptance of tender.]—**In Mar. 1901, *deft.* council advertised for tenders for the carrying out of certain sewerage



**Sect. 2.—The urban district council: Sub-sect. 6, A. (b) iv., & B.; sub-sect. 7. Sect. 3: Sub-sects. 1 & 2. Sect. 4: Sub-sects. 1 & 2, A.]**

works. One of the conditions was that the person tendering should undertake to execute a contract for the due performance of the works & enter into a bond with two responsible sureties for the due & satisfactory completion of the works. Pltf. tendered for the work, & on May 10, 1901, the council resolved that pltf.'s tender should be accepted, & they instructed their clerk to write to pltf. to that effect, & to affix the seal of the council to the letter. Such letter was duly sent:—**Held:** the acceptance of the tender did not conclude a contract between the parties.

In this case I think that the necessities of the contract imposed on both parties the obligation to agree as to the sureties & that the sureties themselves were to be parties to the contract in the sense that they were by the intended formal contract to be made parties to that contract for the performance of it. It seems to me that that was never done & that there never was any contract (LORD HALSBURY, C.).—**BOZSON v. ALTRINCHAM URBAN DISTRICT COUNCIL** (1903), as reported in 67 J. P. 397, C. A.

**Annotations:—Mentd.** *Re Holland S.S. Co., National S.S. Co. & Bristol Steam Navigation Co.* (1906), 23 T. L. R. 59; *Isaacs v. Salbstein*, [1916] 2 K. B. 139; *Cogstad v. Newsum*, [1921] 2 A. C. 528.

**205. ——— Contract part performed—Goods supplied not of value of one hundred pounds.]**—Pltfs. tendered for the supply to defts. of coals which it was thought would exceed in value £100. The tender contained stipulations that if it was accepted a formal contract should be executed, & that a bond with two sureties should be entered into. The tender was accepted, subject to the formal contract & bond being duly executed. The contract & bond were forwarded to pltfs., but were never executed. Pltfs. afterwards, from time to time, supplied to defts. quantities of coal which were accepted, the value of the coal supplied not amounting, in any one instance, to £50, but amounting in the aggregate to over £50:—**Held:** defts. were bound to pay, under an implied contract, for the coal so supplied & accepted.—**SPENCER, WHATLEY & UNDERHILL v. SOUTHAL-NORWOOD URBAN DISTRICT COUNCIL** (1905), 69 J. P. 308; 3 L. G. R. 641.

**206. ——— Liability of sureties — Contract not executed in accordance with statutory requirements.]**—By an indenture made between a local board, pltfs., of the first part, certain contractors of the second part, & deft. of the third part, the contractors covenanted to do certain work upon the basis of a certain specification; & deft. covenanted to pay any losses that might be sustained from the non-performance of the work. The indenture recited that the specification had been signed by five members of the local board as was required by the local Act. In point of fact the specification had never been signed, although it had been acted upon. In an action against the sureties:—**Held:** the mere fact of the specification not having been signed did not release the sureties from their liability.—**RUSSELL v. TRICKETT** (1865), 13 L. T. 280; 30 J. P. 8.

#### *B. Other Contracts.*

**Contracts of corporations generally.]—See CORPORATIONS, Vol. XIII., pp. 378 et seq.**

#### **PART V. SECT. 2, SUB-SECT. 6.—B.**

**b. Must be necessary for exercise of corporate functions.]—The district council has no power to authorise their**

clerk or agent to make any contract for the purchase of books for their several common schools throughout the district, such a contract not being

**207. Whether preliminary report & estimate necessary—Maintenance of work executed under Public Health Acts.]—CUNNINGHAM v. WOLVERHAMPTON LOCAL BOARD OF HEALTH, No. 201, ante.**

**208. Compromise of claims on alteration of area—One claim unfounded in law—Whether compromise invalidated.]—It is no ground for setting aside a compromise that the claim, or one of the claims, made by one of the parties, was not well founded in law, provided that it was put forward *bonâ fide*.**

On the formation in 1900 of an urban district out of a rural district an adjustment had to be made between the two councils under 1894 Act, of the property, income, debts, liabilities, & expenses affected by the formation of the urban district. A number of claims were put forward by the two councils against each other, including one by the rural council in respect of loss of income owing to the transfer of ratable area from the district of the rural council to that of the urban council. After considerable negotiations the two councils entered into an agreement of compromise by which the urban council covenanted to pay to the rural council a sum of £1,500 by thirty annual instalments of £50 each, in consideration of which the rural council released the urban council from certain specified claims, including the claim for compensation for loss of income owing to the transfer of ratable area, & all other claims, if any, which the rural council had or might have against the urban council in respect of any property, income, debts, liabilities, or expenses, & the urban council also released the rural council from all claims in a similar way. In 1906 the urban council brought an action for a declaration that the agreement was *ultra vires* the urban council & not binding on it:—**Held:** the agreement, having been entered into *bonâ fide* by both councils, was not rendered invalid by the fact that one of the claims included in the compromise subsequently proved to be unfounded in law.—**HOLSWORTHY URBAN COUNCIL v. HOLSWORTHY RURAL COUNCIL**, [1907] 2 Ch. 62; 76 L. J. Ch. 389; 97 L. T. 634; 71 J. P. 330; 23 T. L. R. 452; 51 Sol. Jo. 445; 5 L. G. R. 791.

**Annotation:—Appld.** *A.-G. v. Essex County Council* (1907), 71 J. P. 557.

#### **SUB-SECT. 7.—ACQUISITION OF LAND AND PAYMENT OF COMPENSATION.**

*See, generally, Part II., Sect. 5, ante.*

**Building set back to comply with building line.]—See, generally, HIGHWAYS, Vol. XXVI., pp. 559 et seq.**

#### **SECT. 3.—OFFICERS.**

##### **SUB-SECT. 1.—IN GENERAL.**

*See P. H. Act, 1875, s. 189, & generally, Part II., Sect. 6, ante.*

**Knowledge that food unfit for human consumption—Duty to communicate.]—See FOOD & DRUGS, Vol. XXV., p. 115, No. 384.**

**Actions against—Time limit for bringing.]—See PUBLIC AUTHORITIES.**

**Appointment—Necessity for seal.]—See, generally, Sect. 2, sub-sect. 6, A. (b) i., ante.**

necessary for the exercise of their corporate functions.—**RAMSAY v. WESTERN DISTRICT COUNCIL** (1847), 4 U. C. R. 374.—**CAN.**



**209. — Contract exceeding fifty pounds in value—Remuneration by daily salary.]—**P. H. Act, 1875, s. 174, which directs a contract, made by an urban authority to be under their common seal, if "the value or amount exceeds £50," applies only to a contract, to which the parties at the time of entering into it contemplate that it shall exceed that sum. Scarlet fever having broken out, an urban sanitary authority appointed a committee under P. H. Act, 1875, s. 200. A medical man agreed verbally with the committee on behalf of the urban sanitary authority, to attend the patients at the rate of 5s. 3d. per tent per day, & attended until the amount due was nearly £100:—*Held*: (1) the committee men were not liable to pay the medical man; but (2) although more than £50 became due, it was not a contract "whereof the value or amount exceeds £50" within P. H. Act, 1875, s. 174, because at the time of entering into it, the parties had not ascertained that it would exceed £50, & the urban sanitary authority were liable to the medical man.—*EATON v. BASKER* (1881), 7 Q. B. D. 529; 50 L. J. Q. B. 444; 44 L. T. 703; 45 J. P. 616; 29 W. R. 597, C. A.

*Annotations*:—As to (2) *Distd. Mellis v. Shirley & Freemantle L. B. of Health* (1885), 54 L. J. Q. B. 408. *Refd. Spencer, Whatley & Underhill v. Southall-Norwood U. D. C.* (1905), 60 J. P. 308.

**210. — Remuneration by weekly salary—Salary of one pound a week raised to sixty pounds per annum.]—**Pltf. was employed by defts. as matron of an isolation hospital, at a salary of £60 *per annum*. There was no contract between the parties as to dismissal or notice to terminate the employment:—*Held*: pltf. was removable by defts. at their pleasure, under P. H. Act, 1875, s. 189, & therefore defts. were entitled to dismiss her without assigning any reason & at any time without notice

This particular contract was not in writing & sealed, but then the question is, whether in value or amount it exceeded £50, inasmuch as the contract was only for £1 a week, & was not for any defined period? It seems to me very doubtful whether it could be described as a contract the value & amount of which exceeded £50 (*COLLINS, M.R.*).—*WOOD v. EAST HAM URBAN DISTRICT COUNCIL* (1907), 71 J. P. 129; 5 L. G. R. 403, C. A.

**211. — Engagement for no defined period.]—***WOOD v. EAST HAM URBAN DISTRICT COUNCIL*, No. 210, *ante*.

**— Officers necessary for the execution of the Act.]—**See No. 213, *post*.

**Compensation for loss of office.]—**See PUBLIC AUTHORITIES.

**Remuneration.]—**See P. H. Act, 1875, s. 189.

**— Recovery.]—**See, generally, Part II., Sect. 6, *ante*.

**Removal.]—**See P. H. Act, 1875, s. 189.

**212. — Officers removable at pleasure—Whether reason or notice necessary.]—***WOOD v. EAST HAM URBAN DISTRICT COUNCIL*, No. 210, *ante*.

#### SUB-SECT. 2.—PARTICULAR OFFICERS.

**Medical officer of health—Appointment.]—**P. H. Act, 1875, s. 189; Sanitary Officers Order, 1888.

**— Qualification.]—**See P. H. Act, 1875, s. 191; 1888 Act, s. 18; Sanitary Officers Order, 1922.

**— Duties.]—**See 1888 Act, s. 19; Sanitary Officers Order, 1922.

**Under Housing Acts.]—**See PUBLIC

HEALTH.

**— Remuneration.]—**See 1888 Act, s. 24 (2) (c), (3); Sanitary Officers Order, 1922.

**Surveyor—Appointment.]—**See P. H. Act, 1875, ss. 189, 192.

**213. — Temporary surveyor—Whether "surveyor" within P. H. Act, 1875, sect. 16.]—**By above Act, s. 189, every urban local authority is required from time to time to appoint a fit & proper person to be surveyor, & also to appoint such assistants, collectors, & other officers & servants as may be necessary & proper for the efficient execution of the Act:—*Held*: a person appointed surveyor by an urban local authority until the appointment of a permanent surveyor, & subject to the determination of the appointment on a week's notice, was not "the surveyor" within above Act, but was merely an officer or servant necessary for the efficient execution of the Act.—*LEWIS v. WESTON-SUPER-MARE LOCAL BOARD* (1888), 40 Ch. D. 55; 58 L. J. Ch. 39; 59 L. T. 769; 37 W. R. 121; 5 T. L. R. 1.

*Annotations*:—*Mentd. Jones v. Conway & Colwyn Bay Joint Water Supply Board*, [1893] 2 Ch. 603; *Stroud v. Wandsworth District Board of Works*, [1894] 1 Q. B. 64; *Robinson v. Sunderland Corp.*, [1899] 1 Q. B. 751; *Kendal v. Lewisham B. C.* (1903), 67 J. P. 236; *Roberts v. Hopwood*, [1925] A. C. 578.

**Inspector of nuisances.]—**See P. H. Act, 1875, ss. 189, 191, 192; Sanitary Officers Order, 1922.

**Clerk—Appointment.]—**See P. H. Act, 1875, ss. 189, 192.

**Treasurer—Appointment.]—**See P. H. Act, 1875, ss. 189, 192.

**Auditors—Appointment.]—**See District Auditors Act, 1879 (c. 6), s. 4.

#### SECT. 4.—FINANCE.

##### SUB-SECT. 1.—IN GENERAL.

**Power to borrow.]—**See P. H. Act, 1875, ss. 233, 234, & generally, Part II., Sect. 9, sub-sect. 1, *ante*.

**214. — By overdraft.]—***SMITH v. SOUTHAMPTON CORPN.*, No. 580, *post*.

**The district rate.]—**See RATES & RATING.

**Costs of promoting or opposing bills in Parliament.]—**See Borough Funds Acts, 1872 (c. 91), & 1903 (c. 14).

##### SUB-SECT. 2.—ACCOUNTS AND AUDIT.

###### A. Accounts.

See P. H. Act, 1875, s. 247 (4), & generally, Part II., Sect. 9, sub-sect. 2, *ante*.

**Right of inspection—Where urban council not a borough council.]—**See P. H. Act, 1875, s. 247 (4).

**Where urban council a borough council.]—**See Part VII., Sect. 5, sub-sects. 4, A., *post*.

**215. — By person interested—Not affected by bankruptcy.]—**Applt. was a member of the urban district council of Fleetwood, & chairman of the finance committee of that authority till Apr. 1901, when he became disqualified as a member of the urban authority through being adjudicated bkpt. He was not a ratepayer or property owner within the area of the urban authority. On May 3, 1902, a copy of the accounts of the urban district council, together with all the documents mentioned or referred to in such accounts, was deposited in the office of the council for the inspection of all "persons interested" before the



**Sect. 4.—Finance: Sub-sect. 2, A. & B. (a) & (b).]**

audit in compliance with P. H. Act, 1875, s. 274 :—*Held*: notwithstanding his bkpcy., applt. was a "person interested" within the sect. & entitled to inspect the accounts.—*MARGINSON v. TILDSLEY* (1903), 67 J. P. 226 ; 1 L. G. R. 333, D. C.

*Annotation*:—*Refd. R. v. Fleetwood U. D. C.* (1904), 2 L. G. R. 1209.

**216. — After previous inspection & audit—Delay in application—Discretion of court.]—**One M. was a member of the urban district council till Nov. 1901, when he became disqualified through bkpcy. The accounts for the said council were made up to Mar. 1902. The clerk to the council having refused him inspection, M. laid an information against him, & it was decided on appeal that applt. was a person interested & was entitled to inspect the accounts. In the meantime the audit began in May, 1902. M. attended such audit & saw the books. The audit was closed in Dec. 1902. In July, 1903, M. applied for inspection of the books. He was refused, & in Nov. 1903, he moved for a *mandamus* to compel the clerk to allow him inspection:—*Held*: no substantial reason having been put forward for seeing the books, the ct., would, in their discretion, refuse the *mandamus*.—*R. v. FLEETWOOD URBAN DISTRICT COUNCIL* (1904), 68 J. P. 314 ; 2 L. G. R. 1209, D. C.

**B. Audit.****(a) In General.**

*See, generally, Part II., Sect. 9, sub-sect. 2, ante.*

**Where urban council council of borough.]—***See Part VII., Sect. 5, sub-sect. 4, B., C., post.*

**Where urban council not council of borough.]—***See, generally, P. H. Act, 1875, s. 247 ; 1894 Act, s. 58 (2), (3).*

**217. Jurisdiction of auditor—As to evidence.]—**

(1) The High Ct. upon an application under P. H. Act, 1875, s. 247 (8), for a *certiorari* to bring up & quash a disallowance made by a district auditor in the accounts of a local authority to whom that sect. applies, have power to review the auditor's decision not only when it is erroneous in point of law or where it is unsupported by evidence, but also where the ct. is satisfied that the auditor's decision is erroneous in point of fact.

(2) An auditor is not justified in surcharging members of a committee of a local authority who have honestly recommended the acceptance of a tender for the supply of goods which was not in fact the lowest tender.

(3) Now it is plain that under the first limb of P. H. Act, 1875, sect. 247 (7), the auditor is bound to disallow every item of account contrary to law, & that he may "surcharge the person who authorises the making of the illegal payment," although he has not himself made it. Strictly speaking, such a person would not be a person bringing in an account subject to audit & therefore liable to be surcharged in such account. But I think "surcharge" is used in a less technical sense & is equivalent to "charge"; & this enables me to reach the conclusion that the words "any person accounting" in the second limb of the sub-sect. are wide enough to include any member of the local authority whose accounts are before the auditor. Sect. 250, which relates to accounts of

officers or assistants of any local authority who are required to receive moneys or goods on behalf of the authority, supports this view. Now the power & the duty of the auditor must be recognised as of the utmost importance for the protection of the ratepayers, & I am not prepared to place a narrow construction upon this sub-sect. The statute has enabled an auditor, who, in my opinion, has no power to administer an oath or to subpoena witnesses, & who is not a judicial officer in the ordinary sense, to decide that a member of a local authority has been guilty of negligence or misconduct & to assess the amount of loss incurred thereby. The member whose conduct is thus attacked has, so far as I can ascertain, no power to require the attendance of persons whose statements, though not given under oath, might relieve him from the imputation. Happily, this extraordinary jurisdiction conferred upon the auditor is subject to review in the K. B. Div., where the merits will be dealt with upon legal evidence (*COZENS-HARDY, M.R.*).

(4) I will now pass on to consider the important question of the statutory duties & powers of the auditor. These are defined by P. H. Act, 1875, s. 247 (7). The first part of the sub-sect. deals only with illegal payments, i.e., such as are *ultra vires*. They are to be surcharged on the person making or authorising the making of the payment. It is clear that persons answering to either of these descriptions must necessarily be persons who are before the auditor in his capacity as such, & must be persons who either have had money of the corpn. for which they must properly account, or have had control of funds of the corpn. which they have had authority to pay away, & for the proper expenditure of which they have therefore to account. There is, therefore, no difficulty in construing the language of this part of the sect. The auditor must surcharge the illegal payment on the person offending either by disallowing it from the credits claimed by him or by increasing the debts admitted by him (*MOULTON, L.J.*).

(5) The auditor does not claim, nor could he, in my opinion, properly claim, to exercise any control over questions of policy; but he does claim the right to check & challenge all items of administration. It is not easy to draw the line between policy & administration, or to give a definition except by way of example, but in my opinion the establishment of a works committee would be a question of policy into which the auditor could not go, but the payment of abnormally high wages to the workmen employed by such committee would be a matter of administration (*FARWELL, L.J.*).—*R. v. ROBERTS*, [1908] 1 K. B. 407 ; 77 L. J. K. B. 281 ; 98 L. T. 154 ; 72 J. P. 81 ; 24 T. L. R. 226 ; 52 Sol. Jo. 171 ; 6 L. G. R. 268, C. A.

*Annotations*:—*As to (5) Consd. Roberts v. Hopwood*, [1925] A. C. 578. *Generally, Mentd. Hyams v. Stuart King*, [1908] 2 K. B. 696.

**218. — As to individual members or officers of authority—Whether a "person accounting."]**—*R. v. ROBERTS*, No. 217, *ante*.

**219. — As to questions of policy.]—***R. v. ROBERTS*, No. 217, *ante*.

**220. — Assessment of surcharge — Whether court will interfere.]—**By resolutions passed in June & July, 1920, a metropolitan borough council resolved to adopt as a general principle the payment of a minimum rate of wages of £4 per week



to full time male employees of the council over twenty-one years of age, & who were members of a trade union, & similarly of £3 10s. per week to full time female officers & employees of the council, & they continued to pay those wages without taking into account the decrease in the cost of living. In the audit for the year ended Mar. 31, 1922, the district auditor took the view that the council had not paid due regard to the interests of the ratepayers whose funds they administered, that they had made payments for wages which were far in excess of those which were necessary to obtain the services & to maintain a high standard of efficiency, & which were thus in reality gifts to their employees in addition to remuneration for their services, & that the persons responsible for such excessive payments had acted arbitrarily & contrary to law. In the result, he disallowed £2,000, & surcharged that sum upon the councillors, whom he considered to be responsible. In determining that figure he took as his starting-point the council's wages scale of 1914 increased by a bonus proportionate to the increase in the cost of living & further increased by 3d. per hour in each case as a further margin:—*Held*: (1) in disregarding the class of work to be done & the cost of living which the workman had to pay, the borough were not properly exercising the discretion conferred upon them as trustees of the ratepayers' money under Metropolitan Management Act, 1855 (c. 120), s. 62 (2) once it had been determined that the wages had not been properly fixed, the rule which had been applied by the auditor in his discretion was one with which a ct. would not interfere.—*ROBERTS v. CUNNINGHAM* (1925), 134 L. T. 421; 90 J. P. 32; 42 T. L. R. 162; 24 L. G. R. 61, H. L.

**221. Authorised expenditure—Repair of conveyance for use of council.**—An urban district council, having purchased an omnibus for the purpose of conveying the members of the council about the district when performing their ordinary duties, expended certain moneys in repairing such omnibus. The district auditor having surcharged this amount:—*Held*: such surcharge was right.—*R. v. DOLBY, Ex p. NORTHFIELD* (1902), 87 L. T. 27; 66 J. P. 521; 18 T. L. R. 434; 46 Sol. Jo. 359.

**222. — Opposition to local bill—Bill not affecting duties, rights or privileges of council—Necessity for consent of ratepayer.**—An urban district council cannot apply the district rate towards payment of the expenses of opposing a local bill not affecting their own duties, rights, or privileges, without first obtaining the consent of the ratepayers under Borough Funds Act, 1872 (c. 91), s. 4, nor is 50 & 51 Vict. c. 72, s. 3, under which such expenses if incurred may be sanctioned by the Local Govt. Board, intended to prevent the ct. from intervening to restrain such expenses being thrown on the rate when the sanction of the Local Govt. Board has not been applied for.—*A.-G. v. RICKMANSWORTH URBAN DISTRICT COUNCIL* (1902), 86 L. T. 521; 66 J. P. 410; 18 T. L. R. 481.

**223. — Effect of statutory provision for subsequent sanction by Minister of Health.**—*A.-G. v. RICKMANSWORTH URBAN DISTRICT COUNCIL*, No. 222, *ante*.

—*See, also*, No. 81, *ante*.

**224. — Payments for goods supplied—Deliveries insufficiently checked.**—(1) A rule for a *certiorari* was obtained under P. H. Act, 1875, s. 247, to quash certain surcharges made by a district auditor of the Govt. Board:—*Held*: the decision of the auditor was wrong on the evidence

before him & there being jurisdiction to review his decision, both on matters of fact, & in law, the rule for the *certiorari* must be made absolute.

(2) The district auditor, under P. H. Act, 1875, s. 247, disallowed & surcharged certain payments made by the Finance Committee of a local authority for shingle & by the Highways Committee in respect of a contract for the supply of certain goods, upon the grounds that the shingle as delivered by the contractors must have been short in weight, the deliveries not having been, in his opinion, properly checked. Upon an application for a writ of *certiorari* to bring up & quash the disallowance:—*Held*: with regard to the shingle there was no evidence of short delivery or of anything beyond possibly a lax method of keeping a check upon the amount delivered, & there was no evidence that the payments were illegal.

(3) An auditor, if not satisfied, is entitled to investigate any item submitted to him, & if acting *bonâ fide* he comes to a fallacious decision, he is nevertheless entitled to receive his costs, in showing cause against a rule for a *certiorari*, out of the rates.—*R. v. ROBERTS*, [1907] 2 K. B. 878; 76 L. J. K. B. 1113; 96 L. T. 733; 71 J. P. 288; 23 T. L. R. 491; 51 Sol. Jo. 467; 5 L. G. R. 1017, D. C.; *on appeal*, [1908] 1 K. B. 407, C. A. *Annotations*:—*Generally, Referred*. *Roberts v. Hopwood*, [1925] A. C. 578. *Mentd.* *Hyams v. Stuart King*, [1908] 2 K. B. 696.

**225. — Tender accepted not lowest tender—Tender accepted bonâ fide.**—*R. v. ROBERTS*, No. 217, *ante*.

**226. — Contribution to costs of appeal of neighbouring council—Points of law affecting both councils.**—A tramroad ran through three urban districts. The council of one district assessed it at its net annual value, but the Ct. of Appeal held that it should have been assessed as a railway at one-fourth of its net annual value. For the purpose of an appeal to the House of Lords the councils of the three districts agreed to pay the costs in the Ct. of Appeal & the House of Lords *pro rata*:—*Held*: in an action against one of the two councils who had thus agreed to contribute to the costs of the third council's appeal, the agreement was *ultra vires*, & an injunction was granted to restrain debts from carrying out the terms on their part & from any further expenditure of public money in respect thereof.—*A.-G. OF LANCASTER DUCHY & DRUMMOND v. FLEETWOOD URBAN DISTRICT COUNCIL* (1908), 72 J. P. 120.

**227. Liability to surcharge—Whether confined to authority rendering account.**—*R. v. ROBERTS*, No. 217, *ante*.

**Time for enforcing surcharge.**—*See* Poor Law Amendment Act, 1849 (c. 109), s. 9.

**228. — How calculated.**—The determination, within Poor Law Amendment Act, 1849 (c. 103), s. 9 of an appeal to the Local Govt. Board from a disallowance & surcharge by a district auditor means the final determination, & the Board may with the consent of all parties reconsider their determination, & the time for enforcing the auditor's certificate runs from the determination upon the reconsideration.—*BROOKS v. DOLBY, SAVAGE v. DOLBY, TOMLINSON v. DOLBY* (1902), 66 J. P. 532.

Limitation of actions, generally, *see* LIMITATION OF ACTIONS; PUBLIC AUTHORITIES.

(b) *Remedy of Persons aggrieved by Decision of Auditor.*

**Appeal to Minister of Health.**—*See* P. H. Act, 1875, s. 247 (8); Ministry of Health Act, 1919 (c. 21), s. 3 (1) (a).



**Sect. 4.—Finance: Sub-sect. 2, B. (b); sub-sect. 3.**  
**Sect. 5. Parts VI. & VII. Sect. 1: Sub-**  
**sects. 1, 2 & 3.]**

**229. — Jurisdiction to reconsider decision—**  
**By consent of parties.]—**BROOKS *v.* DOLBY, SAVAGE  
*v.* DOLBY, TOMLINSON *v.* DOLBY, No. 228, *ante*.

**230. — Not after application to King's Bench**  
**for certiorari.]—**R. *v.* MINISTER OF HEALTH,  
*Ex p.* DORE (1926), *Times*, Feb. 15, D. C.

**Application to King's Bench Division for**  
**certiorari.]—**See P. H. Act, 1875, s. 247 (8).

**231. — Jurisdiction of court—Whether con-**  
**fined to questions of law.]—**R. *v.* ROBERTS, No.  
 224, *ante*.

**232. — Right of auditor to costs.]—**R. *v.*  
 ROBERTS, No. 224, *ante*.

**—.]—**See, generally, CROWN PRACTICE, Vol.  
 XVI., pp. 398 *et seq.*

#### SUB-SECT. 3.—ADJUSTMENT OF PROPERTY, DEBTS AND LIABILITIES.

*See, generally*, 1888 Act, s. 62; 1894 Act, s. 68;  
 Local Government (Adjustments) Act, 1913 (c. 19).

**233. What amounts to adjustment—Agreement**  
**for sharing expenses of joint hospital.]—**Under the  
 terms of a deed made in 1885 the predecessors in  
 title of pltfs. & of defts., & the corpn. of B., were  
 entitled to the joint use of a hospital, & the  
 expenses of maintaining the hospital were yearly  
 apportioned between & paid by the several  
 authorities. In 1898 another deed was made  
 between the same authorities or their successors  
 by which the provisions of the deed of 1885 as to  
 the management of the hospital were varied, &  
 it was provided that that agreement might be  
 determined by a six months' notice in writing.  
 Under the terms of a third deed made in 1905  
 between pltfs. & defts. & the corporation, & stated  
 to be supplemental to the two previous deeds, the  
 corpn. withdrew & were released from all liability  
 under the deeds of 1885 & 1898, & the provisions  
 for the management of the hospital were again  
 varied. In Apr. 1906, defts. gave notice under  
 the deed of 1898 to determine the three deeds &

ceased to use the hospital & to contribute to its  
 maintenance. After long negotiations which was  
 terminated in Nov. 1909, pltfs. in Dec. 1909, brought  
 an action to recover from defts. their proportion  
 of the management expenses of the hospital for  
 the three years prior to Mar. 31, 1909:—*Held*:  
 the notice was invalid & the deeds of 1885 & 1905  
 were still subsisting, & constituted an agreement  
 adjusting liabilities & expenses within 1888 Act,  
 sect. 62, & defts. were not entitled to have the  
 questions between themselves & pltfs. referred  
 to arbitration under sub-sect. 2 of that sect.—  
 WOLSTANTON UNITED URBAN COUNCIL *v.* TUN-  
 STALL URBAN COUNCIL, [1910] 2 Ch. 347; 79  
 L. J. Ch. 522; 103 L. T. 98; 74 J. P. 353; 8  
 L. G. R. 870; *on appeal*, [1911] 1 Ch. 229, C. A.

**Settlement of disputes.]—**See P. H. Act, 1875,  
 s. 304, & generally, Part II., Sect. 10, *ante*.

**234. — Claim to retain maintenance of roads**  
**—Under 1888 Act, s. 11 (2)—Contribution by**  
**county council disputed.]—**Where an urban  
 authority has claimed, under above sub-sect., to  
 retain the powers & duties of maintaining the main  
 roads within its district, the amount to be paid to  
 such urban authority by the county council in  
 respect of such main roads can only be settled  
 in default of agreement, by the arbn. of the  
 Local Govt. Board.—*Re* BEDFORDSHIRE COUNTY  
 COUNCIL & BEDFORD URBAN SANITARY AUTHO-  
 RITY, [1894] 2 Q. B. 786; 64 L. J. Q. B. 26; 71  
 L. T. 433; 58 J. P. 786; 10 R. 485.

**235. — By compromise—Unfounded claim**  
**included—Whether compromise invalidated.]—**  
 HOLSWORTHY URBAN COUNCIL *v.* HOLSWORTHY  
 RURAL COUNCIL, No. 208, *ante*.

**Adjustment on alteration of areas.]—**See Part  
 II., Sect. 12, *ante*.

#### SECT. 5.—LEGAL PROCEEDINGS.

*See, generally*, Part II., Sect. 11, *ante*.

**Recovery of improvement expenses.]—**See,  
*generally*, HIGHWAYS, Vol. XXVI., pp. 520 *et seq.*

**Enforcement of building line.]—**See HIGHWAYS,  
 Vol. XXVI., pp. 563, 564.

## Part VI.—The Port Sanitary Authority.

**Constitution.]—**See P. H. Act, 1875, s. 287;  
 Public Health (Ships, etc.) Act, 1885 (c. 35),  
 s. 3.

**Jurisdiction.]—**See P. H. Act, 1875, s. 288;  
 Infectious Disease (Notification) Act, 1889 (c. 72),  
 s. 16.

**Powers.]—**See P. H. Act, 1875, s. 287; Public

Health (Ports) Act, 1896 (c. 20); Infectious  
 Disease (Notification) Act, 1889 (c. 72), s. 16.

**—Borrowing.]—**See P. H. Act, 1875, s. 244.

**—Delegation.]—**See P. H. Act, 1875, s. 289.

**Finance.]—**See P. H. Act, 1875, ss. 290, 292.

**Port of London Authority.]—**See WATERS &  
 WATERCOURSES.

## Part VII.—The Borough.

NOTE.—The principal Act now governing Municipal Corporations in England is *Municipal Corporations Act, 1882* (c. 50), which repealed *Municipal Corporations Act, 1835* (c. 76), referred to in this Part as the 1882 Act & 1835 Act respectively. In considering the cases set out in this Part regard must be had to their date, the Act under which they were decided, & the effect of subsequent Acts.

## SECT. 1.—THE MUNICIPAL CORPORATION.

## SUB-SECT. 1.—IN GENERAL.

236. Evidence of existence—Before 1835 Act—Inclusion in Schedule of 1835 Act—Whether conclusive.]—The insertion of the name of a town in Schedule A. of above Act, is *prima facie* evidence of the existence of a municipal corpn. there; but if facts be adduced on affidavit to negative that presumption, a *mandamus* will not issue to compel the delivery of books, papers, moneys, etc., by the ancient officers of the town, to the council elected under the new Act.—*R. v. GREENE* (1837), 11 Ad. & El. 548; 1 Nev. & P. K. B. 631; Will. Woll. & Dav. 291; 1 J. P. 197; 112 E. R. 210.

Annotation:—*Mentd. R. v. Haughton* (1853), 17 Jur. 455.

237. — Production of charter.]—It is not necessary to produce the charter of a city to prove that it is a municipal corpn.; production of the minutes of the council at which the alderman was chosen for the ward is sufficient evidence, if it proves that the councillors of the ward were present on the occasion, & it is a sufficient compliance with 1835 Act, s. 43.—*R. v. TURNER* (1872), 12 Cox, C. C. 313.

238. Whether a person—Within 39 Eliz. c. 5.]—Above Act enables "all & every person & persons" to found hospitals for the poor & to incorporate them. A municipal corpn. is included in the words "every person & persons," & may exercise the powers given by the Act.—*NEWCASTLE CORPN. v. A.-G.* (1845), 12 Cl. & Fin. 402; 8 E. R. 1464, H. L.; *affg. S. C. sub nom. A.-G. v. NEWCASTLE CORPN.* (1842), 5 Beav. 307.

Annotations:—*Mentd. Trye v. Gloucester Corpn.* (1851), 14 Beav. 173; *Re Patten & Edmonton Union Grdns.* (1883), 52 L. J. Ch. 787.

—.]—See, generally, CORPORATIONS, Vol. XIII., pp. 351 et seq.

## SUB-SECT. 2.—STYLE OF CORPORATION.

See, generally, CORPORATIONS, Vol. XIII., pp. 279 et seq.

239. Before 1835 Act—Mayor, bailiffs & burgesses.]—The name of a corpn. is "the mayor, bailiffs, & burgesses," & the power of electing & removing the recorder is in the mayor & burgesses only; *qu.*: whether a *mandamus* to restore be well directed to the latter only.—*HOLT'S CASE*

(1676), 1 Freem. K. B. 441; T. Jo. 51; 89 E. R. 330; *sub nom. R. v. HOLT*, 3 Keb. 667, 700.

Annotations:—*Reid. R. v. Abingdon Corpn.* Raym. 559. *Mentd. Sharp v. London Corpn.* Gilb. 255; *R. v. St. Pancras* (1841), 6 Jur. 391.

240. Under 1835 Act—Corporation of city—"Mayor, alderman & citizens."—The proper appellation of the corpn. of a city, since above Act, is, "the mayor, aldermen, & citizens of the city."—*A.-G. v. WORCESTER CORPN.* (1846), 2 Ph. 3; 1 Coop. temp. Cott. 18; 15 L. J. Ch. 398; 8 L. T. O. S. 85; 47 E. R. 722, L. C.

241. — — — — —.]—Under above Act the corpn. of a city ought to be styled the aldermen & citizens of the city.—*ROCHESTER CORPN. v. LEE* (1846), 15 Sim. 376; 60 E. R. 665. See, now, 1882 Act, s. 8.

242. Style of corporation as party to contract party—"Acting as the local board"—Whether liability affected.]—21 & 22 Vict. c. 98, s. 24, which enacts that in corporate boroughs the local boards "shall be the mayor, aldermen & burgesses acting by the council," does not make the local board a new & separate body, but in substance enacts that in corporate boroughs the corpn. shall be the local board; & if in making contracts the name & style of the corpn. "acting as the local board" is used, the corpn. is the essential body & contracting party & may be sued as such on the contracts.—*ANDREWS v. RYDE CORPN.* (1874), L. R. 9 Exch. 302; 43 L. J. Ex. 174; 23 W. R. 58.

*v. Robinson,*  
*v. McAdam,*

[1895] 1 Q. B. 673.

See, now, P. H. Act, 1875, s. 5.

## SUB-SECT. 3.—CONTINUITY OF CORPORATION.

See, generally, CORPORATIONS, Vol. XIII., p. 278, Nos. 81–87.

243. Effect of 1835 Act—New corporations not created.]—*Semble*: above Act does not create new corpsns.—*LUDLOW CORPN. v. TYLER* (1836), 7 C. & P. 537.

244. — — — — —.]—(1) Above Act has not destroyed the individuality of the old corpsns., but has merely varied the mode in which the officers are to be chosen.

(2) If some of the members of a corpn. are instrumental in unlawfully dispossessing the corpn. of its property, they are personally liable.—*A.-G. v. WILSON* (1837), 9 Sim. 30; 7 L. J. Ch. 76; 1 Jur. 890; 59 E. R. 267; *subsequent proceedings* (1840), Cr. & Ph. 1, L. C.

Annotation:—*Generally, Mentd. A.-G. v. Norwich Corpn.* (1848), 12 Jur. 424.

245. — — — — —.]—*A.-G. v. ASPINALL*, No. 515, *post*.

## PART VII. SECT. 1, SUB-SECT. 1.

d. Whether a person—Within Dominion Railway Act, 1888.]—"Person" in sect. 188 of above Act includes a municipality.—*TORONTO CORPN. v. CANADIAN PACIFIC RY. CO.*, [1908] A. C. 54.—CAN.

e. Creation of new corporation—Powers conferred by legislature.]—On the creation of a municipal corpn. the legislature may confer on it the

powers conferred upon municipal corpsns. generally by any particular law or body of laws in the province.—*WETASKIWIN CITY v. C. & E. TOWNSITES, LTD.* (Alta.), [1918] 3 W. W. R. 145.—CAN.

f. Municipal year.]—The municipal year, under 12 Vict. c. 81, begins on Jan. 1, & ends on Dec. 31, & is not to be reckoned from the day appointed for the municipal elections of one year to the same day of the next year.—

*MELLISH v. TOWN OF BRANTFORD* (1851), 2 C. P. 35.—CAN.

## PART VII. SECT. 1, SUB-SECT. 2.

g. Situation of corporation.]—A municipal corpn. may well be described as "situated" in that place where its seat of govt. is located.—*CANADIAN PACIFIC RY. CO. v. OUTLOOK TOWN*, [1924] 4 D. L. R. 869; [1924] 3 W. W. R. 494; 19 Sask. L. R. 73.—CAN.



*Sect. 1.—The municipal corporation: Sub-sects. & 4, A., B., C., D. & E; sub-sects. 5 & 6,*

**246. — — — — — Acts of old bind new corporation.]—**Injunction granted at the instance of the new corp'n. of Exeter, to restrain an action on a bond entered into by the old corp'n.—*A.-G. v. SAUNDERS* (1838), 2 J. P. 165.

**247. — — — — — Liabilities transferred — Breach of trust.]—**Municipal corpns., as altered by above Act are but a continuance of the old corp'n.; & where the new corp'n. was made party to a suit, in respect of a breach of trust committed by their predecessors, it was held they were not entitled to costs.—*A.-G. v. KERR* (1840), 2 Beav. 420; 9 L. J. Ch. 190; 4 Jur. 406; 48 E. R. 1244.

*Annotations:—*Consol. *A.-G. v. Newcastle Corp'n.* (1842), 5 Beav. 307. *Mentd. A.-G. v. Newark-upon-Trent Corp'n.* (1842), 1 Hare, 396; *A.-G. v. Pilgrim* (1849), 12 Beav. 57; *Re Mason's Orphanage & L. & N. W. Ry.*, [1896] 1 Ch. 54; *Capital & Counties Bank v. Rhodes*, [1903] 1 Ch. 631; *Re Fletcher, Reading v. Fletcher* (1916), 86 L. J. Ch. 139.

**248. — — — — —.]—**The effect of above Act is that it is not a new corp'n., but a newly constituted govt. of the old corp'n.; what is called the new corp'n. remains subject to all the liabilities of the old corp'n. The liabilities of the old corp'n. pass with their corporate property to the new corp'n., which is a continuation of the old corp'n., with a change of government (*LORD LANGDALE, M.R.*).—*A.-G. v. NEWCASTLE CORPN.* (1842), 5 Beav. 307; 6 J. P. 456; 6 Jur. 789; 49 E. R. 596; *on appeal, sub nom. NEWCASTLE CORPN. v. A.-G.* (1845), 12 Cl. & Fin. 402, H. L.

*Annotations:—**Mentd. Trye v. Gloucester Corp'n.* (1851), 14 Beav. 173; *Re Patten & Edmonton Union Grdns.* (1883), 52 L. J. Ch. 787.

**249. — — — — —.]—**The new corpns. succeed to the debts & duties of the old corpns., whose place they now occupy, as well as to their estates, property, & rights.

The present corp'n. is but a continuance of the old (*LORD LANGDALE, M.R.*).—*A.-G. v. LEICESTER CORPN.* (1846), as reported in 9 Beav. 546; 50 E. R. 454.

**250. — — — — — Continuity of contract.]—**A contract with the mayor, alderman, & burgesses of a borough entered into before the passing of above Act, which still subsists, is a contract with the town council of such borough elected under this Act.—*R. v. YORK* (1842), 2 Q. B. 847; 2 Gal. & Dav. 105; 11 L. J. Q. B. 127; 6 J. P. 76; 6 Jur. 797; 114 E. R. 329.

*Annotation:—**Mentd. Simpson v. Ready* (1843), 11 M. & W. 344.

**251. — — — — — Succession to property.]—***A.-G. v. LEICESTER CORPN.*, No. 249, *ante*.

**252. — — — — — Trust property.]—**Testator, by his will, dated in 1586, devised the manor of C., & all his lands in C., to trustees for the founding, by the mayor & aldermen of Bristol, of an hospital for the education of poor infants & orphans, & that they should be for ever the governors, etc., of the same. Queen Elizabeth by charter ordained that the said mayor & common council, & their successors, should be called "the governors of the hospital of Queen Elizabeth of Bristol," & should have the government of all the said orphans, etc., & of all the lands, tenements, etc., & should be a body corporate & politic of itself, for ever, capable of holding lands, etc. The hospital & lands continued vested in the mayor & common council as governors of the hospital down to the passing of above Act. By above Act, s. 71, it was enacted, that, in every borough in which the body corporate shall stand seised of any hereditaments in trust for charitable uses or trusts, all the estate, right,

interest, & title, & all the powers of such body corporate, in respect of the said uses & trusts, should continue in the persons who, at the time of the passing of the Act, were such trustees as aforesaid, until Aug. 1, 1836, or until Parliament should otherwise order, & should immediately thereupon utterly cease & determine; provided that if Parliament should not otherwise direct on or before Aug. 1, 1836, the Lord Chancellor should make such orders as he should see fit for the administration, subject to such charitable uses & trusts as aforesaid of such trust estates. Parliament having made no provision, the Lord Chancellor, by an order dated Oct. 19, appointed certain persons, being in fact the members of the new corp'n., to be trustees of the charity estate, lately vested in the corp'n. of Bristol. An action of ejectment having been brought on demises by the governors of the hospital, & also by the old & new corp'n. of Bristol, to recover possession of the charity estates:—*Held*: (1) notwithstanding sect. 71, the legal estate remained, & had always been vested in the corp'n. as governors of the hospital, & sect. 71, affected only the equitable interest in, or rather the right of administering the charitable funds; & therefore *pltf.* was entitled to judgment on the demises from the corp'n.; (2) the meaning of sect. 71 was, that the estate & interest, in respect of the uses & trusts only, & not the legal estate, was to continue in those in whom it was then vested.

(3) *Qu.*: whether above Act, sect. 71, applied to this case, because the parties seised of the land were not the municipal body corporate of Bristol, but a separate corp'n., viz. the governors of the hospital, though the natural members of both bodies corporate were the same.—*DOE d. BRISTOL HOSPITAL (GOVERNORS) v. NORTON* (1843), 11 M. & W. 913; 12 L. J. Ex. 418; 1 L. T. O. S. 387; 7 J. P. 788; 7 Jur. 751; 152 E. R. 1076.

*Annotation:—**Refd. A.-G. v. Exeter Corp'n.* (1852), 2 De G. M. & G. 507.

**253. — — — — — Change in method of electing officers.]—***A.-G. v. WILSON*, No. 244, *ante*.

**254. Effect of new charter.]—***A.-G. v. AVON CORPN.*, No. 304, *post*.

— **On dormant corporation.]—**See CORPORATIONS, Vol. XIII., p. 299, Nos. 310–312.

#### SUB-SECT. 4.—THE CHARTER.

##### A. In General.

See, generally, 1882 Act, ss. 210–218; CORPORATIONS, Vol. XIII., pp. 291 *et seq.*

**255. Jurisdiction of Crown to grant.]—***A.-G. v. AVON CORPN.*, No. 304, *post*.

**256. Production of — Whether necessary—To prove existence of corporation.]—***R. v. TURNER*, No. 237, *ante*.

##### B. Petition for Incorporation.

See 1882 Act, ss. 210, 211, 213 (4).

**257. Signature — Whether majority of Inhabitant householders necessary.]—**A rate by the justices of W., whereby lands within the alleged borough of B. were assessed to the county rate, was brought up by *certiorari*, & objected to, under 1835 Act, s. 112, on the ground that B. had been incorporated by charter under sect. 141, & a ct. of quarter sessions granted under sect. 103, & notice thereof given under sect. 112. On a case stated, it was found that such charter & grant had been made in fact, & such notice given, & that quarter sessions had in fact been held under



the grants; but that there had been no petition for incorporation by a whole or a majority of the inhabitant householders; & that the grant of quarter sessions had been made on a representation to the Crown that there was a gaol in B., whereas in fact there was none:—*Held*: (1) the charter of incorporation was nevertheless valid; (2) in this proceeding, the allegation that there was no gaol could not be set up against the grant of quarter sessions, no objection being made on the part either of the Crown or any inhabitant of the borough; & the proper course for raising the objection was by a *sci. fa.* to repeal the grant; & this, although the expenses of the quarter sessions of the borough had in part been defrayed by the county rate.—*R. v. BOUCHER* (1842), 3 Q. B. 641; 2 Gal. & Dav. 737; 0 Jur. 851; 114 E. R. 653; *sub nom.* *R. v. WARWICKSHIRE JJ.*, 11 L. J. Q. B. 299; *sub nom.* *R. v. BENEKER*, 6 J. P. 657.

*Annotations*:—As to (1) *Reid. Graham v. Berry* (1865), 3 Moo. P. C. C. N. S. 207; *R. v. Monck* (1875), 45 L. J. M. C. 50. As to (2) *Reid. R. v. Aberavon Corp.* (1864), 13 W. R. 90; *Graham v. Berry* (1865), 3 Moo. P. C. C. N. S. 207.

**Effect of counter petition.**—*See* CORPORATIONS, Vol. XIII., pp. 291, 292, Nos. 224–226.

#### C. Validity.

*See, generally*, CORPORATIONS, Vol. XIII., pp. 297, 298.

**258. Presumption of validity — Charter granted under Municipal Corporation Acts.**—*A.-G. v. AVON CORPN.*, No. 304, *post*.

*See, now*, 1882 Act, s. 216.

**259. Questioning validity—Jurisdiction of Court of Chancery.**—*A.-G. v. AVON CORPN.*, No. 304, *post*.

*See, now*, 1882 Act, s. 216.

**New charter.**—*See* CORPORATIONS, Vol. XIII., pp. 298, 299.

#### D. Effect of Charter.

**Construction.**—*See, generally*, CORPORATIONS, Vol. XIII., pp. 293 *et seq.*

— **Usage as evidence.**—*See* CONSTITUTIONAL LAW, Vol. XI., pp. 573, 574; CORPORATIONS, Vol. XIII., pp. 294, 295.

**260. Effect—On existing prescriptive right.**—(1) A corp. in 1637, let the quay duties, profits, & advantages as anciently have been gotten, & at the expiration of the lease, continued letting them to various people down to 1730, when they let them annually, at a survey held by the town steward until 1782, from which time they were collected by the corp. The first lettings were evidenced by the town clerk producing old books containing memoranda of lettings. Of the annual lettings no lease was ever prepared or executed within the recollection of any one. This was held proof of a regular prescriptive usage, for the ct. would not presume that the tolls of which the leases were granted were of a different nature from the tolls collected.

(2) The acceptance of a charter containing only an affirmative grant, does not take away a pre-existent prescriptive right. *Aliter*, if it contains an express renunciation of former grants.

(3) A variation in modern times of a fixed ancient toll, will not affect the right to such toll.

(4) A grant, that “burgesses & inhabitants may be quit of toll, passage, pontage, murage, etc., throughout our whole realm of England except the city of London,” is no exemption from toll in their own town.—*TRURO CORPN. v. REYNALDS, TRURO CORPN. v. BASTIAN* (1832), 8 Bing.

275; 1 Moo. & S. 272; 1 L. J. C. P. 62; 131 E. R. 407.

**261. — Exemption from tolls throughout the realm—Whether tolls within borough included.**—*TRURO CORPN. v. REYNALDS, TRURO CORPN. v. BASTIAN*, No. 260, *ante*.

— **Valid until impeached.**—*See* CORPORATIONS, Vol. XIII., pp. 297, 298.

— **New charter.**—*See* CORPORATIONS, Vol. XIII., pp. 299, 300.

**262. Modification by statute — Grant of revenue fines—Effect of Inland Revenue Regulation Act, 1890 (c. 21).**—The Crown is entitled under above Act, s. 33, to revenue fines, notwithstanding any grant of those fines previously made by charter to any corp.—*A.-G. v. EXETER CORPN.*, [1911] 1 K. B. 1092; 80 L. J. K. B. 636; 104 L. T. 212; 75 J. P. 280; 27 T. L. R. 249; 5 Tax Cas. 629.

*See, generally*, REVENUE; STATUTES.

#### E. Surrender.

**Surrender.**—*See, generally*, CORPORATIONS, Vol. XIII., p. 434.

— **New charter granted in consideration of void surrender of old charter.**—*See* CORPORATIONS, Vol. XIII., p. 298, Nos. 299–302.

**Revival of surrendered charters—By proclamation of 1689.**—*See* CORPORATIONS, Vol. XIII., p. 298, No. 296.

#### SUB-SECT. 5.—DISSOLUTION.

*See, generally*, CORPORATIONS, Vol. XIII., pp. 434 *et seq.*

**Surrender of charter.**—*See* Sub-sect. 4, E., *ante*.

**Revocation of charter.**—*See, generally*, CORPORATIONS, Vol. XIII., pp. 434, 435.

**Procedure.**—*See* Petty Bag Act, 1849 (c. 109), s. 29.

#### SUB-SECT. 6.—THE BURGESSES.

##### A. In General.

**Definition & qualification.**—*See, now*, Representation of the People Act, 1918 (c. 64).

“Burgess” includes citizen.—*See* 1882 Act, s. 7 (1).

**263. Claim to exercise franchise — Whether tested by quo warranto—As claim to exercise corporate office.**—A burgess is not an “officer” within 6 & 7 Vict. c. 89, s. 5, & therefore cannot be called upon to show cause in the first instance why a *quo warranto* information should not issue against him for exercising the franchise.—*Re MILNER* (1844), 5 Q. B. 589; 13 L. J. Q. B. 186; 114 E. R. 1371; *sub nom.* *R. v. MILNER*, 2 L. T. O. S. 367; 8 J. P. 103; *subsequent proceedings, sub nom.* *R. v. MILNER*, 3 L. T. O. S. 55.

*Annotation*:—*Reid. R. v. Collins* (1876), 1 Q. B. D. 336.

*See, now*, 1882 Act, s. 225.

**264. Burgess illegally upon roll—Whether quo warranto lies.**—A *quo warranto* will not be granted against a burgess for being illegally upon the burgess roll, if it does not appear that he has in some way exercised his office.

A party was inserted by the overseers in the burgess list, & duly objected to by another burgess, but at the time of the revision, the mayor & assessors improperly, as it was alleged, retained his name, but it did not appear that he had since in any way used or exercised his office of burgess:—*Held*: a *quo warranto* would not lie against him.—

*Sect. 1.—The municipal corporation: Sub-sect. 6, A. & B.; sub-sect. 7, A., B., C., D. & E.*

*R. v. ARMSTRONG (1856), 26 L. T. O. S. 248; 20 J. P. 86; 2 Jur. N. S. 211.*

*See, now, 1882 Act, s. 45 (8).*

*B. Rights of Burgesses.*

**265. Rights under charter — Not exercisable to detriment of others.]—**Under an ancient charter, granting to the mayor, aldermen, & burgesses of a borough the right to sport over lands within the liberties thereof, individual burgesses, in the absence of all evidence of exercise, are not entitled to the enjoyment of the right over land within the liberties but in the occupation of a third party.—*POTTER v. BERRY (1857), 6 W. R. 71; 21 J. P. Jo. 756.*

**266. Rights in corporate property — Enjoyed by burgesses before 1835 Act.]—**The new burgesses created under 1835 Act are not entitled to participate in the rights of common enjoyed by the old burgesses & freemen for their own benefit, prior to the passing of that Act.—*HULLS v. ESTCOURT (1863), 2 H. & C. 47; 2 New Rep. 131; 32 L. J. Ex. 193; 8 L. T. 539; 27 J. P. 519; 9 Jur. N. S. 695; 11 W. R. 672; 159 E. R. 21.*

**As local government electors.]—***See ELECTIONS, Vol. XX., pp. 18 et seq., 27.*

**Election of auditors.]—***See 1882 Act, s. 25 (1).*

**Eligibility as councillor.]—***See 1882 Act, s. 11; Representation of the People Act, 1918 (c. 64), sched. VIII.*

**Inspection of proceedings of council—& taking.]—***See 1882 Act, s. 233 (1), (2).*

**Recovery of fine—From officer acting when unqualified.]—***See 1882 Act, s. 224 (1).*

**Right of common—By prescription.]—***See COMMONS, Vol. XI., p. 32, Nos. 414–419.*

**SUB-SECT. 7.—CORPORATE OFFICE.**

*A. In General.*

**What is.]—***See 1882 Act, s. 7 (1).*

**Election to.]—***See, generally, CORPORATIONS, Vol. XIII., pp. 322 et seq.; ELECTIONS, Vol. XX., pp. 119 et seq.*

**Qualification for—Councillor.]—***See 1882 Act, s. 11; Representation of the People Act, 1918 (c. 64), sched. VIII.*

**Alderman.]—***See 1882 Act, s. 14 (1), (3).*

**Mayor.]—***See 1882 Act, s. 15 (1), (2).*

**Disqualification.]—***See Sect. 2, sub-sect. 2, C., post, & compare Part II., Sect. 3, sub-sect. 2, A., ante.*

*B. Acceptance and Refusal.*

**Statutory declaration of acceptance of office—Necessity for.]—***See 1882 Act, s. 34.*

**267. — Who must make.]—**On rule *nisi* for a *quo warranto* information for the office of mayor, it appeared that deft.'s eligibility for that office consisted in his being an alderman of the borough, & his election to the latter office was now impeached because the council had neglected, at the first election of aldermen, in 1835, to declare which aldermen should go out in 1838; that deft. was elected alderman in Nov. 1841, & mayor Nov. 1842; that, by 7 Will. 4, & 1 Vict. c. 78, s. 23, no application could, when this rule was moved for,

have been made to remove him from his office of alderman; & that, when the ct. gave judgment on this motion, there would barely have been time to obtain judgment of ouster before the year of the mayoralty would expire. The ct., in the exercise of their discretion, discharged the rule. Deft. was elected mayor Nov. 9, 1842, being then absent from the borough, to which he did not return until Nov. 23. He had in the meantime casual information of his election, but did not receive any official notice of it until his return. Within five days after his return he made the requisite declaration & took upon him the office:—*Held*: a sufficient acceptance of the office within five days after notice, under 1835 Act, s. 51.

Casual information is not sufficient. . . . Before an elected officer can be visited with the heavy penalties imposed for neglecting to accept his office, he must have regular notice of his own election, either by being actually present when it is announced or by being apprised of the fact by some official authority (*LORD DENMAN, C.J.*).—*R. v. PREECE (1843), 5 Q. B. 94; 1 Dav. & Mer. 156; 12 L. J. Q. B. 335; 1 L. T. O. S. 360; 7 J. P. 754; 7 Jur. 896; 114 E. R. 1183.*

*Annotation:—Reid. R. v. Dixon (1850), 15 Q. B. 33.*

**Form.]—***See 1882 Act, s. 35, sched., Form A.*

**268. — Time for making — What constitutes notice of election.]—***R. v. PREECE, No. 267, ante.*

**269. — How calculated.]—**1835 Act, s. 50, requiring persons elected councillors to make the declaration within five days after they have notice of their election, applies only to persons who are returned as elected; & the five days are to be computed from their notice of their return.

At an election for two councillors of a borough on Nov. 1, 1851, A., B. & C. were candidates. A. & B. had the greatest number of votes, & were returned as elected; but B. was disqualified, & the voters had notice of his disqualification. In July, 1852, judgment of ouster was signed in a *quo warranto* filed against B. On Oct. 26, 1852, C., by a notice, required the council to admit him as a councillor, & to administer to him the declaration required by 1835 Act, s. 50. On Nov. 8, 1852, C. made the declaration, & on Nov. 9, voted at the election for mayor, when his vote was rejected:—*Held*: C. was elected on Nov. 1, 1851, & ought to have been then returned; & having made the declaration before Nov. 9, 1852, he was entitled to vote at the election of mayor.—*R. v. COAKS (1854), 3 E. & B. 249; 2 C. L. R. 947; 23 L. J. Q. B. 133; 22 L. T. O. S. 239; 18 J. P. 296; 18 Jur. 378; 118 E. R. 1133.*

*Annotations:—Reid. R. v. Tewkesbury Corp. (1868), L. R. 3 Q. B. 629; Pritchard v. Bangor Corp. (1888), 13 App. Cas. 241. Mentd. Galway County Election Petition, Trench v. Nolan (1872), 27 L. T. 69.*

**270. Refusal of office — Liability to penalty — Proof of qualification for office—Onus of proof.]—***R. v. RICHMOND, JJ. (1862), 11 W. R. 65; 20 J. P. Jo. 771.*

**Effect of.]—***See 1882 Act, s. 40 (3).*

*C. Acting without Acceptance or during Disqualification.*

**Liability to penalty.]—***See 1882 Act, s. 41.*

**271. — Election not questioned for twelve months—Candidate absolutely disqualified.]—**1882

**PART VII. SECT. 1, SUB-SECT. 7.—B.**

**h. Refusal of office—Effect of.]—***SMITH v. PETERSVILLE VILLAGE CORPN. (1881), 28 Gr. 599.—CAN.*

**k. Public declaration of acceptance—Sufficiency of.]—**A public declaration

of acceptance of office, made in presence of the returning officer & the electors directly after the returning officer has published the result, is a sufficient acceptance.—*R. v. JACKSON (1851), 2 C. L. Ch. 18.—CAN.*

**l. Disclaimer—Form of.]—***R. (MIR-*

*CHILL) v. DAVIDSON (1881), 8 P. R. 434.—CAN.*

**PART VII. SECT. 1, SUB-SECT. 7.—C.**  
**m. Liability to penalty.]—***HASTINGS v. O'CARROLL, [1915] 2 I. R. 4; 49 I. L. T. 55.—IR.*



Act, ss. 41, 73, are incorporated by 1888 Act in reference to county councils. Deft., a woman, having been elected a member of a county council, twelve months elapsed without any proceedings taken to question the validity of her election. After the expiration of the twelve months, she acted on several occasions as a member of the council:—*Held*: deft. was liable to the penalties imposed by 1882 Act, s. 41, for acting when disqualified. *Qu.*: whether sect. 73 applies to the election of a person whose status is one of absolute incapacity for election, as in the case of a woman.—*DE SOUZA v. COBDEN*, [1891] 1 Q. B. 687; 60 L. J. Q. B. 533; 65 L. T. 130; 55 J. P. 565; 39 W. R. 454; 7 T. L. R. 441, C. A.

—*Disqualification of councillors.*—*See* Sect. 2, sub-sect. 2, C., *post*.

—*Action to recover.*—*See* 1882 Act, s. 224.

272. — *Interest in contract—Interest ceasing before acting.*—*LEWIS v. CARR*, No. 418, *post*.

273. — *Pleading—Whether declaration must show that plaintiff a burgess.*—In debt to recover a penalty under 1835 Act, the declaration stated, that, before & at the time of the offence, etc., deft. claimed to be councillor of the borough of Lichfield, & that, before & at etc., he had become disqualified to hold the office of councillor, by having a share & interest of & in a certain contract with the council of the said borough, to wit, an indenture, dated May 20, 1841, whereby the mayor, etc., demised to one J. a certain mill for seven years, from Mar. 25, 1841; & deft., before & at the time of committing the said offence, had become & was interested in the said lease; yet deft., not regarding, etc., after he had become so disqualified as aforesaid, to wit, on Feb. 14, 1842, acted as councillor of the said borough. On motion in arrest of judgment:—*Held*: (1) although 1835 Act, s. 53, enacts that no action shall be brought except by a burgess of the borough, it was not necessary to state in the declaration that pltf. was a burgess of the borough; (2) it sufficiently appeared from the declaration, both that deft. acted as a councillor, & that the corpn. were interested in the lease at the time of the offence.

(3) 1835 Act, s. 28, disqualifies from holding the office of councillor any one who “by himself or his partners” shall have any share or interest in any contract or employment with, by, or on behalf of the council. A lease having been granted by the mayor, etc., of the borough to J., who was a trustee for deft.:—*Held*: deft. was liable to the penalty imposed by 1835 Act, s. 28, on any one acting as a councillor after he has become disqualified.—*SIMPSON v. READY* (1844), 12 M. & W. 736; 1 Dow. & L. 1024; 13 L. J. Ex. 193; 3 L. T. O. S. 39; 8 J. P. 280; 152 E. R. 1395.

*Annotations*:—*As to* (1) *Reid*. *Salford Corpn. v. Ackers* (1846), 16 M. & W. 85. *Generally*, *Mentd.* *Bousfield v. Wilson* (1846), 16 M. & W. 185.

*Compare* Part II., Sect. 3, sub-sect. 2, B., *ante*; Nos. 16, 18, 19, *ante*.

*Interest in contract as disqualification*, *see* Sect. 2, sub-sect. 2, C. (e), *post*.

274. *Whether quo warranto lies.*—Deft. was found guilty upon an information in nature of a *quo warranto* for usurping the office of mayor, & fined.—*R. v. CRACKER* (1724), 8 Mod. Rep. 285; 88 E. R. 204.

275. — *Councillor wrongly enrolled on burgess roll.*—Where a person, though not duly qualified, is upon the burgess roll of a municipal borough, & his title to be there has not been questioned, & such person is afterwards elected a town councillor, this ct., in the exercise of its discretion, will not,

upon the suggestion of such want of qualification as a burgess, grant a rule for an information in the nature of a *quo warranto* for exercising such office of town councillor.—*Ex p. HINDMARCH* (1867), L. R. 3 Q. B. 12; 37 L. J. Q. B. 58; 17 L. T. 176; 16 W. R. 125; *sub nom. Re POTTS*, *Ex p. HINDMARCH*, 8 B. & S. 642.

*Annotation*:—*Reid*. *R. v. Ireland* (1868), L. R. 3 Q. B. 130.

— *Time for application.*—*See* 1882 Act, s. 225; CROWN PRACTICE, Vol. XVI., pp. 365, 366.

276. — *Disqualification by continuing contract.*—(1) Under 1835 Act, s. 28, which provides that no person shall be qualified to be elected councillor of a borough “during such time as” he has any share or interest in any contract with, or employment by or on behalf of, the council, a person who has entered into a contract with the council, & been employed by them in respect of such contract, is disqualified from holding the office, though such contract required the corpn. seal, & is not sealed.

(2) While such contract continues, the disqualifications caused by it arises *de die in diem*; & during that time, a relator is not precluded, under 7 Will. 4 & 1 Vict. c. 78, s. 23, from applying for a *quo warranto*, though twelve calendar months have elapsed from the election of the party disqualified, or from the commencement of his disqualification.—*R. v. FRANCIS* (1852), 18 Q. B. 526; 21 L. J. Q. B. 304; 16 J. P. 664; 16 Jur. 1045; 118 E. R. 199.

277. — *At instance of party administering statutory declaration—With knowledge of disqualification.*—On motion for a *quo warranto* information for exercising the office of councillor while disqualified by 1835 Act, s. 28:—*Held*: a borough officer who administered to such councillor the declaration prescribed by sect. 50, knowing of the disqualification, could not be heard as relator, although he took no further part in the election than by supporting an unsuccessful candidate, & acquiescing in the result.—*R. v. GREENE* (1842), 2 Q. B. 460; 2 Gal. & Dav. 24; 11 L. J. Q. B. 107; 6 J. P. 169; 6 Jur. 777; 114 E. R. 182.

—*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 355 *et seq.*

#### D. Validity of Acts of Disqualified Officers.

*See* 1882 Act, s. 42 (1).

278. *Operation of statutory provision—On vote by disqualified person at election.*—*NELL v. LONG-BOTTOM*, No. 402, *post*.

*Voting at municipal elections.*—*See, generally*, ELECTIONS, Vol. XX., pp. 135–138.

#### E.

*See* 1882 Act (c. 50), ss. 34 (3), 253, 257.

*Clergy.*—*See* 1 Will. & Mar. (c. 18), s. 8; Places of Religious Worship Act, 1812 (c. 155), s. 9; Roman Catholic Relief Act, 1791 (c. 32), s. 8; & *generally*, ECCLESIASTICAL LAW, Vol. XIX., p. 364.

*Customs officers.*—*See* Customs Consolidation Act, 1876 (c. 36), s. 9, & *generally*, REVENUE.

*Excise officers.*—*See* Inland Revenue Regulation Act, 1890 (c. 21), s. 8; & *generally*, REVENUE.

*Incapable or infirm persons.*—*See* 1882 Act, s. 34 (3) (a).

*Inspectors of factories & shops.*—*See* Factory & Workshop Act, 1901 (c. 22), s. 118 (6); & *generally*, FACTORIES, Vol. XXIV., p. 941.

*Members of Universities of Oxford & Cambridge.*—*See* 1882 Act, s. 257 (4).



**Sect. 1.—The municipal corporation: Sub-sect. 7, F. & G.]**

**Persons having previously served or fined for**  
 .]—See 1882 Act, s. 34 (3) (b).

**Persons over sixty-five years of age.]—See 1882 Act, s. 34 (3) (b).**

**Post office officials.]—See Post Office Act, 1908 (c. 48), s. 43; & generally, POST OFFICE.**

**Registered dentists.]—See Dentists Act, 1878 (c. 33), s. 30; & generally, MEDICINE & PHARMACY,**

**Registered medical practitioners.]—See Medical Act, 1858 (c. 90), s. 35; & generally, MEDICINE & PHARMACY.**

**Registrars of births, marriages & deaths.]—See Births & Deaths Registration Act, 1837 (c. 22), s. 18; & generally, REGISTRATION OF BIRTHS, MARRIAGES & DEATHS.**

**Royal Forces.]—See 1882 Act, s. 253, & generally, ROYAL FORCES.**

**— Army Reserve.]—See Reserve Forces Act, 1882 (c. 48), s. 7.**

**— Army Special Reserve.]—See Militia Act, 1882 (c. 49), s. 41; Territorial & Reserve Forces Act, 1907 (c. 9), & Local Militia (England) Act, 1812 (c. 38), s. 197.**

**— Royal Naval Reserve.] — See Naval Volunteers Act, 1853 (c. 73), s. 8; Royal Naval Reserve (Volunteer) Act, 1859 (c. 40), s. 7; Naval Reserve Act, 1900 (c. 52), s. 1 (4).**

**279. Solicitor.]—An attorney of B. R. cannot be fined for refusing to serve as common councilman in a corp. — HADLEY CORPN. v. GAYLE (1675), Freem. K. B. 407; 3 Keb. 509; 89 E. R. 303.**

**280. —.] — An attorney is privileged from serving corp. offices, though resident in the corp. town. — NORWICH CORPN. v. BERRY (1767), 1 Wm. Bl. 636; 4 Burr. 2109; 96 E. R. 369.**

**Annotations:—Reid. R. v. Warner (1799), 8 Term Rep. 375; Ex p. Jefferies (1829), 3 Moo. & P. 450.**

**See, generally, SOLICITORS.**

#### *F. Resignation.*

**See 1882 Act, s. 36.**

**281. Who may resign — Whether officer becoming disqualified.]—By 1835 Act, s. 52, it is enacted that a town councillor who becomes bkpt. or compounds with his creditors by deed, shall “thereupon immediately become disqualified & shall cease to hold the office of such councillor,” & “the council thereupon shall forthwith declare the office void, & shall signify the same by notice, etc., & the said office shall thereupon become void”; but that “every person so becoming disqualified & ceasing to hold such office on account of his being so declared bkpt. or having compounded with his creditors as aforesaid, shall, on obtaining his certificate, or on payment of his debts in full, be capable of being re-elected to such office.” By Debtors Act, 1869 (c. 62), s. 21, those provisions are extended to persons who have compounded with their creditors “whether by deed or otherwise.”**

**B., a town councillor of N., in July, 1872, made a composition with his creditors under 32 & 33 Vict. c. 71, s. 126, under which a resolution was come to for a composition of 3s. 6d. in the pound, secured, in satisfaction of B.’s debts, the first instalment of which was payable six months after registration of the confirming resolution. The registration took place on Sept. 23. On Nov. 4, B. placed his resignation of his office of councillor in the hands of the town clerk, & announced his resignation by advertisement on Nov. 6, & by the same advertisement offered himself for re-election. At the annual meeting of the town council on**

**Nov. 9, the above letter was read, & B.’s resignation was accepted by the council; & on Nov. 18, there having been no declaration by the council that the office was void, he was re-elected a town councillor. Upon a case stated for the opinion of the ct., pursuant to Ballot Act, 1872 (c. 33), s. 15:—Held: B. having by reason of his having compounded with his creditors ceased to hold the office of councillor, was incapable of resigning it, & the council not having pursued the course pointed out by 1835 Act, s. 52, the election was therefore void; & B. not having “paid his debts in full,” he was not qualified for re-election under that sect.—HARDWICK v. BROWN (1873), L. R. 8 C. P. 406; 28 L. T. 502; 37 J. P. 407; 21 W. R. 639.**

**Annotations:—Reid. R. v. Welchpool Corp. (1876), 35 L. T. 594; Fitcher v. Saunders (1885), 49 J. P. 424.**

**See, also, Nos. 285, 288, post.**

**282. When resignation complete — Not till payment of fine—What constitutes payment—Delivery of cheque—Though not cashed.]—Under 1882 Act, s. 36, which enacts that a person elected to a corporate office may at any time, by writing signed by him & delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof, the resignation is completed by the delivery of the writing to the town clerk & the payment of the fine, & cannot afterwards, even with the assent of the corp., be withdrawn.—R. v. WIGAN CORPN. (1885), 14 Q. B. D. 908; 54 L. J. Q. B. 338; 52 L. T. 435; 49 J. P. 372; 33 W. R. 547; 1 T. L. R. 370.**

**Annotations:—Consd. Pease v. Lowden, [1899] 1 Q. B. 386.**

**Reid. Finch v. Oake, [1896] 1 Ch. 409.**

**283. — On delivery in writing to town clerk & payment of fine.]—R. v. WIGAN CORPN., No. 282, ante.**

**284. — Necessity for declaration by council that office vacant.]—An alderman of a borough whose turn it is to go out of office on Nov. 9, & who resigns office on the previous day, but whose office has not been declared vacant by the council in accordance with 1882 Act, s. 36 (2), is in the position of one who has resigned office but whose office is not vacant, & being an “outgoing alderman” within 1882 Act, s. 60 (3), is disqualified to vote at the annual election of aldermen on Nov. 9.—PEASE v. LOWDEN, [1899] 1 Q. B. 386; 68 L. J. Q. B. 239; 79 L. T. 672; sub nom. Re MUNICIPAL ELECTION PETITION, PEASE v. LOWDEN, 63 J. P. 56; sub nom. Re PONTEFRAC T MUNICIPAL ELECTION PETITION, 15 T. L. R. 147, D. C.**

**Compare No. 289, post.**

**285. Whether valid—Resignation for supposed disqualification.]—R. v. WARAKER (1872), 36 J. P. Jo. 88.**

**See, also, No. 281, ante; No. 288, post.**

**286. Amount of fine — Where no amount fixed by bye-law.]—(1) Although the town council may not have passed any bye-law fixing the amount to be paid by way of fine, as required by 1835 Act, & 6 & 7 Will. 4, c. 104, s. 8, yet that will not deprive a councillor of the power of resigning his seat, on tendering the highest sum which could have been enforced by such bye-law.**

**(2) The acceptance by a town councillor of a place of profit in the gift of the council operates ipso facto as a cessation to be a town councillor & therefore, though there be no power to resign, yet a town councillor is eligible to such an office.—STAINLAND v. HOPKINS (1841), 5 J. P. 755.**

**287. Withdrawal of resignation — Whether possible.]—R. v. WIGAN CORPN., No. 282, ante.**

**288. Resignation by unqualified officer involuntarily elected—After application quo warranto—**



**Liability for costs.]—**M., an unqualified person, was elected a town councillor of the borough of B., without having taken any part in the election; but on being informed by the town clerk, that if he did not accept the office he would be liable to a fine, he signed the usual declaration. Upon application for a *quo warranto*, he sent in a written resignation to the town clerk, which was accepted:—*Held*: the relator was not entitled to the costs of the application.—*R. v. MAY* (1851), 2 L. M. & P. 144; 20 L. J. Q. B. 268; 15 Jur. 129.

*Annotations:—**Reid. R. v. Sidney* (1851), 2 L. M. & P. 149; *R. v. Hartley* (1854), 22 L. T. O. S. 221.

*See, generally, CROWN PRACTICE, Vol. XVI., p. 371, Nos. 2074–2081.*

—*See, also, Nos. 281, 285, ante.*

#### G. Avoidance.

*See 1882 Act, s. 39.*

**By bankruptcy.]—***See BANKRUPTCY, Vol. IV., p. 177, Nos. 1644, 1647.*

**289. By composition with creditors — Necessity for declaration by council that office void.]—**J., a town councillor of the borough of W., whose term of office would expire by lapse of time on Nov. 1, 1876, on June 29, in that year filed a petition for liquidation of his affairs by arrangement. On July 29, a statutory majority of his creditors by special resolution declared that his affairs should be liquidated by arrangement, & his discharge was granted to him on Sept. 29. No declaration was made by the council under 1835 Act, s. 52, that the office held by him was void under that sect., but he did not, in fact, act as town councillor after the institution of these proceedings with his creditors until after Nov. 1. On Nov. 1, the offices of three other councillors besides that of J. would become vacant by lapse of time, & for these four vacancies seven candidates presented themselves for election. In consequence of all the candidates being nominated by one & the same person, contrary to the provisions of the Act regulating the elections, the mayor declared no one to be duly nominated. Thereupon the returning officer, under 22 Vict. c. 35, s. 8, sub-sect. 4, declared that the retiring councillors, among whom he included J., had been re-elected to their offices. Upon a rule for a *mandamus* calling upon the mayor, etc., of W. to declare the office of councillor lately held by J. void, as required by 1835 Act, s. 52, & to proceed to the election of another person to supply such vacancy:—*Held*: (1) the office “lately held by J.” was in fact filled up, & the time had, therefore, passed when it could be declared void; (2) the *mandamus* would not lie for a fresh election, for inasmuch as the council had not declared J.’s office void under 1835 Act, s. 52, the office was still full on Nov. 1; & J. was, therefore, a retiring councillor within 22 Vict. c. 35, s. 8 (4), & under that sect. was properly declared to be re-elected to his office.—*R. v. WELCHPOOL CORPN.* (1876), 35 L. T. 594; 41 J. P. 424; *R. v. Beer*, [1903] 2 K. B. 693.

*Compare No. 284, ante.*

**290. — Composition “by deed” — What is included.]—**Pltf., an alderman of a borough, made a composition with his creditors, but executed no composition deed; nor were any composition proceedings taken under Debtors Act, 1869 (c. 62). He had, however, executed a bill of sale, duly registered, to a person not a creditor, to secure a sum of money advanced by him to meet the amount of the composition. A meeting of the corpn. of the borough having been summoned by notice for

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the purpose of declaring the office held by pltf. void under 1835 Act, s. 52, & Debtors Act, 1869 (c. 62), s. 21, & electing a successor. An injunction was granted, at the instance of pltf., restraining the corpn. from proceeding under their notice, on the ground, that, having regard to the express words of the sects., pltf. had not become disqualified from holding office.—*ASLATT v. SOUTHAMPTON CORPN.* (1880), 16 Ch. D. 143; 50 L. J. Ch. 31; 43 L. T. 464; 45 J. P. 111; 29 W. R. 117.

*Annotations:—**Mentd. Donahoo v. L. G. Board* (1882), 46 L. T. 300; *North London Ry. v. G. N. Ry.* (1883), 11 Q. B. D. 30; *London & Blackwall Ry. v. Cross* (1886), 31 Ch. D. 354; *Holland v. Dickson* (1888), 37 Ch. D. 669; *Richardson v. Methley School Board*, [1893] 3 Ch. 510; *Harris v. Beauchamp*, [1894] 1 Q. B. 801.

**291. — Resignation tendered before petition filed—No action taken on resignation.]—**S. served as town councillor for the T. ward from 1877 to July 21, 1880, when he left at the office of the town clerk a notice of resignation addressed to the mayor & council. No action was taken thereon by the council, & no fine paid or tendered by S. S. did not sit in council or vote after the date of the notice. On the following day S. filed a petition for liquidation. In Aug. a composition was accepted by the creditors of S. S. did not pay his debts in full. At an election of town councillors for the T. ward in Nov. 1884, S. was returned. The objection was then taken that S. was disqualified, he having been in liquidation when he was a member of the council, & not having paid 20s. in the pound:—*Held*: (1) the objection was valid; (2) where a statute provided that in a given event persons should be re-eligible for election, that was tantamount to saying that they should be disqualified until they complied with the conditions of requalification.—*FUTCHER v. SAUNDERS* (1885), 49 J. P. 424.

**292. — Resignation tendered after composition — Whether effective.]—***HARDWICK v. BROWN*, No. 281, *ante.*

—*Compare Nos. 10–12, ante.*

**293. Duration of disqualification — Effect of statutory provision for eligibility.]—***FUTCHER v. SAUNDERS*, No. 291, *ante.*

*See, also, No. 289, ante.*

**By absence.]—***Compare Nos. 23–26, ante.*

**By resignation.]—***See Sect. 1, sub-sect. 7, F., ante.*

**Declaration that office void.]—***See 1882 Act, s. 39 (2).*

**294. — Necessity for.]—**Previous to the annual election of councillors in Nov., in a borough divided into wards, the mayor published a notice purporting to be made with the concurrence of the aldermen & assessors, to the effect that two vacancies were to be filled up, one in the room of A., going out by rotation, & one in the room of C., who had been declared a bkpt. The council had not declared the office of C. to be void, or given any notice thereof. At the election two hundred & fifty burgesses voted for two candidates jointly, & one hundred & twenty voted for a third singly:—*Held*: the votes given for the two candidates were thrown away, & the third candidate to whom the one hundred & twenty votes were given was duly elected.—*R. v. LEEDS CORPN.* (1838), 7 Ad. & El. 963; 3 Nev. & P. K. B. 145; 1 Will. Woll. & H. 23; 7 L. J. Q. B. 80; 2 J. P. 71; 2 Jur. 345; 112 E. R. 733.

**295. — —.]—***HARDWICK v. BROWN*, No. 281, *ante.*

**296. — —.]—***R. v. WELCHPOOL CORPN.*, No. 289, *ante.*

**On bankruptcy of office.] —***See, now, Bankruptcy Act, 1883 (c. 52), s. 34.*



**Sect. 1.—The municipal corporation: Sub-sect. 8, A. & B. (a) & (b) i.]**

**SUB-SECT. 8.—CORPORATE PROPERTY.**

**A. In General.**

**Definitions — Corporate land.]—See 1882 Act s. 7 (1).**

**— Corporate stock.]—See 1882 Act, s. 118 (1).**

**297. What is included — Town bell.]—Under 1835 Act, s. 65, the council have power to require from a common crier, as a ministerial or executive officer of the borough, the delivery up of the town bell, as part of the goods of the body corporate; such crier having been appointed by the old corp., & having been removed from office upon the election of the council under the Act, & in case of refusal, he may be proceeded against by summary conviction before the justices of the borough, in the manner pointed out in s. 60.—BAYLIS v. STRICKLAND (1840), 1 Man. & G. 591; 1 Scott, N. R. 540; 10 L. J. M. C. 61; 4 Jur. 823; 133 E. R. 469.**

**Annotation:—Mentd. Jones v. Gurdon (1842), 2 Q. B. 600.**

**— Hustings.]—See No. 299, post.**

**298. Nature of estate—In land.]—True it is, that land given to a mayor & commonalty is fee simple, & the reason is because they are perpetual, & if the estate be not limited, they shall take according to their continuance (DODGE-RIDGE, J.).—MARSH v. NEWMAN (1625), Poph. 163; 79 E. R. 1261; *sub nom.* NEWMAN v. MARSH, Lat. 14.**

**299. Vesting of property — In whom vested.]—Hustings were erected in a borough at the expense of the candidates for a seat in Parliament. They were much injured by the populace, & repaired by the candidates. The mayor brought an action under Seditious Meetings Act, 1817 (c. 19), against two of the inhabitants to recover the amount of the damages:—*Held*: the property in the hustings was not in the mayor, who, therefore, could not maintain an action, even if it had been a building.—ALLEN v. AYRE (1823), 3 Dow. & Ry. K. B. 96; 1 L. J. O. S. K. B. 204.**

**300. — Under P. H. Act, 1875, s. 310.]—(1) The words "council of such borough" in the above sect. mean the mayor, aldermen, & burgesses acting by the council.**

**(2) The effect of the sect., therefore, is that, when the district of a local board is incorporated as a borough all the property of the board, including property acquired by them by purchase after the passing of the Act, vests at once in the corp., without the necessity of any conveyance or transfer. In such a case the Bank of England are bound, on the request of the corp., to register in their corporate name Govt. stock previously standing in the books of the bank in the name of the local board, without requiring any transfer to be executed.—HYDE CORPN. v. BANK OF ENGLAND (1882), 21 Ch. D. 176; 51 L. J. Ch. 747; 46 L. T. 910; 30 W. R. 790.**

**Annotation:—As to (1) *Appl. Re Leeds Institute of Science, Art & Literature & Leeds City Council*, [1909] 1 Ch. 500.**

**See, generally, CORPORATIONS, Vol. XIII., pp. 369, 370, Nos. 1010 *et seq.*; & compare EDUCATION, Vol. XIX., p. 554, No. 10.**

**301. — Under P. H. Act, 1875, s. 310—Whether conveyance or transfer necessary.]—HYDE CORPN. v. BANK OF ENGLAND, No. 300, *ante*.**

**— Soil of highways.]—See HIGHWAYS, Vol. XXVI., pp. 329 *et seq.***

**— Property vested in members of corporation as governors of charity.]—See No. 252, *ante*.**

**302. Whether property held as trustees — Common vested in corporation—Subject to common rights of freemen.]—The municipal corp. of L. as lords of the manor, had the soil of a common vested in them, while the freemen had a right of common only. The corp. repaired the fences, appointed wardens, & managed the common, but they derived no profit from it, the expenses being paid out of the corporate funds, & there being no return:—*Held*: the corp., & not the freemen, were ratable, but inasmuch as they derived no profit the rate must be reduced to nothing.**

**Since the Municipal Corporation Act the freemen have been entirely detached from the corporate body. They are now no longer a part of the municipal corp. (COCKBURN, C.J.).—LINCOLN CORPN. v. HOLMES COMMON OVERSEERS (1867), L. R. 2 Q. B. 482; 8 B. & S. 344; 36 L. J. M. C. 73; 16 L. T. 739; 31 J. P. 645; 15 W. R. 786.**

**Annotations:—*Reid. R. v. Rhymney Ry.* (1869), L. R. 4 Q. B. 276; *Winstanley v. North Manchester Overseers*, [1910] A. C. 7. *Mentd. Hare v. Putney Overseers* (1881), 7 Q. B. D. 223; *L. C. C. v. Lambeth Churchwardens*, etc., [1896] 2 Q. B. 25; *Roberts v. Poplar Metropolitan Borough Assessment Committee*, [1922] 1 K. B. 25.**

**— See, also, CORPORATIONS, Vol. XIII., p. 370, Nos. 1020, 1021.**

**303. Protection of property — Rights to prevent acquisition of easement of light—Over open spaces held as trustees.]—A local authority acting under statutory powers is entitled by a screen or other suitable means to prevent anything which may interfere with the free use by the public of an open space of which it is the trustee, & to prevent thereby the acquisition of an easement of light or other adverse right over such space by an adjoining owner.—PADDINGTON CORPN. v. A.-G., [1906] A. C. 1; 75 L. J. Ch. 4; 93 L. T. 673; 70 J. P. 41; 54 W. R. 317; 22 T. L. R. 55; 50 Sol. Jo. 41; 4 L. G. R. 19, H. L.; *reversg.* S. C. *sub nom.* BOYCE v. PADDINGTON BOROUGH COUNCIL, [1903] 2 Ch. 556, C. A.**

**Annotations:—*Mentd. Heath's Garage v. Hodges* (1915), 14 L. G. R. 195; *Hurley v. Stepney B. C.* (1923), 67 Sol. Jo. 767.**

**See, generally, OPEN SPACES.**

**304. Alienation of property before incorporation — Right of corporation to question.]—A Royal Charter must be assumed to be valid, unless proceedings are taken to set it aside; & the Ct. of Ch. is not the proper ct. in which to try the validity of the charter.**

**The 1835 Act enables the town council of boroughs mentioned in the schedule to call in question any collusive alienation of the corporate property prior to June 5, 1835. Municipal Corporations Act, 1837 (c. 78), s. 49, enables the Crown to grant charters to other towns, extending to them "all the powers & provisions" of 1835 Act. The Crown having granted such a charter in 1861:—*Held*: all the clauses of the first Act were applicable & the right of questioning collusive alienation could be carried back to the date of the charter, but not further.—A.-G. v. AVON CORPN. (1863), 33 Beav. 67; 2 New Rep. 8 L. T. 594; 27 J. P. 757; 9 Jur. N. S. 1117; 11 W. R. 709; 55 E. R. 291; *on appeal, sub nom.* A.-G. v. AVON (OTHERWISE ABERAVON) CORPN., 3 De G. J. & Sm. 637, L. JJ.**

**Annotation:—*Mentd. Evans v. Bagshaw* (1870), 39 L. J. Ch. 145.**

**305. — Information brought before grant of charter.]—If there be no title to sue at the time of filing an original bill or information, a decree cannot be founded upon a subsequently acquired right brought forward by supplemental**



bill, for there must be a right of suit when the litigation commenced; & a supplemental bill is merely the continuance of a suit already instituted.

The portreeve, etc., of A. were a corp'n. from time immemorial, owning freehold estates & a town hall, & were not made subject to the provisions of 1835 Act. By a local Act, the portreeve, etc., were empowered to construct a market, market-place, etc., & to levy & receive rents & tolls, which were to be applied, (a) in defraying the costs of obtaining the act; (b) in making & maintaining the buildings & in paying off borrowed moneys; & (c) to such objects as the portreeve, etc., should think fit. In 1860, pending an application by the inhabitants for a charter of incorporation, the portreeve, etc., sold all their property, except the town hall & the market, etc., constructed under the above-mentioned Act, & early in 1861, after an intimation that the Lord President would recommend the Queen to grant the charter, they sold the town hall, & agreed to let the rents & tolls of the market to J. for fifty years, at an annual rent of £5 in consideration of a fine of £600.

On Mar. 15, 1861, the original information was filed, praying a declaration that the portreeve, etc., were not authorised so to demise or lease the rents & tolls, & that any such demise or lease would be a breach of trust; & praying an injunction accordingly. On July 2, 1861, a new charter was granted to the inhabitants under Municipal Corporations Amendment Act, & on Feb. 6, 1862, the information was amended by making the mayor, aldermen & burgesses under the new charter defendants, & praying a declaration that the markets, market-place, etc., & the lands belonging thereto, & all rights to levy rents & tolls, & all other the property & rights of the portreeve, etc., had become vested in the mayor, etc., under 1835 Act, etc.; that the portreeve, etc., might be decreed to deliver up possession thereof, & that inquiries & accounts might be directed to ascertain what property belonged to the portreeve, etc., at the date of the new charter. The portreeve, etc., insisted that there was no trust, for the benefit of the inhabitants, & the ct. having come to the conclusion that this was so except as to the property under the local A. Act:—*Held*: (1) a decree in conformity with the prayer of the amended information, must be discharged; (2) no relief to enforce rights arising under the new charter could be given upon an information filed before the grant of that charter; & the only decree that could be made upon the information was to restrain leases of the market property upon fine.—*A.-G. v. AVON (OTHERWISE ABERAVON) CORPN.* (1863), 3 De G. J. & Sm. 637; 2 New Rep. 564; 33 L. J. Ch. 172; 9 L. T. 187; 27 J. P. 757, 758; 11 W. R. 1050; 46 E. R. 783, L. J. J.

*Annotation*:—As to (1) *Reid. Evans v. Bagshaw* (1870), 39 L. J. Ch. 145.

**306. Rating — Property producing no profit—Common land subject to common rights of freemen.]**—*LINCOLN CORPN. v. HOLMES COMMON OVERSEERS*, No. 302, *ante*.

*See, generally, RATES & RATING.*

#### VII. SECT. 1, SUB-SECT. 8.—

##### B. (a).

*n. By purchase—Power to acquire.]*—*Having regard to 8 Vict., No. 7,* and the corp'n. of the city that corp'n. has power

*o. — — —.]*—Pltf. brought action on behalf of himself & all other ratepayers of the city of T. for a declaration that deft. corp'n. was not legally empowered to purchase certain land, alleged to have been purchased for the purposes of erecting thereon an isolation hospital:—*Held*: if the land was not purchased "for the use of the corp'n." or "the public use of the municipality," the Crown also could object. Action dismissed with

*costs.*—*VERNER v. TORONTO CITY* (1912), 21 O. W. R. 170; 3 O. W. N. 586.—*CAN.*

#### B. Real Property.

##### (a) Acquisition.

*By purchase—Power to acquire.]*—*See* 1882 Act, ss. 105, 107.

*Open spaces & recreation grounds.]*—*See* OPEN SPACES.

*Compulsory acquisition.]*—*See, generally, Part II., Sect. 5, ante.*

*Consent of Ministry of Health.]*—*See* 1882 Act, s. 107 (i); 1888 Act, s. 72; Ministry of Health Act, 1919 (c. 21).

**307. — Restrictive covenants—Power to enter into—Covenants limiting general statutory powers.]**—When a corp'n. purchases land by agreement for any of the purposes for which it is authorised to acquire land by Public Health or other public Acts, or by its special local Acts, it is not *ultra vires* for the corp'n. to enter into covenants with the vendor restricting the erection of buildings upon the land purchased, which it might erect under other powers given to it for the benefit of the public, provided that such restrictions do not prevent the user of the land for the particular purposes for which it was acquired.—*STOURCLIFFE ESTATES CO., LTD. v. BOURNEMOUTH CORPN.*, [1910] 2 Ch. 12; 79 L. J. Ch. 455; 102 L. T. 629; 74 J. P. 289; 26 T. L. R. 450; 8 L. G. R. 595, C. A.

**308. By lease—Short lease of foreshore—For purposes of authorised oyster fishing.]**—Where a municipal corp'n., empowered by charter to hold lands, tenements & hereditaments, & goods & chattels, has obtained an order from the Board of Trade conferring a right of regulating an oyster fishery under Sea Fisheries Act, 1868 (c. 45), it may lawfully take a lease of the foreshore of the fishery to enable it to carry out the purposes of the order.—*TRURO CORPN. v. ROWE*, [1902] 2 K. B. 709; 71 L. J. K. B. 974; 87 L. T. 386; 66 J. P. 821; 51 W. R. 68; 18 T. L. R. 820, C. A.

*Annotation*:—*Mentd. Foster v. Warblington U. D. C.*, [1906] 1 K. B. 648.

*Whether subject to Mortmain Acts.]*—*See* CHARITIES, Vol. VIII., p. 284, Nos. 595, 596, 600.

**309. Restraint on—Corporation closely connected with governing body of charity—Acquisition by corporation from charity restrained.]**—A hospital having a corporate character was established in close connection with a municipal corp'n. The ex-mayor was to be the governor, the masters & assistants were elected from the corp'n., & the mayor & aldermen were visitors:—*Held*: the corp'n. & hospital were, in equity, incapable of contracting, & a purchase by the corp'n. of property belonging to the hospital was set aside.—*A.-G. v. PLYMOUTH CORPN.* (1845), 9 Beav. 67; 15 L. J. Ch. 109; 8 L. T. O. S. 34; 50 E. R. 268.

##### (b) Alienation.

###### i. In General.

*Approval by Ministry of Health.]*—*See* 1882 Act, ss. 108 (1) (2), 109; 1888 Act, s. 72; Ministry of Health Act, 1919 (c. 21), s. 3 (1).

*costs.*—*VERNER v. TORONTO CITY* (1912), 21 O. W. R. 170; 3 O. W. N. 586.—*CAN.*

*p. — — —.]*—*PICTOU COUNTY v. NEW GLASGOW TOWN* (1915), 48 N. S. R. 424.—*CAN.*

#### PART VII. SECT. 1, SUB-SECT. 8.—

##### B. (b) i.

*q. Necessity for bye-law.]*—To give legal authority for the alienation of



**Sect. 1.—The municipal corporation: Sub-sect. 8, B. (b) i., ii. & iii.]**

— **Necessity for—To restrictive covenants.]—**  
See No. 314, *post*.

**Effect of local Act.]—**See No. 312, *post*.

**Grant of new lease on surrender of old.]**  
—See No. 324, *post*.

**To mortgage.]—**See Nos. 326, 327, *post*.

**310. — Effect of—Limited to transaction for which approval sought.]—**The consent of the Lords Comrs. of the Treasury to the alienation of the property of a corp'n. required by 1835 Act, s. 94, can authorise no alienation or charge of the corporate property further than is specified in the memorial on which it is founded.—**ARNOLD v. GRAVESEND CORPN., PALLISTER v. GRAVESEND CORPN.** (1856), 25 L. J. Ch. 776; 27 L. T. O. S. 282; 20 J. P. 611; 2 Jur. N. S. 706; 4 W. R. 763.

**Annotation:—**Reid. *Davis v. Leicester Corp'n.*, [1894] 2 Ch. 208

See, also, No. 314, *post*.

**311. Illegal alienation — Whether Statutes of Limitation apply.]—**In the year 1850 an Act was passed to enable comrs. (appointed under a local Act), for managing the affairs of B. to purchase the P. estate. By the Act, the comrs. were expressly prohibited from letting or selling any part of the property to be so acquired by them without the consent of the vestry. In 1854, the town of B. was incorporated, & in 1855 the powers & property of the comrs. under the local Act were transferred to the corp'n. Down to the year 1853 the guardians of the poor of B. had had the use of offices in the town hall. On Mar. 7, in that year they removed (by arrangement with the comrs.) to buildings which formed part of the P. estate, in the adaptation of which to their purposes they expended a considerable sum of money; & they continued in the exclusive occupation of their new offices without payment of rent or any acknowledgment of title in the comrs. or the corp'n., down to Nov. 19, 1879, when an action was brought by the latter to recover possession:—**Held**: inasmuch as the guardians had had the exclusive possession of the offices for more than twelve years, assuming their relation to the corp'n. to have been that of tenants at will, the claim of the corp'n. was barred by Stat. Limitations notwithstanding the prohibition against letting or selling without the consent of the vestry, contained in the local Act.—**BRIGHTON CORPN. v. BRIGHTON GUARDIANS** (1880), 5 C. P. D. 368; 49 L. J. Q. B. 648; 44 J. P. 683.

**Annotations:—**Consd. *Bobbett v. S. E. Ry.* (1882), 9 Q. B. D. 424. *Wimbledon & Putney Commons Conservators v. Nicol* (1894), 10 T. L. R. 247.

— **Before incorporation.]—**See Nos. 304, 305, *ante*.

## ii. By Sale.

**312. Necessity for approval — Ancient estates vested in former corporation—Effect of local Act.]—**The approval of the Local Govt. Board, to the sale of corporate land required by 1882 Act, as amended by 1888 Act, is still necessary to the sale by the Plymouth Corp'n. of lands forming part of the ancient estates which were vested in the

former corp'n. by virtue of an Act of 18 Hen. 6. The result of Local Govt. Board's Provisional Order Confirmation (No. 18), Act, 1914 (c. clxxxiii), & the local Act of 1915, has been to place the present corp'n. of Plymouth in the same position with regard to the various properties derived from the former corp'n. as that corp'n. occupied apart from the provisions of these Acts. But the restrictions on sale of their ancient lands was not, as regards the former corp'n., removed by s. 13 of the local Act of 1898, the scope of that Act being limited to the statutory undertakings of the corp'n. & the object of s. 13 being only to free land acquired for such undertakings &—*semble*—only from obligations imposed by such Acts as the Lands Clauses Acts.—**Re PLYMOUTH CORPN. & WALTER**, [1918] 2 Ch. 354; 87 L. J. Ch. 635; 119 L. T. 626; 82 J. P. 273; 16 L. G. R. 793, C. A.

—.]—See, generally, Sect. 1, sub-sect. 8, B. (b) i., *ante*.

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**314. Sale subject to restrictive covenants—Whether binding on corporation—Statutory approval of covenants not obtained.]—**In Mar. 1888, a municipal corp'n. offered for sale by auction, in lots some of their corporate land, subject to special conditions restricting the right of each purchaser to build on his lot. At the auction none of the lots were sold. In June, 1888, pltf. entered into a contract to purchase two of the lots, subject to the conditions. The proper steps were taken to obtain the approval of the Treasury, which is required by 1882 Act, ss. 108, 109, to enable a municipal corp'n. to sell their corporate land; & that approval was given in the ordinary way by two Lords of the Treasury joining in the conveyance to pltf. The conveyance contained a covenant by pltf. in the terms of the restrictive conditions, but there was no reference to those conditions, or to the previous abortive sale. There was no covenant by the corp'n. binding them by the conditions as regarded the unsold lots. & the Treasury were not, before they gave their approval, informed that the corp'n. would be liable to any such restriction. The corp'n. afterwards contracted with the trustees of a church to sell to them two others of the lots, & authorised them to build on those lots in a manner inconsistent with the conditions:—**Held**: (1) if the corp'n. had been ordinary individuals, they would have been bound by the original building scheme, & they, & the trustees, who had purchased with notice of the scheme, must have been restrained from building or permitting building on the lots purchased by the trustees, in a manner inconsistent with the conditions; but (2) the Treasury had only given their approval to what was to be found in the conveyance, & they had not sanctioned the disposition by the corp'n. in favour of pltf. of any right over other land than that which was con-

the property of a municipal corp'n., it is necessary that a bye-law of the corp'n. should be passed, even though thereto has been obtained originally in an informal manner.—**GRAND JUNCTION RY. CO. v. COUNTY OF HASTINGS** (1877), 25 Gr. 40.—CAN.

## PART VII. SECT. 1, SUB-SECT. 8.—B. (b) ii.

**r. Sale by committee of council—Council's authority necessary.]—**A committee of a municipal council cannot, unless authorised by the council, sell corporate property, & if they do so

an action lies against them by the corp'n. for any loss incurred thereby.—**TOWN OF NEW GLASGOW v. BROWN** (1907), 39 S. C. R. 586.—CAN.

**t. Sale to other than highest bidder.]—**Where the action of a municipal corp'n. in selling real estate of the



veyed to him. & consequently neither the corpn. nor the trustees could be restrained from violating the conditions.—*DAVIS v. LEICESTER CORPN.*, [1894] 2 Ch. 208; 63 L. J. Ch. 440; 70 L. T. 599; 42 W. R. 610; 10 T. L. R. 385; 38 Sol. Jo. 362; 7 R. 609, C. A.

*Annotations*:—*As to* (1) *Reid*. *Holford v. Acton U. C.*, [1898] 2 Ch. 240; *Canterbury Corpn. v. Cooper* (1908), 99 L. T. 612. *As to* (2) *Reid*. *Lambeth Corpn. v. South London Electric Supply Corpn.* (1907), 96 L. T. 440.

**Application of proceeds of sale.**—*See* 1882 Act, ss. 114, 115.

**315. — Discharge of debts accruing since 1835 Act.**—Where money, the produce of the sale of corpn. lands, has been paid into ct. under an Act of Parliament authorising the ct. to make such order concerning it, for the benefit of the parties interested, as the ct. shall think fit, it is not competent for the ct., since above Act, to order the principal money to be paid in discharge of corpn. debts accruing since the passing of that Act. The dividends only can be applied for that purpose. The trusts of above Act are applicable to personal as well as real estate.—*Ex p. HYTHE CORPN.* (1840), 4 Y. & C. Ex. 55; 160 E. R. 917.

*Annotation*:—*Reid*. *A.-G. v. Newcastle-upon-Tyne Corpn. & N. E. Ry.* (1889), 60 L. T. 791.

**316. — Discharge of incumbrance—On other corporation lands.**—All the lands of a municipal corpn. are held “upon the same or the like uses, trusts or purposes” within Lands Clauses Consolidation Act, 1845 (c. 18), s. 69, so that money paid for the compulsory purchase of one part of the lands of a municipal corpn. may be applied in the redemption of an incumbrance upon another part of the lands of the same corpn.—*Re EASTERN COUNTIES RY. CO., Ex p. CAMBRIDGE CORPN.* (1848), 6 Hare, 30; 5 Ry. & Can. Cas. 204; 12 Jur. 450; 67 E. R. 1069.

**317. — Payable out of borough fund.**—Money paid into ct. under Lands Clauses Consolidation Act, 1845 (c. 18), s. 69, by a railway co., for the purchase of lands belonging to the corpn. of D., was ordered to be applied in the payment off of mtges. of certain tolls & of bonds which had been given by the corpn. for moneys borrowed under the provisions of Baths & Washhouses Act, 1846 (c. 74), s. 21, & were payable out of the borough fund, which fund was largely composed of the rents & profits of the real estates of the corpn.—*Re DERBY MUNICIPAL ESTATES* (1876), 3 Ch. D. 289; 24 W. R. 729.

**318. — Discharge of sums borrowed—Under Baths & Washhouses Act, 1846 (c. 74)—Payable out of borough fund.**—*Re DERBY MUNICIPAL ESTATES*, No. 317, *ante*.

**319. — Land subject to right of pasturage for freeman—Right of freemen to be heard on application for scheme.**—A railway co. took possession of lands belonging to the corpn. of L., & over which the freemen of L. had a right of pasturage. The co. afterwards contracted with the corpn. to purchase the lands, & by an Act of Parliament it was provided, that such part of the purchase-money should be appropriated for the corpn., as the Ct. of Ch., upon an application by them in the matter of the Act, *ex p.* the corpn., should direct, & that the residue should be appropriated for the permanent benefit of the freemen, as the ct. should direct; & that seven days’ notice of

such application should be given by fixing the same at the town hall of L.:—*Held*: a sufficient number of the freemen to form a fair representation of the whole should be served with a petition for appropriating this purchase-money.—*Ex p. LINCOLN CORPN.* (1852), 6 Ry. & Can. Cas. 738; 21 L. J. Ch. 621; 18 L. T. O. S. 298; 16 Jur. 756.

**320. — Not divisible among freemen.**—Every resident freeman of the borough of B. had the right of annually turning on to the freemen’s common, allotted under an Inclosure Act of 1795 to the corpn., as trustees of the allotment, in lieu of certain rights of common of resident freemen, one head of stock, for a period fixed from time to time by the town council, subject to a payment annually fixed by the town council for every head of stock so turned on; this right was transferable.

A portion of the freemen’s common having been taken by a railway co., on a bill to obtain the direction of the ct. as to the application of the purchase-money:—*Held*: the present resident freemen were not entitled to have the corpus of the purchase-money divided amongst them, but that the proper course would be to invest the money in land, to be held in trust for the freemen from time to time resident within the borough, & in the meantime the money ought to be invested, & the dividends paid to such residents at the same time in each year as they had been accustomed to enter upon the enjoyment of their rights of common.—*NASH v. COOMBS* (1868), L. R. 6 Eq. 51; 37 L. J. Ch. 600; 32 J. P. 612; 16 W. R. 663.

*Annotations*:—*Reid*. *Richards v. De Winton, Richards v. Evans*, [1901] 2 Ch. 566. *Mentd.* *Austin v. Amhurst* (1878), 26 W. R. 312.

### iii. By Lease.

**Renewal of lease.**—*See* 1882 Act, s. 110.

**321. — Construction of statutory power.**—(1) 1835 Act, s. 95, which enables municipal corpn. to renew leases on a fine, in cases where sanctioned “by ancient usage or by custom or practice,” at “a fine certain,” or where they “have ordinarily made renewal” upon “an arbitrary fine,” is to be construed liberally.

(2) The word “renewal,” in 1835 Act, does not mean a mere custom to let on lease at different rents, & though the renewals need not be on precisely the same terms, there must be such an uniformity as to show that the same lease has been renewed.

(3) Leases were granted by a municipal corpn. of the same property in 1778, 1798 & 1824, to the same lessee & his assigns, for twenty-one years, at a rent of 5s. In the two last instances alone a fine of 7s. 6d. had been taken. The covenants varied, & there was an interval of six years between the second & third, during which there was a yearly tenancy:—*Held*: the case did not come within s. 95 of Act, & a renewal could not be granted at an undervalue & on a fine.—*A.-G. v. GREAT YARMOUTH CORPN.* (1855), 21 Beav. 625; 25 L. T. O. S. 5; 3 W. R. 309; 52 E. R. 1001.

**322. — Terms of renewal—Power to vary.**—*A.-G. v. GREAT YARMOUTH CORPN.*, No. 321, *ante*.

to a person other than the bidder is called in question:—*is sufficient if the ct. find*

justify their action.—*PHILLIPS v. BELLEVILLE CITY* (1906), 11 O. L. R. 256; 7 O. W. R. 49.—*CAN.*

**PART VII. SECT. 1, SUB-SECT. 3.—**  
**B. (b) iii.**

**a. Renewal of lease.**—To an action

against a municipal corpn. on their covenant to renew a lease, defts. pleaded that they had no authority to make the lease, as *pltf.*, who was an inhabitant of the town, well knew when he took it; & that before the term expired a decree was obtained



**Sect. 1.—The municipal corporation: Sub-sect. 8, B. (b) i., ii. & iii.]**

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See No. 314, *post*.

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*Annotations*:—**Reid**. *Richards v. De Winton*, *Richards v. Evans*, [1901] 2 Ch. 566. **Mentd.** *Austin v. Amburst* (1878), 26 W. R. 312.

### iii. By Lease.

**Renewal of lease.**—*See* 1882 Act, s. 110.

**321. — Construction of statutory power.**—(1) 1835 Act, s. 95, which enables municipal corps. to renew leases on a fine, in cases where sanctioned "by ancient usage or by custom or practice," at "a fine certain," or where they "have ordinarily made renewal" upon "an arbitrary fine," is to be construed liberally.

(2) The word "renewal," in 1835 Act, does not mean a mere custom to let on lease at different rents, & though the renewals need not be on precisely the same terms, there must be such an uniformity as to show that the same lease has been renewed.

(3) Leases were granted by a municipal corp. of the same property in 1778, 1798 & 1824, to the same lessee & his assigns, for twenty-one years, at a rent of 5s. In the two last instances alone a fine of 7s. 6d. had been taken. The covenants varied, & there was an interval of six years between the second & third, during which there was a yearly tenancy:—*Held*: the case did not come within s. 95 of Act, & a renewal could not be granted at an undervalue & on a fine.—*A.-G. v. GREAT YARMOUTH CORPN.* (1855), 21 Beav. 625; 25 L. T. O. S. 5; 3 W. R. 309; 52 E. R. 1001.

**322. — Terms of renewal**—Power to vary.]—*A.-G. v. GREAT YARMOUTH CORPN.*, No. 321, *ante*.

other than

if the ct. find  
faith, & that they had reasons before  
them  
considered good & sufficient to

justify their action.—**PHILLIPS v. BELLEVILLE CITY** (1906), 11 O. L. R. 256; 7 O. W. R. 49.—**CAN.**

**PART VII. SECT. 1, SUB-SECT. 8.**—**B. (b) iii.**

**a. Renewal of lease.**—To an action

against a municipal corp. on their covenant to renew a lease, defts. pleaded that they had no authority to make the lease, as pltf., who was an inhabitant of the town, well knew when he took it; & that before the term expired a decree was obtained



*Sect. 1.—The municipal corporation: Sub-sect. 8, B. (b) iii. & iv., C. & D.; sub-sect. 9. Sect. 2: Sub-sect. 1, A. & B. (a) & (b).]*

**323. — What constitutes—Whether grant six years after expiry of lease.]—A.-G. v. GREAT YARMOUTH CORPN., No. 321, ante.**

**324. Surrender of old lease in consideration of grant of new—New lease invalid for want of statutory approval—Whether surrender operative.]—In 1892 deft. occupied certain premises under a lease granted in 1599 for the term of three hundred years, which would expire in ordinary course in 1899. The lease was granted at a rent of 8*d.* per annum, but for more than a hundred years the tenant had paid no rent. An action was brought against deft. for rent, but a compromise was arrived at by which deft. agreed to surrender the lease for three hundred years if she were given a new lease for her life free of rent. Accordingly she handed the old lease to pltf. & received from them in 1892 what purported to be a lease of the premises to her, free of rent, but containing a covenant to repair. The approval of the Local Govt. Board to the lease of 1892 was not obtained, & that lease was, therefore, admittedly either void or voidable by reason of sect. 108 of 1882 Act, as amended by sect. 72 of 1888 Act. In an action to recover possession of the premises, deft. contended that the lease of 1892 was invalid, that the old lease had been surrendered in 1892, that Stat. Limitations began to run in 1892, & that, therefore, she was entitled to the freehold:—*Held*: (1) as the lease granted in 1892 was invalid there was no surrender of the old lease, & therefore, Stat. Limitations did not begin to run until the expiration of the old lease in 1899, & pltf. were entitled to recover possession of the premises; (2) pltf. were not estopped from setting up the invalidity of the lease of 1892 or from denying that the old lease had been surrendered.—*CANTERBURY CORPN. v. COOPER* (1909), 100 L. T. 597; 73 J. P. 225; 53 Sol. Jo. 301; 7 L. G. R. 908, C. A.**

#### iv. By Mortgage.

**325. Power to mortgage land—Whether surplus lands included—Lands acquired compulsorily for special purpose—Construction of local Act.]—(1) Where an Act of Parliament authorises a corpn. to mortgage its tolls, etc., this ct. had jurisdiction to appoint a receiver of them, though no such express power is given by the Act. But the receiver over such property ought not to have committed to him any powers of management which ought properly to be exercised by the corpn. itself.**

**(2) Where one clause of an Act of Parliament directs specific acts to be done, but which acts would be included in the general terms of a subsequent prohibitory clause, the former clause is not controlled by the latter.**

An Act of Parliament gave a corpn. compulsory powers of purchasing land to make a market. Sect. 29 required it to sell the surplus not wanted, & to give certain parties a right of pre-emption, the produce to be applied "to the purposes of the Act." Sect. 30 gave the corpn. power to borrow on debenture, sect. 32 power to mortgage or sell any of its land "for the purposes of the Act," & sect. 83 provided that the Act should not empower the corpn. to sell without the approbation of the Lords of the Treasury:—*Held*: (3) sect. 32

did not authorise a mtge. of the surplus land for the purposes of the Act, but it must be sold as directed by sect. 29; (4) a mtge. only of the lands of the corpn. required the assent of the Lords of the Treasury.

(5) Debenture-holders under the Act were to be entitled *pari passu*. One debenture-holder attempted to obtain an advantage over the rest by means of an additional mtge.:—*Held*: it was invalid.—*DE WINTON v. BRECON CORPN.* (1859), 26 Beav. 533; 28 L. J. Ch. 598, 600; 33 L. T. O. S. 296; 23 J. P. 627; 5 Jur. N. S. 882; 53 E. R. 1004; *subsequent proceedings* (1860), 28 Beav. 200.

*Annotations:—As to (4) Folld. Brecon Corpn. v. Seymour* (1859), 26 Beav. 548. *Generally, Mentd. Gardner v. L. C. & D. Ry.* (No. 1), *Drawbridge v. Same, Gardner v. Same* (No. 2), *Imperial Mercantile Credit Assocn. v. Same* (1867), 2 Ch. App. 201; *Date v. Gas Coal Collieries*, [1915] 2 K. B. 454.

**326. Necessity for statutory assent—Statute requiring assent to sale.]—DE WINTON v. BRECON CORPN., No. 325, ante.**

**327. — Effect on judgment—Whether a charge on corporation lands.]—Qu.: whether a judgment against a municipal corpn. operates as an equitable mtge. on its lands, 1835 Act forbidding a mtge., except with the assent of the Lords of the Treasury.—*BRECON CORPN. v. SEYMOUR* (1859), 26 Beav. 548; 28 L. J. Ch. 606; 5 Jur. N. S. 1069; 7 W. R. 380; 53 E. R. 1010.**

—*See, generally, Sect. 1, sub-sect. 8, (b) i., ante.*

**328. Priority between mortgagees—Attempt to prefer one debenture-holder by mortgage—Whether valid.]—DE WINTON v. BRECON CORPN., No. 325, ante.**

**329. Execution of judgment under mortgage—By appointment of receiver—Jurisdiction of court.]—DE WINTON v. BRECON CORPN., No. 325, ante.**

#### C. Charity Property.

*See* 1882 Act, ss. 133–135.

**What is charitable trust property.]—See, generally, CHARITIES, Vol. VIII., pp. 255 et seq.**

**330. — Property subject to payment for charitable purposes.]—Semble: if property be granted to a corpn., subject to a payment for charitable purposes imposed by the grantor, this falls under the provisions of s. 71 of 1835 Act; & s. 68 applies, not to such property, but to cases where the payment has been made by the gift of the corpn. itself.—*R. v. SANKEY* (1836), 5 Ad. & El. 423; 6 Nev. & M. K. B. 839; 5 L. J. K. B. 255; 111 E. R. 1226; *sub nom. R. v. WILLIAMS, SANKEY, ETC.*, 2 Har. & W. 275.**

*Annotation:—Mentd. Newington L. B. v. Eldridge* (1879), 12 Ch. D. 349.

**331. — Borough lands let to burgesses at low rent.]—A.-G. v. STAFFORD CORPN., [1878] W. N. 74.**

*See, also, No. 302, ante; CHARITIES, Vol. VIII., p. 373, Nos. 1807–1819; CORPORATIONS, Vol. XIII., p. 370, Nos. 1020, 1021.*

**Evidence of charitable trust.]—See CHARITIES, Vol. VIII., p. 335, Nos. 1227, 1228.**

**332. Vesting of property—In trustees other than the corporation—Property vested in trustees with power to fill vacancies—With consent of corporation.]—A charity estate was vested in trustees, with the direction, that when the number was reduced to six, other trustees to the number of twelve or fourteen should be appointed by the six survivors, with the advice & consent of the high**

against them in chancery of which pltf. had notice before this action, declaring that the land in question

was dedicated for a market square only, & that this lease had been granted without authority, & should

not be renewed:—*Held*: no defence.—*WADE v. BRANTFORD TOWN CORPN.* (1860), 19 U. C. R. 207.—CAN.

bailiff & capital burgesses of the borough, who should always be of the number so to be appointed. By a subsequent charter from the Crown, the corpn. was converted into a high bailiff, aldermen, & assistants; & afterwards by 1835 Act, into a mayor, aldermen, & burgesses:—*Held*: neither s. 71 nor s. 73 of the Act had any application to trustees of charity estates so chosen; the municipal corpn. of the borough appointed under the subsequent charter of the Crown, & also that appointed under the Act, stood in the place, & were entitled to the same right, power, authority, & discretion, with respect to the charity estate, as the body formerly composed of the high bailiff & capital burgesses.—*A.-G. v. PHILLIMORE* (1840), 9 L. J. Ch. 338.

**333.** ——— Members of corporation also trustees of charity.]—*DOE d. BRISTOL HOSPITAL (GOVERNORS) v. NORTON*, No. 252, *ante*.

**334.** ——— On failure to prove existence of separate trustees.]—*A.-G. v. CHESTER CORPN.* (1849), 1 H. & Tw. 46; 13 L. T. O. S. 397; 47 E. R. 1320, L. C.

*See, further*, CHARITIES, Vol. VIII., pp. 372, 373.

**335.** Control over appointment of trustees—Power of consent vested in former corporation—Whether divested by 1835 Act.]—*A.-G. v. PHILLIMORE*, No. 332, *ante*.

Liability for breach of trust—Committed by predecessors.]—*See* No. 247, *ante*.

———.]—*See, generally*, CHARITIES, Vol. VIII., pp. 379, 380, Nos. 1928–1930.

Sale of property.]—*See* CHARITIES, Vol. VIII., p. 356, Nos. 1528–1531.

By charity to corporation.]—*See* No. 309, *ante*.

#### D. Protection of Open Spaces.

*See* OPEN SPACES.

#### SUB-SECT. 9.—CORPORATION BOOKS AND DOCUMENTS.

Custody.]—*See* 1882 Act, s. 17 (3); & *generally*, CORPORATIONS, Vol. XIII., p. 348.

Right of inspection.]—*See, generally*, CORPORATIONS, Vol. XIII., p. 349.

——— By members.]—*See, generally*, CORPORATIONS, Vol. XIII., pp. 302 *et seq.*

——— In legal proceedings.]—*See, generally*, CORPORATIONS, Vol. XIII., pp. 422 *et seq.*

——— Criminal proceedings.]—*See* CRIMINAL LAW, Vol. XIV., p. 440, Nos. 4657, 4658.

**336.** ——— Of minutes of proceedings under 1882 Act, s. 233—Whether minutes of committees included.]—By above sect. a burgess has the right to inspect minutes of proceedings of the muni-

cipal council, but the Act does not give the right in terms to a burgess to inspect minutes of proceedings of a committee appointed by the council.

Burgesses of the city of M. being dissatisfied that on the minutes of the council no particulars appeared of the proceedings of committees approved by the council, claimed the right to inspect all minutes of such committees:—*Held*: the burgesses had the right to inspect only such minutes of committees as were actually laid before the council for their approval.—*WILLIAMS v. MANCHESTER CORPN.* (1897), 45 W. R. 412; 13 T. L. R. 299; 41 Sol. Jo. 388, D. C.

——— Enforcement.]—*See, generally*, CROWN PRACTICE, Vol. XVI., p. 316, Nos. 1283 *et seq.*

#### SECT. 2.—GOVERNMENT OF THE MUNICIPAL BOROUGH.

##### SUB-SECT. 1.—THE COUNCIL.

###### A. In General.

Constitution—Mayor, aldermen & councillors.]—*See* 1882 Act, s. 10 (2); Sub-sects. 2, 3, 4, *post*.

Exercises powers of corporations.]—*See* 1882 Act, s. 10.

Disqualification of members—For appointment to office under council.]—*See* 1882 Act, ss. 17 (1) 18 (1), 25 (2).

###### B. Powers.

###### (a) In General.

*See, generally*, P. H. Act, 1875, ss. 10, 310; 1882 Act, ss. 133–138.

**337.** County borough—Power to transfer functions under adoptive Acts—As urban district council—Under 1894 Act, s. 62.]—A county borough is an “urban district” within above sect., & the borough council are accordingly entitled to exercise the powers conferred by that sect. upon the council of an urban district of transferring to themselves the functions of authorities under the adoptive Act.—*KIRKDALE BURIAL BOARD v. LIVERPOOL CORPN.*, [1904] 1 Ch. 829; 73 L. J. Ch. 529; 91 L. T. 28; 68 J. P. 289; 52 W. R. 427; 20 T. L. R. 406; 48 Sol. Jo. 396; 2 L. G. R. 763.

Powers in respect of particular matters.]—*See* the cross references at the head of this Title.

###### (b) Limitation of Powers.

*See, generally*, CORPORATIONS, Vol. XIII., pp. 354 *et seq.*

**338.** General rule—Limited by constitution.]—A public body invested with statutory powers must take care not to exceed or abuse those powers, & must act in good faith within the limits of its authority.

Where a corpn. under Public Health, London, Act, 1891 (c. 76), constructs public conveniences,

from the city's service.—*BELLAMY v. CITY OF EDMONTON*, [1921] 1 W. W. R. 1132; 16 Alta. L. R. 213; 39 D. L. R. 611.—CAN.

g. Cost of illegal survey.]—The survey being illegal, the municipal council had no power to pass a bye-law to levy the cost of it.—*SUTTON VILLAGE OF PORT CARLING*, (1902), 22 C. L. T. 139; 3 O. L. R. 445; 1 O. W. R. 67.—CAN.

#### PART VII. SECT. 2, SUB-SECT. 1.—B. (b).

**338 i.** General rule—Limited by constitution.]—A municipal corpn. has only such authority as is given by the statute creating it.—*CITY OF SWIFT CURRENT v. LESLIE* (Sask.), [1920] 1

#### PART VII. SECT. 2, SUB-SECT. 1.—B. (a).

b. Exercise—What must be considered.]—In exercising its legislative powers dealing with public utilities, wherein considerable money has been invested over a long period of years, a municipal council cannot ignore the equities which have thus arisen.—*CUNNINGHAM v. CITY OF NEW WESTMINSTER* (1912), 18 B. C. R. 188.—CAN.

c. ———.]—*GROSVENOR ST. PRESBYTERIAN CHURCH TRUSTEES v. CITY OF TORONTO* (1919), 45 D. L. R. 327.—CAN.

d. Remuneration to own members—No power to grant.]—Under 12 Vict. township councils could not for the remuneration of their

own members, they not being “township officers.”—*Re WRIGHT & MUNICIPAL COUNCIL OF TOWNSHIP OF CORNWALL* (1851), 9 U. C. R. 442.—CAN.

e. ———.]—Municipal councillors cannot vote salaries to themselves, unless expressly authorised by statute.—*TOWN OF AMHERST v. READ*, *TOWN OF AMHERST v. FILLMORE* (1897), 40 N. S. R. 154.—CAN.

f. Power to grant bonus to municipal servant.]—Where a city's charter authorises the city council “to make bye-laws & regulations for the peace, order, good government & general welfare of the city,” the council may pay reasonable & *bona fide* bonuses to city employees upon their retirement



**Sect. 2.—Government of the municipal borough:**  
**Sub-sect. 1, B. (b) & (c) i.]**

the mere provision in connection with such a convenience of a subway capable of being used as a thoroughfare under a crowded street is not evidence of bad faith or excess of authority. To establish such a case it would have to be shown that the corpn. constructed the subway as a means of crossing the street under colour of providing public conveniences.—**WESTMINSTER CORPN. v. LONDON & NORTH WESTERN RY. CO.**, [1905] A. C. 426; 74 L. J. Ch. 629; 93 L. T. 143; 69 J. P. 425; 54 W. R. 129; 21 T. L. R. 686; 3 L. G. R. 1120, H. L.; *reusg.* S. C. *sub nom.* **LONDON & NORTH WESTERN RY. CO. v. WESTMINSTER CORPN.**, [1904] 1 Ch. 759, C. A.

**Annotations:**—**Apld.** **R. v. Brighton Corpn.**, *Ex p.* Shoosmith (1907), 96 L. T. 762. **Refd.** **Conron v. L. C. C.**, [1922] 2 Ch. 283.

**339. Powers conferred by statute — Use of land as recreation ground—Use for fair not included.]**—Where, by an Act of Parliament, a corpn. were directed to cause a piece of land to be drained & levelled, & kept in a proper condition for purposes of public recreation, the ct. restrained the corpn. by injunction from permitting a cattle fair to be held on such piece of land.—**A.-G. v. SOUTHAMPTON CORPN.** (1859), 1 Giff. 363; 29 L. J. Ch. 282; 1 L. T. 155; 24 J. P. 131; 6 Jur. N. S. 36; 65 E. R. 957.

**Annotations:**—**Distd.** **A.-G. v. Teddington U. C.**, [1898] 1 Ch. 66. **Apld.** **A.-G. v. Hanwell U. C.**, [1900] 2 Ch. 377.

**340. — Provision of promenade & carriage drive—No power to use as motor race-track.]**—By a local Act, passed in 1865, the corpn. of B. were authorised to make & maintain a carriage drive & a promenade, called "the parade," by the sea. It was provided by s. 13 of the Act that the carriage drive should be a public highway, by s. 17 that the parade should not be a public highway, & by s. 18 that the parade should be "kept & used exclusively for the purposes of recreation by persons on foot, & with or without carriages, in respect of which toll is authorised to be taken." Sect. 19 authorised a toll of twopence for every bath-chair, etc., or like carriage driven by human power. By a later Act, passed in 1899, additional works were authorised, including a new carriage way, absorbing the original parade, a new road with a tramway thereon alongside the said carriage way, & a new parade alongside the tramroad. By s. 7 it was provided that the corpn. might appropriate the whole or such part of the new parade as they might think fit for the exclusive use of foot passengers, & by s. 8 it was provided that the new road should be for the exclusive purpose of the tramways laid thereon. The parade was, in fact, used exclusively for foot passengers & bathchairs, etc. The corpn., in 1906, gave their approval to motor car races being held on the parade, & gave permission for part of the tramway road to be used for the purpose of cars returning to the starting point. They also undertook to keep the portion of the parade over which the races were to be run clear of traffic, & to erect a barrier & provide the necessary police control. This action was brought by the A.-G., at the relation of a ratepayer, for an injunction to restrain the corpn. from organising or promoting

motor races on the sea front:—**Held:** the corpn. were in the position of trustees of the parade for limited public purposes, namely, for the purpose of use by foot passengers, perambulators, invalid carriages, & similar vehicles, & it was an abuse of the parade to allow it to be used for either horses or motor cars, & *a fortiori* motor races.—**A.-G. v. BLACKPOOL CORPN.** (1907), 71 J. P. 478.

— **In connection with soil of highway.]**—**See** **HIGHWAYS**, Vol. XXVI., pp. 329 *et seq.*

— **On corporation as statutory undertakers—Electric lighting undertaking.]**—**See** **ELECTRIC LIGHTING**, Vol. XX., pp. 198 *et seq.*

— **Tramway undertaking.]**—**See** **TRAMWAYS & LIGHT RAILWAYS**.

— **Under Baths & Washhouses Acts.]**—**See** **PUBLIC HEALTH**.

— **Power of justices under local Act—Except business of court of civil judicature.]**—**See** 1882 Act, s. 138.

**341. — — — — — Fixing salary of clerk of the court excepted.]**—By a local Act of Parliament, a Ct. of Requests was created at B., & certain fees, according to a table therein contained, were fixed to be paid to the assessor & officers of the ct., with power for the justices of the peace for the said city, at any general quarter sessions of the peace, to lessen or reduce them. By 6 & 7 Will. 4, c. 105, s. 8, it is enacted, "that everything provided in any local Act of Parliament, to be done by the justices, or by some particular class or description of members of such body corporate, being justices at some ct. of general or quarter sessions assembled, & which does not relate to the business of a ct. of criminal or civil judicature, shall & may be done by the council at some quarterly meeting of the council." The town council of B., acting under 1835 Act, s. 124, & 6 & 7 Will. 4, c. 105, s. 8, by an order of council, reduced the fees payable to the assessor & clerk of the ct.:—**Held:** the regulation of the fees of the Ct. of Requests was a matter relating to the business of a ct. of civil judicature, & the town council had no authority to interfere with it.—**PALMER v. POWELL** (1840), 6 M. & W. 627; 9 L. J. Ex. 209; 4 Jur. 825; 151 E. R. 563.

**342. — — — — — Power to levy rates — Whether price of land compulsorily acquired applicable to purposes of rates.]**—The corpn. of L. were empowered by a local Act to erect offices for the transaction of their public business, & to make rates for the purposes of the Act, & to borrow money on the security of the rates. A railway co. having taken other property of the corpn., not consisting of buildings, the corpn. petitioned that the purchase-money which had been paid into ct., under Lands Clauses Consolidation Act, 1845 (c. 18), might be applied in part payment of the expenses of erecting the offices:—**Held:** such an application of the money ought not to be ordered, as it could only be directed where there were special circumstances showing it to be beneficial to all parties interested.—**Ex p.** **LIVERPOOL CORPN.** (1866), 1 Ch. App. 596; 35 L. J. Ch. 655; 14 L. T. 785; 12 Jur. N. S. 720; 14 W. R. 906, L. JJ.

**Annotation:**—**Apld.** **Re Johnson's Settlements**, (1869), L. R. 8 Eq. 348.

**See, generally, COMPULSORY PURCHASE OF LAND**, Vol. XI., pp. 236 *et seq.*

W. W. R. 467; 52 D. L. R. 532; 13 Sask. L. R. 176.—**CAN.**

**h. Powers conferred by statute—Power to levy rates—Whether power of revision court of revision included.]**—**FRASER & BELL v. TOWN OF NEW GLASGOW** (1880), 1 R. & G. 250.—**CAN.**

**k. Revenue arising from one part of township—No power to apply to another part.]**—A municipal council, under 12 Vict. c. 81, s. 31, cannot appropriate the revenue arising from a tax imposed on the owners of dogs in only a part of the township to the improvements of the public streets, &

to other purposes within the limits of such part.—**Re RICHMOND v. TOWNSHIP OF LEEDS & LANSLOWNE** (1851), 8 U. C. R. 567.—**CAN.**

**l. Powers incident to exercise of statutory powers.]**—Deft. municipality to which large statutory powers were given to carry on a hydro-electric



**343. Election to proceed under statute—Limited by statute.]**—Where the members of a corpn. elect to proceed under their Local Govt. Act, instead of asserting their common law right as a corpn., they will be bound to proceed according to the provisions of such Act. Thus, although there may be a clear right at law to change the site of a market in the corpn. of a borough, if the corpn. proceeds under the Act to change such site, & transfer & regulate the market, they must not exceed the powers conferred upon them by such Act of Parliament, although less extensive than their rights at common law.—*ELLIS v. BRIDGNORTH CORPN.* (1861), 2 John. & H. 67; 4 L. T. 112; 25 J. P. 324; 9 W. R. 331; 70 E. R. 973.

*Annotations:—Apld. Manchester Corpn. v. Peverley* (1876), 22 Ch. D. 294, n. *Refd. Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co.*, [1921] 2 Ch. 154.

**344. Authority bound by acts of predecessors.]**—F. had applied to the local board of E. to be registered as keeper of a common lodging-house, & the board resolved, on June 4, that F. be registered. The clerk did not make the entry in the register, as he found afterwards that no inspection had taken place, & the inspector, afterwards visiting, reported against the registration. Meanwhile E. became a borough, & then the town council resolved that F. be not registered. F. was then summoned for keeping, without registration, a common lodging-house:—*Held*: the justices were right in dismissing the summons, for that the omission of the clerk, on June 4, was no justification for prosecuting F.; F. had been substantially registered, & the town council were concluded by the first resolution of the local board.—*COLES v. FIBBENS* (1884), 52 L. T. 358; 49 J. P. 308, D. C.

(c) *Exercise of Powers.*

i. *In General.*

**345. Discretionary powers — Must be according to law.]**—Wheresoever a comr. or other person has power given to do a thing at his discretion it is to be understood of sound discretion & according to law, & the ct. has power to redress things otherwise done by them (*BACON, J.*).—*ESTWICK v. LONDON (CITY)* (1847), Stv. 42; 82 E. R. 515.

*Annotation:—Mentd. Sharp v. London Corpn.* (1714), Gilb. 255, 276.

**346. — Must be bona fide.]**—*WESTMINSTER CORPN. v. LONDON & NORTH WESTERN RY. CO.*, No. 338, *ante*.

**347. — Must be reasonable.]**—*ROBERTS v. HOPWOOD*, No. 83, *ante*.

**348. — Whether court will interfere—Power exercised judicially.]**—On an application by a co. to a town council for licences to run a service of omnibuses, & for charabancs, the council refused the former on the ground that they had already licensed an existing co. & that, having taken the opinion of the chief constable, they were satisfied that on account of the narrowness of their streets there would be danger & inconvenience to the

public if licences were granted to a competing co. The watch committee of the council recommended that of eight charabanc licences, which they thought desirable, four should be granted to appcts. The council, however, refused the application for the charabanc licences, & granted the eight licences to the existing co. A rule having been obtained for a *mandamus*, directed to the council, requiring them to hear & determine the application according to law upon the ground that the council had not properly exercised its discretion under Town Police Clauses Act, 1847 (c. 89):—*Held*: as to the omnibus licences, there being nothing in the evidence to show that the council had not exercised a judicial discretion, the rule must be discharged; but, as to the charabanc licences, the evidence showed that the council had been influenced by extra-judicial & extraneous considerations which had no bearing upon the application, or by reasons not appearing at all, & the rule must be made absolute.—*R. v. BRIGHTON CORPN., Ex p. TILLING (THOMAS), LTD.* (1916), 85 L. J. K. B. 1552; 114 L. T. 800; 80 J. P. 219; 14 L. G. R. 776, D. C.

*Annotation:—Apld. R. v. Farnborough U. C., Ex p. Aldershot District Traction Co.*, [1920] 1 K. B. 234.

**349. — Decision influenced by extraneous matters.]**—*R. v. BRIGHTON CORPN., Ex p. TILLING (THOMAS), LTD.*, No. 348, *ante*.

**350. — — —.]**—The A. co. had for some years past run omnibuses in various directions from their headquarters at A., & one of their routes ran through a district under the control of the F. urban district council. The council had granted licences to run the omnibuses in previous years, as they were empowered to do under Town Police Clauses Act, 1847 (c. 89), & 52 & 53 Vict. c. 14, but in 1919 they refused to meet for the purpose of considering the grant of the renewal of the licences to the A. co. on various grounds, but more especially on the ground that the A. co. had raised their fares; that they had refused to adopt 1d. fares; & that in this scale of fares the co. had made an unfair discrimination between the military population on the one hand & civilians on the other. The A. co. thereupon applied for & were granted a rule *nisi* calling upon the F. urban district council to show cause why a writ of *mandamus* should not issue against them to compel them to meet to consider the grant of a renewal of the licences:—*Held*: the rule *nisi* must be made absolute; the council had no power to deal with the question of fares & charges, & in declining to grant a renewal of the licences to the A. co., they had failed to exercise a judicial discretion & had taken into consideration extraneous matters with which they had no concern.—*R. v. FARNBOROUGH URBAN COUNCIL, Ex p. ALDERSHOT DISTRICT TRACTION CO.*, [1920] 1 K. B. 234; 89 L. J. K. B. 284; 122 L. T. 283; 83 J. P. 290; 36 T. L. R. 22; 17 L. G. R. 728, D. C.

**351. — Discretion exercised bona fide.]**—*HORNSEY v. EXETER CORPN.* (1918), 82 J. P. Jo. 51.

business was held to have power to expend upon advertising out of the revenues derived from such business such moneys as it deemed advisable & such powers, although not specifically mentioned, being incident to the full & beneficial exercise of the powers actually given.—*COX v. WINNIPEG CITY (Man.)*, [1922] 3 W. W. R. 376; 70 D. L. R. 305.—*CAN.*

affected, & the resolution of the corpn. thereon not being such as the statute requires to authorise an application to the govt. for the survey, the survey made by the instructions of the comr. of Crown lands was unauthorised.—*COOPER v. WELLBANKS* (1864), 14 C. P. 364.—*CAN.*

**345 ii. — — —.]**—*Re ARTHUR & CITY OF NELSON CORPN.* (1898), 6 B. C. R. 323.—*CAN.*

**346 i. — Must be bona fide.]**—The ct. will only interfere with the discretionary power of a town council to sanction building plans where it is shown that the council in refusing its sanction is actuated by dishonest,

fraudulent or otherwise wholly improper motives.—*REID & Co. v. CITY OF CAPE TOWN CORPN.* (1901), 18 S. C. 373; 11 C. T. R. 617.—*S. AF.*

**346 ii. — — —.]**—*STUTTERHEIM MUNICIPALITY v. DE BEER* (1901), 18 S. C. 285; 11 C. T. R. 479; 15 E. D. C. 68.—*S. AF.*

**351 i. — Whether court will interfere—Discretion exercised bona fide.]**—The ct. has not the power of restraining councillors of an incorporated village, in the due exercise of their constitutional power, from changing the site of a proposed town hall & market.—*LITTLE v. WALLACEBURGH* (1876), 23 Gr. 540.—*CAN.*

PART VII. SECT. 2, SUB-SECT. 1.

(c) i.

the one-half the resident landholders



**Sect. 2.—Government of the municipal borough**  
**Sub-sect. 1, B. (c) ii. & iii.**

**ii. Liability for Injury.**

*See, generally, NEGLIGENCE; NUISANCE.*

**Liability as highway authority.]—See HIGHWAYS, Vol. XXVI., pp. 398 et seq., 413 et seq.**

**Streets insufficiently lit.]—See HIGHWAYS, Vol. XXVI., p. 515, Nos. 2187–2190.**

**Liability as sanitary authority.]—See SEWERS & DRAINS.**

**Liability in respect of statutory undertakings.]—See, generally, ELECTRIC LIGHTING, Vol. XX., pp. 209 et seq.; GAS, Vol. XXV., pp. 482 et seq.; TRAMWAYS & LIGHT RAILWAYS; WATER SUPPLY.**

**Nuisance arising from hospital for infectious diseases.]—See PUBLIC HEALTH.**

**Interference with watercourses.]—See WATERS & WATERCOURSES.**

**Removal of telephone wires crossing street.]—See TELEGRAPHS & TELEPHONES.**

**iii. Remedies of Persons Aggrieved.**

*See, generally, NEGLIGENCE; NUISANCE.*

**Compensation—Under P. H. Act, 1875—Food wrongly condemned.]—See FOOD & DRUGS, Vol. XXV., p. 113.**

**Corporation acting as statutory undertakers—Powers exercised beyond area.]—See GAS, Vol. XXV., p. 474, No. 29; compare ELECTRIC LIGHTING, Vol. XX., pp. 205, 206.**

**Limitation of action—Under Public Authorities Protection Act, 1893 (c. 61).]—See PUBLIC AUTHORITIES.**

**C. Liabilities.**

**352. Transfer of liabilities—Costs of pending action for nuisance included.]—Where a provisional order had transferred a portion of land within the jurisdiction of a rural district council to the jurisdiction of the corpn. of a borough, & the same order had provided that any action then pending against the rural district council might be continued against the corpn., & that all liabilities attaching exclusively to the added area**

should be transferred to the corpn. as urban sanitary authority:—*Held*: in regard to an action brought against the rural district council prior to the provisional order & pending at the time, for a nuisance caused by sewage, all liability attached to the corpn., & the corpn. must pay the costs of pl'ts. & the rural district council.—*JACKSON v. PLYMPTON ST. MARY RURAL DISTRICT COUNCIL* (1900), 64 J. P. 168.

**Transfer of powers under Public Health Acts—Liabilities of former authorities.]—See PUBLIC HEALTH.**

**353. In respect of criminal proceedings ordered—Irregular proceedings—Effect of interference.]—**

(1) A municipal corpn. by an order under their common seal, directed proceedings to be taken against a former town clerk, for neglect of his duty to deliver up books, etc., of the corpn., pursuant to 1835 Act, s. 60:—*Held*: the order must be confined to lawful proceedings, & if the corpn. never interfered with the execution of warrants badly executed, or bad in themselves, issued & executed in the course of these proceedings, they were not liable as trespassers for such execution.

(2) A good warrant of commitment under 1835 Act, s. 60, issued against A., formerly town clerk of L., at the instance of the corpn. of L. by their town clerk, S., for non-compliance with an order to deliver up books, etc., the property of the corpn. in his possession as such former town clerk. The warrant was executed on a Sunday, Oct. 16, 1853, by P., one of the constables of L., S. having delivered the warrant to, & having instructed the superintendent of police of L. that it might legally be executed on that day, & A. was taken to gaol. The arrest was communicated to S., who expressed his approval of it. On Oct. 24, a second warrant, which omitted to state a complaint to, a justice on a summons, was lodged by P. with the gaoler. On Nov. a third warrant, similar to the first, but founded on a neglect of A. as clerk to the council, in their capacity of paving comrs. under a local Act, which contains a clause limiting to three months the time for bringing actions for anything done under it, was lodged with the gaoler. This warrant was obtained at the instance of S., who

**351 ii. ———.]—Acts within the discretionary powers of a municipal council are not subject to judicial control, except where fraud is imputed & shown, or there is a manifest invasion of private rights.—HAGGERTY v. CITY OF VICTORIA** (1895), 4 B. C. R. 163.—CAN.

**351 iii. ———.]—PARSONS v. CITY OF LONDON** (1912), 21 O. W. R. 205; *affg.*, 20 O. W. R. 534; 3 O. W. N. 604; 25 O. L. R. 172, 442.—CAN.

**351 iv. ———.]—A municipal corpn. or its council, within the limits of the powers committed to them by the legislature, at all events, in the absence of fraud, should be free from interference by the cts.—NORFOLK v. ROBERTS** (1913), 28 O. L. R. 593; 4 O. W. N. 1231.—CAN.

**351 v. ———.]—ROGERS v. TORONTO** (1915), 7 O. W. N. 600; 33 O. L. R. 89.—CAN.

**351 vi. ———.]—The ct. has no jurisdiction to review the action of a municipal corpn. acting within its powers & in good faith.—LEITCH v. STRATHROY TOWN** (1923), 53 O. L. R. 865.—CAN.

**351 vii. ———.]—MONTAGU MUNICIPALITY v. HONIKMAN**, [1913] C. P. D. 798.—S. AF.

**351 viii. ———.]—A.-G. v. WELLINGTON**, [1924] N. Z. L. R. 818.—N.Z.

**m. ———.]—Delegation.]—A municipal corpn. cannot delegate to a board of health any power to cancel a license which it may have under 42 Vict. c. 26, s. 37 (2).—*Re FOSTER & HAMILTON CITY CORPN.* (1899), 20 C. L. T. 40; 31 O. R. 292.—CAN.**

**n. ———.]—A corpn. cannot submit to arbn. the price to be paid for a leasehold estate, because the element of price in a bargain involves the exercise of discretion.—SOLICITOR GENERAL v. DUNEDIN CORPN.** (1875), 1 N. Z. Jur. N. S. 1.—N.Z.

**o. ———.]—The corpn. could not, even under its seal, delegate power to make a contract except to two members of the council, as provided by Municipal Corporations Act, 1886, s. 221.—SLOWEY v. LODDER** (1901), 20 N. Z. L. R. 321.—N.Z.

**p. ———.]—A municipality has no right to delegate to the mayor a duty imposed upon it as a whole.—HOISAIN v. WYNBERG TOWN CLERK**, [1916] App. D. 236.—S. AF.

**q. ———.]—WILSON v. DURBAN CORPN.** (1920), 41 N. L. R. 5.—S. AF.

**PART VII. SECT. 2, SUB-SECT. 1.—B. (c) iii.**

**r. Compensation—Powers properly exercised.]—Owners of land upon a highway have no claim to compensation**

for anything done by municipal corps. in the proper exercise of their powers, within the line of the road as originally laid out.—*R. v. MUNICIPAL COUNCIL OF PERTH* (1856), 14 U. C. R. 156.—CAN.

**t. ———.]—ADAMS v. CITY OF TORONTO** (1886), 12 O. R. 243.—CAN.

**a. ———.]—Construction of work—Alteration in highway—Borough council makes an alteration in the highways of the borough the work is the construction of a public work within Municipal Corporations Act, 1900, & persons whose land is injuriously affected by the alteration are entitled to compensation.—SYMONS v. FOXTON BOROUGH COUNCIL** (1906), 26 N. Z. L. R. 698.—N.Z.

**PART VII. SECT. 2, SUB-SECT. 1.—C.**

**b. Liability of individual members for corporate acts—Injunction.]—A.-G. v. WEBB** (1888), 9 N. S. W. Eq. 54.—AUS.

**c. ———.]—KING v. MATTHEWS** (1903), 23 C. L. T. 109; 5 O. L. R. 228; 2 O. W. R. 18.—CAN.

**d. ———.]—PATCHELL v. RAIKES** (1904), 24 C. L. T. 212; 7 O. L. R. 470; 3 O. W. R. 457.—CAN.

**e. ———.]—Wrongful dismissal of clerk.]—An action cannot be maintained against the town comrs. of a**



opposed an application for a postponement of the hearing on the summons until a motion in this ct. for pltf.'s discharge should have been disposed of. On Nov. 2, the ct. discharged A. on *habeas corpus*, on the ground that the arrest on the Sunday had been illegal, & that the two warrants were one proceeding of the same party. The order for discharge was received on Nov. 3, but the gaoler still detained A. under the third warrant; & on Nov. 4, a *ca. sa.* was *bond fide* lodged by a creditor, not colluding with the corpn., against him. On Nov. 24, the ct. refused another application on *habeas corpus* to discharge A., on the ground that, notwithstanding the third warrant was bad, the *ca. sa.* was a lawful ground of detention. On Mar. 2, 1854, A. settled with his detaining creditor, & was set at liberty, but he was again arrested when he had got but a few yards from the gaol, under a fourth warrant, similar to the second, & executed at the express instance of S. A. was shortly afterwards discharged by a judge, on the ground that the recapture was illegal, as A. had not been completely at liberty, & brought actions against all parties. The writs were issued on Sept. 1, 1854:—*Held*: there were three distinct imprisonments, the first from Oct. 16 to Nov. 2; the second from Nov. 2 to Mar. 2; & the third from Mar. 2 till the final discharge; the action for the first imprisonment was barred by lapse of time, as it had been commenced contrary to 1835 Act, s. 133, which was the limitation clause applicable after the expiration of six months from the fact committed; the second action was in like manner barred, as the inference from the facts was, that the third warrant was abandoned when the *ca. sa.* was put in; & for the third imprisonment, an action might be maintained, as the fourth warrant was bad, against S. who had instigated the proceedings & taken a personal part in the execution of that warrant, but not against the constables, nor against the corpn. which had not interfered, & had only authorised A. to do lawful acts.—*EGGINGTON v. LICHFIELD CORPN.* (1855), 5 E. & B. 100; 24 L. J. Q. B. 360; 26 L. T. O. S. 27; 19 J. P. 819; 1 Jur. N. S. 908; 119 E. R. 418.

*Annotation*:—Generally, *Mentd. Flood v. Jackson*, [1895] 2 Q. B. 21.

**Limitation of actions—Under Public Authorities Protection Act, 1893 (c. 61).]**—See PUBLIC AUTHORITIES.

**354. Liability of individual members—For corporate acts—Acts injurious to corporation.]—A.-G. v. WILSON, No. 244, ante.**

*Compare* No. 86, ante, & see, generally, CORPORATIONS, Vol. XIII., pp. 418, 419.

**355. — For costs of certiorari—Order for payment out of borough funds quashed—Costs to be paid by "prosecutors."]**—When the order of a town council, being brought up by *certiorari*, is quashed, on motion, with costs, the ct. should decide who is to be charged with costs as prosecutor of the order, & the party should be named in the rule. Therefore, where orders for payment of money out of borough funds were so brought up & quashed with costs to be paid by prosecutors,

the rule not further stating by whom the costs were to be paid, & no cause having been shown, the ct. refused to grant an attachment against individuals, A., B. & C., for non-payment, though the rule for an attachment was drawn up on reading affidavits of A., B. & C., used in opposing the motion for a *certiorari*, & which showed, as the parties applying for an attachment contended, that A., B. & C. were the persons who prosecuted the orders since quashed, by supporting them in this ct.—*R. v. DUNN* (1844), 5 Q. B. 959; 1 Dav. & Mer. 737; 13 L. J. Q. B. 237; 3 L. T. O. S. 102; 9 J. P. 7; 8 Jur. 773; 114 E. R. 1510.

**356. — — — — —.]—**A municipal corpn. having adopted a drainage scheme which had been drawn up by their surveyor, resolved that he should superintend the works, & that he should be paid at a certain rate on the cost of the work, the whole remuneration not to exceed a fixed sum. Proceedings having been instituted against the surveyor to recover penalties under P. H. Act, 1875, s. 193, on the ground that he was interested in the contracts within the meaning of that sect., the corpn. resolved to contribute the sum of £300 towards his legal expenses. Certain penalties having been recovered against the surveyor, a rule was obtained for a writ of *certiorari* to bring up the order of the corpn. settling the remuneration of the surveyor & the order for the payment of the sum of £300 in order that they might be quashed, on the ground that they were illegal & *ultra vires*, & that the corpn. had no power to make them. This rule was made absolute, & the ct. further ordered that "prosecutors (the mayor, aldermen, & burgesses) do pay the costs of & occasioned by the application." The ct. was now asked to make an order that certain members of the corpn. should personally pay the costs of & occasioned by the application for the writ of *certiorari*, the issuing thereof & consequent thereon:—*Held*: the members of the corpn. who voted in favour of the resolutions for carrying on the legal proceedings were personally liable for the costs occasioned thereby.—*R. v. VAILE* (1889), 23 Q. B. D. 483; 54 J. P. 134; *sub nom. R. v. WHITELEY*, 58 L. J. M. C. 164; 61 L. T. 253, D. C.

**357. — As trustee—Profits on transactions in debentures of corporation.]—**The mayor & corpn. of the City of Toronto, in Canada, were authorised by a Canadian Act, to issue debentures to a certain amount, to assist in the construction of The Toronto, Simcoe, & Lake Huron Union Ry. At that period B. was the mayor & a member of the finance committee, & took an active part in passing a bye-law which authorised the issue by the corpn. of debentures for the completion of the railway. B. at that time was engaged in co-partnership with H., & B. & H.'s firm purchased of S. & Co., contractors for the railway co., some of the debentures so issued, which had been assigned to S. & Co. by the corpn. B. & his partner afterwards sold the debentures, & thereby realised a large profit. This transaction was without the knowledge of the corpn.:—*Held*: B. must, in the

town in Ireland, sued in their official capacity by their clerk, under Towns Improvement (Ireland) Act, 1854, s. 94, at the suit of a party complaining of a wrongful dismissal from the office of clerk. *Semble*: such an action is maintainable against the individuals of the body concerned in the commission of the act.—*RICHARDSON v. CORCORAN* (1855), 8 Ir. Jur. 305.—IR.

**f. — For costs of legal proceedings—Breach of duty by members.]—**Members of a municipal council were

held liable to indemnify the municipality against all costs of legal proceedings occasioned by their refusal to discharge duties cast upon them by statute, & to pay all costs as between solr. & client.—*Re WEST MISSOURI* (1917), 38 O. L. R. 207; 33 D. L. R. 209.—CAN.

**g. — As trustees.]—**The law attaches the liability of trustees to municipal councillors, & it is sufficient to charge them as such without using the word "trustees."—*MORROW v.*

*CONNOR* (1886), 11 P. R. 423.—CAN.

**h. Liability of committee—For improper expenditure at ceremony.]—***THOMAS v. WILSON* (1861), 20 U. C. R. 331.—CAN.

**k. Malicious resolution of councillors.]—**A municipality is liable for the act of the councillors in passing a void resolution purporting to dismiss a valuator from his office, if the councillors in voting for such resolution acted maliciously.—*GALLAGHER*



**Sect. 2.—Government of the municipal borough:**  
**Sub-sect. 1, C., D. & E.]**

circumstances of his being a member of the corp., & the manner in which he acted throughout the transaction, be treated as the trustee of the corp., & was not entitled to any benefit received from the sale of the debentures, & was liable to account to the corp. for the ascertained & unquestioned amount of profit made & received by him in the transaction in which he had engaged in respect of the sale of the corp. debentures.—**BOWES v. TORONTO (CITY)** (1858), 11 Moo. P. C. C. 463; 14 E. R. 770.

**Annotation:—Mentd. Vyse v. Foster** (1872), 8 Ch. App. 309.

**D. Proceedings.**

See 1882 Act, ss. 22, 230, sched. II., & generally, CORPORATIONS, Vol. XIII., pp. 339 *et seq.*

**Quarterly meetings—Business at.]—See** 1882 Act, ss. 60 (1), 61 (1).

**358. Notice of meeting—Corporation exercising transferred powers under local Act—Provisions of 1882 Act apply.]—A** local Act, for paving the borough of K., provided that all orders & proceedings of the comrs. for executing the Act should be at a public meeting, of which notice in writing should be given "by affixing the same upon the door of the parish church of K., on the Sunday, & upon the town hall two days, preceding such intended meeting." Under 1835 Act, s. 75, the powers of the comrs. were duly transferred to, & were thenceforward exercised by, the town council of the borough:—**Held**: notice of a meeting of the town council for the purpose of appointing overseers to make a rate for the purposes of the local Act was properly given by affixing the same on or near the door of the town hall, in accordance with 1835 Act, s. 69.—**KIDDERMINSTER TOWN COUNCIL v. COURT** (1859), 1 E. & E. 770; 33 L. T. O. S. 104; 23 J. P. 629; 7 W. R. 412; 120 E. R. 1098; *sub nom.* **KIDDERMINSTER TOWN COUNCIL v. CROFT**, 28 L. J. M. C. 148; 5 Jur. N. S. 1055.

**359. — Necessity for—Adjourned quarterly meeting.]—R. v. THOMAS**, No. 470, *post*.

**360. — Contents of notice—Quarterly meeting.]—The** borough of W. having petitioned for a grant of a separate ct. of quarter sessions, under 1835 Act, s. 103, received a letter from the Secretary of State, informing them that the Crown had made the grant, & within ten days from the receipt of this letter, but before the actual grant has passed the Great Seal, the town council appointed R. coroner of the borough, not under seal, who exercised the office, & was recognised as coroner by the town council repeatedly, & within ten days after the actual grant of the quarter sessions had been received by the council. A general quarterly meeting was held on Nov. 9, when a mayor was elected, & other general business transacted, & the meeting was, by a resolution then passed, adjourned

to Nov. 16, on which day a resolution was passed by the council, removing R. from the office of coroner & appointing G. in his stead. No notice was given of this meeting, except the ordinary three days' notice required by sect. 69, which did not specify the business to be transacted at the meeting:—**Held**: (1) the office was full, as, even if the council had no right to appoint until after the actual grant of the ct. of quarter sessions, the recognition of R. as coroner by them, within ten days after the actual grant, was a good ratification of the prior appointment; (2) the election of G. was invalid; (3) under 1835 Act, s. 69, no notice need be given of such business transacted at the adjourned meeting of Nov. 16, as had been entered upon on Nov. 9, but notice ought to be given of any other business transacted at the adjourned meeting.—**R. v. GRIMSHAW** (1847), 10 Q. B. 747; 2 Saund. & C. 146; 16 L. J. Q. B. 385; 9 L. T. O. S. 221; 11 J. P. 710; 11 Jur. 965; 116 E. R. 284.

**Annotation:—As to** (1) **Reld.** Addison v. Preston Corp. (1852), 21 L. J. C. P. 146.

**361. — — — Adjourned quarterly meeting.]—R. v. GRIMSHAW**, No. 360, *ante*.

— — — — —.]—**See, also**, CORPORATIONS, Vol. XIII., p. 341, Nos. 793, 794.

**The chairman.]—See** 1882 Act, s. 16 (3).

**Quorum.]—See** 1882 Act, sched. II. (10).

**For passing bye-law.]—See** 1882 Act, s. 23 (2).

**362. Voting—Who may vote—Councillors de facto—Though election disputed.]—HOLDEN v. SOUTHWARK CORPN.**, No. 381, *post*.

**363. — Restrictions on—"Any pecuniary interest"—Election to salaried office.]—NELL v. LONGBOTTOM**, No. 402, *post*.

**364. — Casting vote of chairman at election of mayor—Right to vote in first instance.]—NELL v. LONGBOTTOM**, No. 402, *post*.

**365. — — — On equality of votes—Equality of valid votes.]—The** expression "equality of votes" in 1882 Act, s. 61 (4), means "equality of valid votes." Therefore, at a municipal election the chairman may give a contingent casting vote which is to operate only in the event of there being an equality of valid votes.—**BLAND v. BUCHANAN**, [1901] 2 K. B. 75; 70 L. J. K. B. 466; 84 L. T. 390; 65 J. P. 404; 49 W. R. 601; 17 T. L. R. 348; *sub nom.* **Re GLOUCESTER BOROUGH ELECTION PETITION**, **BLAND v. BUCHANAN**, 45 Sol. Jo. 345, D. C.

— — — — —.]—**See, generally**, ELECTIONS, Vol. XX., pp. 135, 136.

**366. Minutes of meeting—Time for entry signature.]—Under** 1835 Act, s. 19, the minutes of proceedings in town council should be entered & signed by the chairman at the meeting & not afterwards.

A mayor having refused to call a meeting of a borough council, one was called by some of the

**v. WESTMORLAND CORPN.** (1892), 31 N. B. R. 194.—CAN.

**l. Liability by resolution—Effect of mistake as to immaterial matter.]—MCISAAC v. INVERNESS** (1905), 38 N. S. R. 76.—CAN.

**m. Liability of municipality—To individual member.]—MAHONEY v. CITY OF GUELPH** (1918), 14 O. W. N. 330; 43 D. L. R. 490; *reversg.*, 13 O. W. N. 279; 41 O. L. R. 308.—CAN.

**PART VII. SECT. 2, SUB-SECT. 1.—D.**

**n. Notice of meeting—Objection to sufficiency.]—Re MACDONALD RURAL MUNICIPALITY** (1895), 10 Man. L. R. 382.—CAN.

**o. — — — — —.]—If** the sufficiency of the notice calling a special meeting of a borough council for a specific purpose is questioned, the grounds on which it is objected to should be brought before the ct., & it ought to be shown that the resolutions carried are not the legitimate outcome of such notice.—**NEWTON v. MCNEIL** (1883), 2 N. Z. L. R. 194 (S. C.).—N.Z.

**p. The chairman—Powers.]—SMIT v. WOODSTOCK (MAYOR)**, [1911] C. P. D. 154.—S. AF.

**q. Voting—Whether compulsory.]—Local Government Act, 1903**, provides that the council shall vote by a show of hands & any council present

but not voting shall be guilty of an offence:—**Held**: the words "Shall vote by a show of hands" are directory & not mandatory.—**HONEYBONE v. GLASS**, [1908] V. L. R. 466.—AUS.

**r. — — — Who may vote—Shareholder of company—On matter affecting company.]—Held**: a councillor cannot vote on any question affecting a co. of which he is a shareholder.—**Re BAIRD & VILLAGE OF ALMONTE** (1877), 41 U. C. R. 415.—CAN.

**t. — — — Councillor having interest in subject.]—A** member of a municipal council is disqualified from voting in the council upon any subject



councillors, & a councillor was in the chair. The town clerk did not attend, on account of a notice issued by the mayor. Several resolutions were passed at the meeting, & minutes of them were left by the chairman with the town clerk, who made a copy, & sent it to the chairman to be signed the day after the meeting. The minutes were never entered by the town clerk, & a resolution passed in the council, that the meeting was illegal. A *mandamus* moved for, to enter the resolutions passed at the meeting in the corp'n. books, was refused, as no correct minute was made of them at the time.—*R. v. EVESHAM CORPN.* (1838), 8 Ad. & El. 266; 3 Nev. & P. K. B. 351; 1 Will. Woll. & H. 428; 2 J. P. 358; 2 Jur. 819; 112 E. R. 839.

*Annotations*:—*Expld.* Miles v. Bough (1842), 3 Q. B. 845; West London Ry. Co. v. Bernard (1843), 3 Q. B. 873.

**367.** ——— Meeting called by councillors.]—*R. v. EVESHAM CORPN.*, No. 366, *ante*.

——— Right of inspection.]—*See* CORPORATIONS, Vol. XIII., p. 423, No. 1436.

**368.** ——— Under 1882 Act, s. 233 — Whether minutes of committees included.]—*WILLIAMS v. MANCHESTER CORPN.*, No. 336, *ante*.

**369.** ——— Restraint of publication — On ground of alleged libel.]—*PLANT v. EAST HAM CORPN.* (1906), 70 J. P. Jo. 244.

**370.** Admission to meetings — The public.]—In a municipal borough neither the public, nor the burgesses, nor reporters for newspapers, have the right to attend the meetings of the borough council without the consent of the council expressed or implied.

*Semble*: the same principle applies to the meetings of a district council or of a county council.

By r. 13 of the second part of the First Schedule to that Act [1894 Act] it is expressly provided that a parish council shall be open to the public unless the council shall otherwise direct. This same Act of Parliament constituted district councils but there is no similar provision as to district councils (*COZENS HARDY, M.R.*).—*TENBY CORPN. v. MASON*, [1908] 1 Ch. 457; 77 L. J. Ch. 230; 98 L. T. 349; 72 J. P. 89; 24 T. L. R. 254; 6 L. G. R. 233, C. A.

**371.** ——— Burgesses.]—*TENBY CORPN. v. MASON*, No. 370, *ante*.

**372.** ——— Newspaper reporters.] — *TENBY CORPN. v. MASON*, No. 370, *ante*.

——— See, now, Local Authorities (Admission of the Press to Meetings) Act, 1908 (c. 43).

#### E. Committees.

*See* 1882 Act, s. 22 (2)–(6).

**373.** Membership — Whether compulsory.]—By 1882 Act, s. 22, "The council may from time to time appoint out of their own body such & so many committees, either of a general or special

nature & consisting of such number of persons as they think fit, for any purposes which in the opinion of the council would be better regulated & managed by means of such committees, but the acts of every such committee shall be submitted to the council for their approval:—*Held*: the rule of the common law, that a person who is qualified cannot refuse to serve a public office to which he is appointed, does not apply to the appointment of a member of a borough council to serve on a particular committee of the council. Membership of such a committee is not an independent public office, & a person who is appointed to serve on it may lawfully resign it against the will of the council who appointed him. *Qu.*: whether the common law rule applies to statutory offices at all.—*R. v. SUNDERLAND CORPN.*, [1911] 2 K. B. 458; 80 L. J. K. B. 1337; 105 L. T. 27; *sub nom.* *R. v. SUNDERLAND CORPN.*, *Ex p. CRAWFORD & LAWSON*, 75 J. P. 365; 27 T. L. R. 385; 9 L. G. R. 928, D. C.

*Annotation*:—*Mentd.* Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.

**374.** Proceedings — Right of inspection.]—*WILLIAMS v. MANCHESTER CORPN.*, No. 336, *ante*.

——— Approval by council.]—*See* 1882 Act, s. 22 (2); & compare *METROPOLIS*.

**375.** Delegation of powers to sub-committee—What amounts to—Whether appointment of sub-committee to make recommendations.]—An order of the corp'n. of M., was made under the following circumstances: the making of the order was recommended by a sub-committee of the sanitary committee of the city council by a resolution passed at a meeting of the sub-committee at which applt. was informed that the matter would be considered, & at which he had an opportunity of which he had not availed himself of being heard on the question, & after the sub-committee had considered plans prepared with reference to applt.'s property by the city surveyor. The sanitary committee afterwards passed, without discussion, a resolution in accordance with the recommendation of the sub-committee; & the minutes of the sanitary committee embodying this resolution were, without discussion, approved at a meeting of the city council, whereupon the order issued:—*Held*: there had been no infringement of the principle that a committee to which powers are delegated cannot, in turn, delegate those powers to a sub-committee.—*AGNEW v. MANCHESTER CORPN.* (1902), 67 J. P. 174; 1 L. G. R. 9, D. C.

*Annotation*:—*Mentd.* Smith v. Greenwood, [1907] 2 K. B. 385.

**376.** In respect of offences against bye-laws—No power to try.]—A committee of a town council held to have no jurisdiction to cause summonses to be issued to cabdrivers to appear before them & answer complaints of offences against bye-laws.—*Re WISEMAN, Re MANCHESTER CORPN. CAB COMMITTEE* (1886), 3 T. L. R. 12, C. A.

in which he has a personal or pecuniary interest, distinct from that which he has as a ratepayer in common with other ratepayers.—*Re L'ABBE & CORPN. OF BLIND RIVER* (1904), 24 C. L. Jo. 230;

a. ——— ———.]—*BOYD v. COLBY*, [1918] N. Z. L. R. 487.—N.Z.

——— Admission to meetings—The — Under Act 45 of 1882 s of municipal councils must be to the public, & the council not, by resolving itself into committee, exclude ratepayers.—*MABERLEY WOODSTOCK MUNICIPALITY* (1901),

18 S. C. 257.—S. AF.

b. *Whether reeve must be present.*]—A bye-law requiring the presence of the reeve, as a condition of the transaction of business at a meeting is invalid.—*R. (PACAUD) v. DUBORD* (1885), 3 Man. L. R. 15.—CAN.

c. *Majority—Meaning of.*]—Under Municipal Corporation Act, 1840, the majority must be a majority of the total members present, whether voting or not.—*R. (SISK) v. DONOVAN* (1911), 45 L. T. 24.—IR.

d. *Motions—Where signature requisite—Waiver.*]—*WICHURA v. POWRIE* (1888), 6 S. C. 132.—S. AF.

#### PART VII. SECT. 2, SUB-SECT. 1.—E.

e. *Powers—Sale of corporate property.*]—A committee of a municipal council cannot, unless authorised by the council, sell corporate property, & if they do so an action lies against them by the corp'n. for any loss incurred thereby. Such illegal sale cannot be ratified by resolution of the council carried by the votes of the members of the committee.—*NEW GLASGOW TOWN v. BROWN* (1907), 39 S. C. R. 586.—CAN.

f. *In respect of licences—What committee may consider.*]—*FLANAGAN v. DUNEDIN CITY CORPN.*, [1920] N. Z. L. R. 713.—N.Z.



**Sect. 2.—Government of the municipal borough:**  
**Sub-sect. 2, A. & B.]**

**SUB-SECT. 2.—THE COUNCILLORS.**

**A. Election.**

See, generally, ELECTIONS, Vol. XX., pp. 119 et seq.

**377. Enforcement by mandamus.]—Mandamus** to proceed to the election of town councillors, a former election having become void in consequence of the mayor omitting to declare the result within due time.—*R. v. CARMARTHEN (MAYOR), Ex p. SIMONS* (1845), 6 L. T. O. S. 131; 9 J. P. Jo. 773.

**378. —.]—R. v. YEOVIL CORPN.** (1856), 28 L. T. O. S. 123; 20 J. P. Jo. 819.

—.]—See, generally, CROWN PRACTICE, Vol. XVI., pp. 314, 315; ELECTIONS, Vol. XX., pp. 120, 121, 134, 135, Nos. 983–990, 1080–1085.

**379. Publication of names—Enforceable by mandamus.]—Where** a person had been duly elected a town councillor under the municipal corpn. reform Act, in the place of a person whose election had become void in consequence of his being unable, through illness, to make the declaration required by sect. 50, within the time limited for that purpose; but the alderman of the ward for which he was re-elected, refused to publish his name as that of the person so elected to serve as such councillor, as directed by sect. 35 of the Act: the ct. granted a *mandamus* to compel him to do so.—*R. v. HANCOCK* (1839), 3 J. P. 723.

**380. — Effect of.]—On** an election of councillors for a ward in a borough, the presiding alderman, & two assessors, before two in the afternoon of the next day but one after the election, published, under 1835 Act, s. 35, a declaration containing a list of the councillors elected, which declaration included the name of P. After two o'clock, the alderman & assessors, on the discovery of a supposed error in counting the legal votes, signed & published a second list, omitting the name of P. & substituting that of R. P. afterwards made the declarations required by 9 Geo. 4, c. 17, s. 2, & 1835 Act, s. 50; & R. subsequently did the same. Afterwards, upon P. claiming to act, the mayor & town council refused to permit him to do so, & allowed R. to act.

On application by P. for a *mandamus* to receive & count his vote:—*Held*: the office was not full of R.; & the proper remedy was by *mandamus*;

the second publication & subsequent acting by & on behalf of R. being merely void, & P. being in *de facto*.—*R. v. LEEDS CORPN.* (1841), 11 Ad. & El. 512; Arn. & H. 317; 5 J. P. 435; 5 Jur. 548; 113 E. R. 510; *sub nom.* *R. v. LEEDS CORPN., Ex p. POTTS*, 4 Per. & Dav. 632; 10 L. J. Q. B. 112; *subsequent proceedings* (1843), 4 Q. B. 796.

*Annotations*:—*Distd. R. v. Welchpool Corpn.* (1876), 35 L. T. 594. *Refd. R. v. Chester Corpn.* (1855), 25 L. J. Q. B. 61; *R. v. St. Faith* (1856), 4 W. R. 267; *R. v. Bangor Corpn.* (1886), 18 Q. B. D. 349.

—.]—See, now, 1882 Act, s. 57.

**Validity of election—How tested—Whether by petition or quo warranto.]—See** 1882 Act, s. 87.

— By quo warranto.]—See CROWN PRACTICE, Vol. XVI., pp. 355 et seq.

— By election petition.]—See ELECTIONS, Vol. XX., pp. 181 et seq.

**381. Disputed election—Rights of de facto councillors.]—(1)** The votes of councillors whose rights are in dispute must not be disallowed, because, if not *de jure* councillors, they are at any rate *de facto* councillors until disqualified.

(2) 1894 Act, s. 46 (1) (e), is limited in its operation to bargains made with corps. for profit where the interest of the councillor will conflict with his duty, & does not apply to rate compounding agreements which are for mutual convenience, there being no evidence of profit.—*HOLDEN v. SOUTHWARK CORPN.*, [1921] 1 Ch. 550; 90 L. J. Ch. 395; 125 L. T. 253; 85 J. P. 126; 37 T. L. R. 479; 65 Sol. Jo. 475; 19 L. G. R. 225.

*Annotation*:—As to (2) *Refd. Everett v. Griffiths*, [1924] 1 K. B. 941.

**B. Qualifications.**

See 1882 Act, s. 11; Qualification of Women (County & Borough Councils) Act, 1907 (c. 33), s. 1; County & Borough Councils (Qualification) Act, 1914 (c. 21), s. 1 (1); Representation of the People Act, 1917 (c. 64), ss. 3, 10, scheds. VI. (2), VIII.

**382. Property qualification—Annual value—How calculated.]—By** s. 20, of a local Act, it is enacted that “no person shall be capable of acting as a comr. in the execution of this Act unless he shall be a resident inhabitant or an occupier of houses or lands within the limits thereof, & shall be rated in the rate made for the relief of the poor of the parish of A., for houses or lands of not less,

**PART VII. SECT. 2, SUB-SECT. 2.—A.**

**g. Publication of names—Effect of omission of one name.]—R. (WALKER) v. MITCHELL** (1868), 4 P. R. 218.—CAN.

**h. Validity of election—How tested—Judge in chambers.]—Where** the summons under 12 Vict. c. 81, s. 146, was to show cause wherefore deft. had usurped the office of councillor, etc.:—*Held*: the authority of a judge in chambers extended only to an adjudication of the validity of the election complained of, & he could not further decide upon the validity of the relator's election.—*R. v. McLELLAN* (1850), 1 C. L. Ch. 125.—CAN.

**k. — Application for injunction.]—A** ct. of equity will not, upon an injunction bill, try the validity of an election to office of mayor or councillor, even though the custody of the books & papers of the municipality be in question.—*FAIRBANKS v. DOUGLAS* (1888), 5 Man. L. R. 41.—CAN.

**l. — By petition or quo warranto.]—R. (O'DWYER) v. LEWIS** (1881), 32 C. P. 104.—CAN.

**m. —.]—R. (GRANT) v. COLEMAN** (1882), 7 A. R. 619.—CAN.

**n. —.]—R. v. KIRK** (1892), 24 N. S. R. 168.—CAN.

**o. —.]—A quo warranto** proceeding is the correct method for testing a municipal candidate's right to the office. Such remedy is taken away only where an election petition will lie.—*R. (MACKAY) v. GOOD (Man.)*, [1922] 1 W. W. R. 712; 66 D. L. R. 763.—CAN.

**381 i. Disputed election—Rights of de facto councillors.]—Re** HAWK & BAL-LARD (1852), 3 C. P. 241.—CAN.

**p. — Proof of status of petitioners.]—On** the hearing of a petition questioning the election of a councillor the better method of proving the identity of petitioners & their execution of the petition is by calling each petitioner to prove his own identity & status.—*Re MUNICIPAL ACT, HEATHER v. MADDOCK*, [1925] 2 W. W. R. 464.—CAN.

**q. Time.]—Though** C. S. U. C., c. 54, s. 130, declares that the members of every municipal council shall hold the first meeting at noon, & at such meeting organise themselves as a council by electing one of themselves as a reeve, an election at 6 p.m. on the same day is sufficient.—*R. (HEENAN) v. MURRAY* (1864), 3 P. R. 345.—CAN.

**r. Successful candidate—Right to**

*return of deposit.]—Pltf.,* being duly elected to the municipal council, applied to deft., the returning officer, for a return of one-half his nomination fee:—*Held*: a successful candidate is entitled to have one-half his deposit returned.—*CAREW v. DOYLE* (1906), 9 Nfld. L. R. 213.—NFLD.

**t. Nomination.]—Re** HINTON, *Ex p. ROYLE* (1884), 5 N. S. W. L. R. 468; 1 N. S. W. W. N. 97.—AUS.

**u. —.]—R. (CORRETT) v. JULL** (1869), 5 P. R. 41.—CAN.

**v. —.]—It** is necessary that two qualified electors should personally appear & nominate a candidate for the office of councillor: otherwise the clerk may refuse to receive the nomination.—*Ex p. O'KEEFE* (1877), 1 P. & B. 4.—CAN.

**PART VII. SECT. 2, SUB-SECT. 2.—B.**

**o. Property qualification—Assessed value.]—Under** 12 Vict. c. 81, s. 65, as amended by 14 & 15 Vict. c. 109, candidates for town councillors must be not only assessable but assessed for the necessary amount of property.—*R. (METCALFE) v. SMART* (1852), 10 U. C. R. 89; 2 C. L. Ch. 114.—CAN.

**d. —.]—Property** owned by



according to such rate, than the annual value of £15 by him occupied within such limits." In an action brought to recover penalties for acting without qualification:—*Held*: (1) the "annual value" meant the ratable value; & therefore it was not a sufficient qualification that deft. was rated by name for a house of which he was the occupier, & of which the gross estimated rental was stated in the rate to be £17 2s. but the ratable value only £14 6s.; (2) the necessary qualification could not be made up by showing that deft. actually paid the rate for other houses to a value much beyond £15 he not being named in the rate, although it appeared that the name of another person had been inserted in the rate by mistake.—*BOWER v. WOOD* (1848), 11 L. T. O. S. 62; 12 J. P. Jo. 261.

**383.** — — — — —.]—By 1835 Act, the qualification of a councillor in certain boroughs is the possession of property to the amount of £500, or the being rated to the relief of the poor in the borough "upon the annual value of not less than £15":—*Held*: the "annual value" means the ratable value according to Parochial Assessment Act, 1836 (c. 96); & a person who had acted as councillor, being assessed upon a ratable value of £11 5s. only, though the gross estimated rental of his property was set down as £15, was liable to a penalty for so acting.—*BAKER v. MARSH* (1854), 4 E. & B. 144; 3 C. L. R. 343; 24 L. J. Q. B. 1; 24 L. T. O. S. 72; 19 J. P. 117; 1 Jur. N. S. 44; 3 W. R. 13; 119 E. R. 56.

*Annotation*:—*Distd. Smith v. Birmingham Corpn.* (1883), 11 Q. B. D. 195.

a candidate, but not mentioned in the assessment roll, cannot be made available as a qualification.—*R. (CARROLL) v. BECKWITH* (1854), 1 P. R. 278.—*CAN.*

e. — — — — —.]—The fact of a property on which a candidate seeks to qualify being incumbered cannot be taken into consideration for the purpose of reducing the amount for which he appears to be rated on the roll, which must be taken to be conclusive as to his property qualification.—*R. (FLATER) v. VAN VELSOM* (1870), 5 P. R. 319.—*CAN.*

f. — — — — —.]—*R. (PHILBRICK) v. SMART* (1871), 5 P. R. 323.—*CAN.*

g. — — — — —.]—Notwithstanding the use of the word "estate" in the declaration of a candidate under Consolidated Municipal Act, 1873, he is, nevertheless, qualified, if the rating of the value on the roll is sufficient in amount.—*R. (BOLE) v. MCLEAN* (1875), 6 P. R. 249.—*CAN.*

h. — — — — —.]—*R. (KELLY) v. ION* (1881), 8 P. R. 432.—*CAN.*

k. — — — — —.]—*R. (BRINE) v. BOOTH* (1883), 9 P. R. 452.—*CAN.*

l. — — — — —.]—A person to be qualified for alderman for Victoria city must be the owner, in his own right, of property of the clear unincumbered value of at least \$500, during the whole period of the six months preceding nomination.—*FALCONER v. LANGLEY* (1899), 6 B. C. R. 444.—*CAN.*

m. — — — — —.]—The word "value" used in Municipal Act (Man.), s. 52, defining the property qualifications of candidates for the office of councillor of a rural municipality means the actual value & not the amount at which the property was assessed.—*SPENCER v. FARTHING* (1915), 31 W. L. R. 944; 23 D. L. R. 620; 25 Man. L. R. 564.—*CAN.*

n. — — — — —.]—*Personal property not sufficient.*—A person cannot qualify as town councillor on personal property.—*R. (FLUETT) v. SEMANDIE* (1869), 5 P. R. 19.—*CAN.*

o. — — — — —.]—*Meaning of "owner."*—It is not necessary under 9 Vict. c. 75, s. 13, that the property on which an alderman qualifies should be assessed in the name of one person possessed of it to his own use.—*R. v. MCKENZIE* (1851), 2 C. L. Ch. 36.—*CAN.*

p. — — — — —.]—*On quo warranto*, to test deft.'s right to the office of reeve:—*Held*: a person having the mere possession of a lot vested in the Crown, determinable at any moment, has not such an estate in it as will qualify him under the Municipal Act.—*R. (LACHFORD) v. FRIZELL* (1872), 6 P. R. 12.—*CAN.*

q. — — — — —.]—Resp. was rated on an assessment roll in respect of a leasehold property, sufficient in value to qualify him for office, but the property of his wife:—*Held*: resp. had no estate or interest in the property under Municipal Act, 1883.—*R. (FELTZ) v. HOWLAND* (1886), 11 P. R. 264.—*CAN.*

r. — — — — —.]—Resp. lived with his wife upon a property in a village that was assessed in the name of the wife as owner at \$600:—*Held*: resp. had not the necessary property qualification.—*Re MORDEN ELECTION, RUDELL v. GARRETT* (1899), 12 Man. L. R. 563.—*CAN.*

t. — — — — —.]—The candidate must not only be the real "owner" in terms of Municipal Act but must be also rated as "owner" in his own name.—*Re MUNICIPALITY OF ST. CLEMENTS, FLETT v. HOLUBOWICZ*, [1922] 3 W. W. R. 729; 70 D. L. R. 365; 32 Man. L. R. 366.—*CAN.*

u. — — — — —.]—A purchaser under a registered agreement with the registered owner for the sale & purchase of land is an "owner" within Municipal Act, 1920 (c. 63), s. 6.—*Re MUNICIPAL ELECTIONS ACT, ROSE v. MOIR*, [1924] 4 D. L. R. 498; [1924] 3 W. W. R. 391; 34 B. C. R. 284.—*CAN.*

b. — — — — —.]—*Loss before election.*—An alderman elect, though rated for 1863 to the amount of \$344 on leasehold property, yet since May, 1863,

**384. Enrolment on burgess roll**—On current roll.]—(1) To be qualified to be elected an alderman, on an extraordinary vacancy, within the meaning of 1835 Act, ss. 27 & 28, a corporator must be either a councillor or a person qualified to be a councillor by being entitled to be on the burgess list of the borough.

(2) The term "burgess list" is to be understood to be the list in force for the current municipal year in which the election takes place, viz. from Nov. 1 to Nov. 1, & therefore it is not sufficient to be entitled to be or to be on the burgess list made out & completed on Oct. 22 of that year, under sect. 22, which is not to be in force until Nov. 1 following.—*R. v. HARVEY* (1842), 3 Q. B. 475; 3 Gal. & Dav. 246; 11 L. J. Q. B. 282; 6 J. P. 670; 0 Jur. 874; 114 E. R. 589.

*Annotations*:—*Consd. Budge v. Andrews* (1878), 3 C. P. D. 510. *Reid. R. v. Dixon* (1850), 15 Q. B. 33.

**385. — Whether conclusive of right to enrolment.**—To be eligible for the office of town councillor, a candidate must be "entitled to be on" the burgess roll within 1835 Act, s. 28, as well as "on" the roll within 38 & 39 Vict. c. 40, s. 1 (2), & the burgess roll containing his name is not conclusive evidence that he is "entitled to be on" the roll.—*MIDDLETON v. SIMPSON* (1880), 5 C. P. D. 183; 49 L. J. Q. B. 312; 42 L. T. 55; 44 J. P. 251; 28 W. R. 629.

**386. — Though unqualified**—Whether sufficient under 1882 Act, s. 11 (3).]—The above subsect. provides that every person shall be qualified to be elected & to be a councillor who is at the time of election qualified to elect to the office of

had ceased to hold part of the property to the value of \$160 per annum:—*Qu.*: whether the qualification set out was sufficient.—*Re KELLY v. MACAROW* (1864), 14 C. P. 457.—*CAN.*

e. — — — — —.]—*R. (DEXTER) v. GOWAN*, 1 P. R. 104.—*CAN.*

d. — — — — —.]—*New qualification acquired.*—*R. (CHICK) v. SMITH* (1892), 22 O. R. 279.—*CAN.*

aa. — — — — —.]—A candidate for alderman who, prior to nomination, has conveyed the lands which professedly constitute his qualification, is not disqualified, if the conveyance is not registered.—*LEVY v. GLEASON* (1907), 13 B. C. R. 357.—*CAN.*

bb. *Residence.*—*R. v. SCOTT* (1851), 2 C. L. Ch. 88.—*CAN.*

cc. *Declaration.*—At a meeting of a municipal council the mayor has a right to reject the vote of an alderman who has not made & subscribed the declaration required by Municipalities Act, 1867, s. 34.—*Ex p. WHITNEY* (1890), 11 N. S. W. L. R. 118.—*AUS.*

dd. — — — — —.]—*Re ASPHODEL TOWNSHIP CORPN. & SARGANT* (1859), 17 U. C. R. 593.—*CAN.*

ee. — — — — —.]—Where an alderman elect did not state in his declaration the nature of his estate in, or the value of the land, but declared that his property was sufficient to qualify him "according to the true intent & meaning of the municipal laws of Upper Canada":—*Held*: the declaration was insufficient.—*R. (CLANCY) v. ST. JEAN* (1881), 46 U. C. R. 77.—*CAN.*

ff. — — — — —.]—*R. (O'SHEA) v. LETHBRIDGE* (1908), 16 O. L. R. 582; 11 O. W. R. 929.—*CAN.*

gg. — — — — —.]—*R. (MILLIGAN) v. HARRISON* (1908), 16 O. L. R. 475; 11 O. W. R. 554, 678.—*CAN.*

hh. — — — — —.]—*R. (LEFAIVE) v. OUELLETTE* (1921), 64 D. L. R. 347; 50 O. L. R. 249.—*CAN.*

kk. *Payment of taxes.*—The non-payment of taxes by a candidate before the election disqualified him, under



**Sect. 2.—Government of the municipal borough:**  
**Sub-sect. 2, B. & C. (a), (b), (c), (d) & (e).]**

**councillor:—Held:** a person who, though not qualified to be a burgess, had been enrolled on the burgess roll & was, therefore, entitled to vote under s. 51 of the Act was not thereby qualified to be elected a councillor under above sub-sect.—**FLINTHAM v. ROXBURGH** (1886), 17 Q. B. D. 44; 55 L. J. Q. B. 472; 54 L. T. 797; 34 W. R. 543; *sub nom.* **Re ALDEBURGH SUFFOLK ELECTION, FLINTHAM v. ROXBURGH**, 50 J. P. 311, D. C.

**Annotation:—****Reid.** Beresford-Hope v. Sandhurst (1889), 23 Q. B. D. 79.

**Residence.]—See** County & Borough Councils (Qualification) Act, 1914 (c. 21), s. 1 (1).

**387. — What constitutes — Whether joint occupancy.]—On** a rule nisi for an information in the nature of a *quo warranto* against a town councillor, as not being a resident householder, it not appearing that he had taken the house, or that he paid the rent though a joint occupant, the rule was made absolute.—**R. v. MAXWELL** (1863), 11 W. R. 308.

**388. — —.]—WARD v. MACONCHIE** (1891), 7 T. L. R. 536, D. C.

**—.]—Compare,** No. 503, *post*.

**—.]—See, generally,** ELECTIONS, Vol. XX., pp. 11 *et seq.*

**C. Disqualifications.**

**(a) Non-Residence.**

**See** 1882 Act, s. 11 (4).

**What constitutes residence.]—See** Nos. 387, 388, *ante*.

**(b) Holding Office or Place of Profit.**

**See** 1882 Act, s. 12 (1) (A).

**389. What amounts to — Surgeon of borough gaol—Confirmation vested in council.]—Where,** on the election of councillors to supply the places of those going out of office, the alderman & assessors

29 & 30 Vict. c. 52, s. 73.—**R. (ADAMSON) v. BOYD** (1868), 4 P. R. 204.—**CAN.**

**p. —.]—CAWLEY v. BRANCHFLOWER & WEBB** (1884), 1 B. C. R., pt. 2, 35.—**CAN.**

**q. —.]—Re MUNICIPAL ACT, HEATHER v. MADDOCK**, [1925] 2 W. W. R. 464.—**CAN.**

**r. Payment of rates.]—R. v. MACK** (1906), 2 E. L. R. 263; 41 N. S. R. 128.—**CAN.**

**t. —.]—Where** the municipal rates of a candidate for election as municipal councillor were in arrear on the day of his nomination for election:—**Held:** the candidate was ineligible for election.—**ISMAIL v. GARDENER**, [1921] C. P. D. 4.—**S. AF.**

**a. Occupation — What constitutes.]—“Actual occupation”** in Consolidated Municipal Act, 1892 (c. 42) (O), s. 73, does not necessarily mean exclusive occupation.—**R. (JOANISSE) v. MASON** (1897), 23 O. R. 495.—**CAN.**

**b. Time for possessing qualification.]—Semb:** a person cannot be nominated as a candidate for the office of alderman unless he is a person qualified to hold that office at the time the nomination papers are sent in.—**Re OSGOOD, Ex p. THOMPSON** (1892), 13 N. S. W. L. R. 61; 8 N. S. W. W. N. 95.—**AUS.**

**c. —.]—R. (TINNING) v. EDGAR** (1867), 4 P. R. 36.—**CAN.**

**PART VII. SECT. 2, SUB-SECT. 2.—C. (b).**

**d. What amounts to—Auditor.]—An** auditor of a municipality receiving a remuneration for his services is not a person holding a place of profit under

the council so as to disqualify him from being elected an alderman.—**Ex p. CROFT** (1894), 15 N. S. W. L. R. 186; 10 N. S. W. W. N. 216.—**AUS.**

**e. —.]—A** municipal election set aside, but without costs to the relator, on the ground that he was a confidential officer (auditor) of the corp.—**R. (BRINE) v. BOOTH** (1883), 9 P. R. 452.—**CAN.**

**f. — School superintendent.]—Under** the old law a local superintendent of schools, entitled to a salary to be paid by the county treasurer, was not disqualified.—**It. v. MARCHANT** (1851), 2 C. L. Ch. 189.—**CAN.**

**g. — Secretary to school trustees.]—A** secretary to school trustees is not disqualified by 44 Vict. c. 1, s. 7.—**HOLDSWORTH v. RUSSELL** (1883), 4 R. & G. 184.—**CAN.**

**h. — Registrar.]—Held:** a registrar & a county ct. bailiff are disqualified for the office of mayor & councillor respectively.—**R. (DUNCAN) v. LAUGHLIN, R. (STEVENSON) v. BLANCHARD** (1885), 2 Man. L. R. 78.—**CAN.**

**k. — County court bailiff.]—R. (DUNCAN) v. LAUGHLIN, R. (STEVENSON) v. BLANCHARD** (1885), 2 Man. L. R. 78.—**CAN.**

**l. — Solicitor employed by inspector of licenses.]—Solr.** engaged by the inspector of licenses of an incorporated town to prosecute cases under Canada Temperance Act, & to whom there was due a small sum for services rendered as such prosecutor, held to be disqualified from holding office as mayor.—**R. (MCDONALD) v.**

objected to return one of the candidates who had a majority of votes, on the ground that he was disqualified, inasmuch as he had been appointed by the justices the surgeon of the borough gaol, the confirmation of which appointment was in the council, as also the payment of the salary:—**Held:** the aldermen & assessors were right in returning the candidate who had the next greatest number of votes.—**R. v. DAWBER** (1839), 3 J. P. 272.

**—.]—Compare** Nos. 13, 14,

**390. — Acting as returning officer—For ward other than that for which standing.]—R. v. OWENS**, No. 392, *post*.

**391. Effect of disqualification—Whether eligible to office of profit.]—STAINLAND v. HOPKINS**, No. 286, *ante*.

**(c) Holding Incompatible Office.**

**392. Mayor candidate & returning officer Borough not divided into wards.]—The** mayor of a borough not divided into wards, who, with the two assessors, presides at & declares the result of an election of town councillors for the borough, under 1835 Act, ss. 32–35, is precluded from being a candidate for election as town councillor; inasmuch as, acting as returning officer, he cannot return himself. Under sect. 28, which enacts that no person shall be eligible as councillor “during such time as he shall hold any office or place of profit, other than that of mayor,” in the disposal of the council of the borough, the mayor is eligible as town councillor, if the borough is divided into wards, for a ward in which he is not acting as returning officer.—**R. v. OWENS** (1859), 2 E. & E. 86; 28 L. J. Q. B. 316; 33 L. T. O. S. 257; 23 J. P. 741; 5 Jur. N. S. 764; 7 W. R. 566; 121 E. R. 34.

**Annotations:—Consd.** **R. v. White** (1867), L. R. 2 Q. B. 557. **Reid.** **R. v. Tewkesbury Corp.** (1868), L. R. 3 Q. B. 629; **Galway County Petn., Trench v. Nolan** (1872), 27 L. T. 69; **R. v. Collins** (1876), 1 Q. B. D. 336; **R. v. Morton**, [1892] 1 Q. B. 39.

**ROBERTSON** (1902), 35 N. S. R. 348.—**CAN.**

**m. — Municipal inspector.]—An** inspector, under Canada Temperance Act, appointed by the municipality, is disqualified from being a member of the municipal council.—**Re DICKIE, Ex p. WILLIAMS** (1907), 3 E. L. R. 378; 38 N. B. R. 156.—**CAN.**

**n. — Paid official — Duties completed before election.]—R. (SMITH) v. SCHICK** (N. W. P.) (1907), 5 W. L. R. 533.—**CAN.**

**o. — Member of school board.]—R. (ROBINSON) v. MCCARTHY** (1903), 23 C. L. T. 203; 5 O. L. R. 638; 2 O. W. R. 298.—**CAN.**

**p. —.]—R. (SCROGGIE) v. ROBB** (1925), 57 O. L. R. 23.—**CAN.**

**q. —.]—HOLMES v. THORNE** (1900), 26 S. C. 181.—**S. AF.**

**r. — Poundmaster.]—REICH v. McNALLY & ALIWA NORTH MUNICIPALITY** (1906), 22 S. C. 553.—**S. AF.**

**PART VII. SECT. 2, SUB-SECT. 2.—C. (a).**

**aa. County clerk.]—A** county clerk held disqualified under 29 & 30 Vict. c. 51, s. 73, from sitting as mayor of the same or any other municipality.—**It. (BOYES) v. DETLOR** (1868), 4 P. R. 195.—**CAN.**

**bb. Member of body engaged in proceedings against municipality.]—It. (DAVIS) v. CAMPBELL**, 22 C. L. T. 118.—**CAN.**

**cc. Licensee.]—A** license cannot lawfully be transferred except in the cases mentioned in R. S. O., 1877, c. 181, s. 28, none of which had occurred



**393.** ———.]—In a borough not divided into wards W., the mayor, was nominated on Oct. 25 for election as town councillor at the annual election on Nov. 1: on Oct. 29 the town council elected an alderman to execute all the duties of mayor in his place at the election. W. was elected councillor. On *quo warranto*:—*Held*: (1) he was not, as mayor, disqualified from being a candidate, but could not act as returning officer; (2) he was "incapable of acting" within 1835 Act, s. 36, & therefore the election was properly conducted, & he was duly elected.—*R. v. WHITE* (1867), L. R. 2 Q. B. 557; 8 B. & S. 587; 36 L. J. Q. B. 267; 16 L. T. 828; 31 J. P. 595; 15 W. R. 988.

*Annotations*:—As to (1) *Reid. R. v. Collins* (1876), 1 Q. B. D. 336; *R. v. Morton*, [1892] 1 Q. B. 39. As to (2) *Reid. R. v. Tewkesbury Corp.* (1868), L. R. 3 Q. B. 629.

**394. Alderman.**]—At an election for the office of a councillor of one of the wards of a borough, R. & P. were the only candidates. At the close of the poll P. objected that R. was disqualified for election by reason of his being an alderman of the borough whose term of office had not expired, & P. claimed himself to be elected whatever might be the result of the poll. The returning officer counted the votes, & then stated to those present the number given to each candidate, the result of the poll being that R. had a majority. Having taken time to consider the objection, the returning officer on the following day issued a public notice stating the number of votes given to each candidate, & the objection, & declaring that P. was duly elected. P. thereupon made & subscribed the declaration of acceptance of the office required by 1882 Act, s. 35, & attended meetings of the council. R. subsequently made & subscribed a similar declaration & attended meetings of the council:—*Held*: (1) R. was not by reason of his being an alderman disqualified for election to the office of councillor, & by accepting the latter office he vacated the former; (2) the returning officer had no power to decide whether R. was disqualified or not; (3) the office of councillor was not *de facto* filled by P. so as to entitle him to hold it until dispossessed by an election petition or by *quo warranto*.—*R. v. BANGOR CORPN.* (1886), 18 Q. B. D. 349; 56 L. J. Q. B. 326; 51 J. P. 51; 35 W. R. 158; 3 T. L. R. 176, C. A.; *on appeal*, *sub nom. PRITCHARD v. BANGOR CORPN.* (1888), 13 App. Cas. 241, H. L.

*Annotations*:—As to (1) *Consd. R. v. Douglas*, [1898] 1 Q. B. 580. As to (2) *Reid. Harford v. Linskey*, [1899] 1 Q. B. [1904] 1 K. B. 74. *Generally*,

**395. Town clerk.**]—In the borough of C., by charter, the mayor, burgesses, & commonalty were to elect a town clerk, who was also to be clerk of the peace, clerk of assize, & prothonotary, & the mayor, recorder, & town clerk were to hold plea of certain actions. The mayor, recorder, & a common council, twenty in number, were to enact bye-laws for the good order & government of the borough. None of the common council held any judicial office in any ct. where the town clerk acted. His accounts were audited by a committee, named by the mayor & the common hall. No fixed salary

here. Therefore deft., who retained his interest in the license, was not qualified to be a councillor.—*R. (BRINE) v. BOOTH* (1883), 3 O. R. 144; 9 P. R. 452.—CAN.

**c.** ———.]—A licensed vendor under the second part of the Canada Temperance Act is disqualified from being a member of the municipal council.—*Re DICKIE, Ex p. WILLIAMS* (1907), 3 E. L. R. 378; 38 N. B. R. 156.—CAN.

**d. Candidate acting as returning officer.**]—At an election of alderman for a ward in the city of Dublin, the outgoing alderman, who was a candidate for re-election, presided & acted as returning-officer:—*Held*: the election was void.—*FANAGAN v. KERNAN* (1881), 8 L. R. Ir. 44.—IR.

**e. Government servant.**]—Resp. was employed in locomotive works under the Department of Railways & Harbours, & was on the fixed establishment of the Civil Service:—*Held*: resp.'s whole time was required to be devoted to the public service, & he was disqualified from being elected as a municipal councillor.—*INGGS v. BOWER*, [1920] E. D. L. 2.—S. AF.

the corp., but he was remunerated by certain fee of right payable to him:—*Held*: the offices of common councilman & town clerk were not incompatible.—*R. v. JONES* (1831), 1 B. & Ad. 677; 9 L. J. O. S. K. B. 103; 109 E. R. 938.

*Annotation*:—*Mentd. Iron Ship Coating Co. v. Blunt* (1868), L. R. 3 C. P. 484.

**Army officer.**]—See Army Act, 1881 (c. 58), ss. 146, 181 (5).

**Election auditor.**]—See 1882 Act, s. 12 (1) (a).

**396. Overseer.**]—*R. v. LANCASHIRE JJ.*, No. 146, *ante*.

**Recorder of borough.**]—See 1882 Act, s. 163 (6).

**397. Whether acting in incompatible office sufficient—Without valid appointment.**]—Where a rule is obtained for a *quo warranto* upon the ground that a party has vacated a corporate office by having accepted a second incompatible office, the affidavits must show a valid appointment to the second office, the acceptance of which is made the ground of motion.—*R. v. DAY* (1829), 9 B. & C. 702; 4 Man. & Ry. K. B. 541; 2 Man. & Ry. M. C. 391; 7 L. J. O. S. K. B. 308; 109 E. R. 261.

(d) *Clergyman or Minister.*

See, now, Ministers of Religion (Removal of Disqualifications) Act, 1925 (c. 54).

(e) *Share or Interest in Contract.*

**398. What constitutes interest—In contract—Beneficial interest—Contract in name of trustee.**]—*SIMPSON v. READY*, No. 273, *ante*.

**399. ——— Pecuniary or material interest—Distinguished from pecuniary advantage.**]—An "interest" in a contract within the meaning of 1882 Act, s. 12 (1), must be a pecuniary, or, at least, a material interest, but it need not be a pecuniary advantage.

Deft., who was a member of a municipal corp., carried on business as a jeweller & optician. The optical department was managed by his son, who was not a partner but a paid employee. A contract was made between the son, in his own name, & the municipal corp. for the supply of spectacles to the children of the schools controlled by the corp.'s education committee. The contract was carried out by the son, the spectacles were paid for by him with his own cheque, & he received payment in his own name from the corp. & paid the amounts so received into his own banking account. The spectacles were supplied in cases bearing the son's name but deft.'s business address, some of the cases being taken at the expense of deft. out of his stock. The son alone derived direct pecuniary benefit from the contract, but the shop was provided, & the establishment expenses paid, by deft., & the fact that the spectacle cases bore his address helped to advertise his business with the consequent probability of increasing his custom:—*Held*: on these facts the county ct. judge was warranted in finding that deft. had an "interest" in the contract within s. 12 (1) of the Act.—*ENGLAND v. INGLIS*, [1920] 2 K. B. 636; 89 L. J. K. B. 1062; 123 L. T. 576; 84 J. P. 198; 36 T. L. R. 558; 18 L. G. R. 407, D. C.

*Annotations*:—*Consd. Everett v. Griffiths*, [1924] 1 K. B. 941. *Apprvd. Lapish v. Braithwaite*, [1925] 1 K. B. 474.



**Sect. 2.—Government of the municipal borough:**  
**Sub-sect. 2, C. (e).]**

**400. ——— Supply of materials to contractor.]—**(1) A., who had contracted with the council of a borough, acting as local board of health, for the performance of certain public works in the borough, bought of deft., who was a tradesman, articles required in the course of these works:—**Held:** this was not such a contract or employment as disqualified the defendant from holding a corporate office under 1835 Act.

(2) Deft., & three other persons had contracted with the comrs. under a local Act to sink an artesian well for the purpose of supplying the town with water. This contract & the works were afterwards assigned over to the comrs. by deed, who thereby released the contractors, & covenanted to pay them a certain sum which had been already incurred, & a further sum of £850 in case the comrs. should either abandon the works or complete them, & obtain a specified supply of water from the well. The contractors also covenanted with the comrs. for quiet enjoyment, & not to molest them in the completion of the works. All the powers & contracts of the comrs. were transferred to the council, acting as local board of health, by Public Health Act:—**Held:** this contract was “a security for the payment of money only” within the meaning of 5 & 6 Vict. c. 104, s. 1, & did not, therefore, disqualify deft. from holding a corporate office under 1835 Act, s. 28.—**LE FEUVRE v. LANKESTER** (1854), 3 E. & B. 530; 2 C. L. R. 1426; 23 L. J. Q. B. 254; 22 L. T. O. S. 282; 18 J. P. 198; 18 Jur. 894; 2 W. R. 307; 118 E. R. 1241.

**Annotations:—**As to (1) **Distd.** Tomkins v. Jolliffe (1887), 51 J. P. Jo. 247. **Refd.** Nicholson v. Fields (1862), 7 H. & N. 810; Lewis v. Carr (1876), 34 L. T. 390; Cox v. Truscott (1905), 69 J. P. 174; Lapiash v. Braithwaite, [1925] 1 K. B. 474. **Generally, Mentd.** R. v. Hull JJ. (1854), 4 E. & B. 29.

.]—**Compare** No. 17, ante.

**401. ——— Effect of dissolution of partnership.]—**Resp. was a member of a firm interested in certain continuing contracts with a corpn. of a borough unexpired at the time of a municipal election for that borough. Before offering himself as a candidate at the election resp. dissolved partnership, & assigned all his interest in the said contracts to the other partner, remaining liable, however, on bonds securing the due performance of the contracts. The corpn. was not a party to the assignment & gave no assent thereto nor did they release resp. from the contracts. Resp.'s connection with the said contracts & the fact that his candidature was objected to on that ground were matters of notoriety in the ward for which he was a candidate. On a petition against his return as councillor:—**Held:** resp. was not qualified to be elected within 1882 Act, s. 12, & votes given for him were thrown away.—**COX v. AMBROSE** (1890), 60 L. J. Q. B. 114; 55 J. P. 23; 7 T. L. R. 59, D. C.

**402. ——— Appointment as chemist.—**Though value of contract small.]—(1) Where by

the resolution of a town council under 1882 Act, s. 15 (4), a salary is attached to the office of mayor, a candidate for that office is disqualified under s. 22 (3), from voting for himself, as he has a pecuniary interest in the matter.

(2) 1882 Act, s. 12 (2) (a), which provides that a person shall not be disqualified from being a councillor by reason only of his having an interest in any lease in which the council is also interested, refers as much to a letting for one day as to a lease for a longer period.

(3) 1882 Act, s. 61 (4), which provides that in case of equality of votes at the election of mayor “the chairman, although not entitled to vote in the first instance, shall have the casting vote,” does not prevent the chairman from voting in the first instance, unless he is otherwise disqualified.

(4) Resp. contended that one of the votes given, that of G., was bad, inasmuch as at the time of his election as councillor he held an office or place of profit in the gift of the council & also had a share or interest in a contract or employment, with, by, or on behalf of the council, contrary to 1882 Act, s. 12 (1) (c). It appears that the appointment of chemist to the council entitles the person appointed to supply goods, in the way of his business as a chemist & druggist, to the police & to the fire brigade, & that G., who held this office, had not resigned the appointment before his election, & had after his election supplied a member of the fire brigade on behalf of the council with fourpence worth of oil. The first answer made to this was that the contract was a very small one. That, however, is a matter into which we cannot enter, as the legislature has not entrusted us with any dispensing power, & probably considered the maxim of *obsta principiis* should apply to cases of this class (CAVE, J.).—**NELL v. LONGBOTTOM**, [1894] 1 Q. B. 767; 10 T. L. R. 344; 38 Sol. Jo. 309; *sub nom.* **Re LOUTH MUNICIPAL ELECTION**, **NELL v. LONGBOTTOM**, 63 L. J. Q. B. 490; 70 L. T. 499; 10 R. 193, D. C.

**Annotation:—****Generally, Mentd.** Bland v. Buchanan, [1901] 2 K. B. 75.

**403. ——— Effect of application for release—Release not effective till after election.]—**A petition was presented against a town councillor, alleging that his election was void on the ground that at the date of his nomination, he had an interest in a contract with the council. Resp., in answer to an advertisement had offered to supply to the council for twelve months certain goods at specified prices & the offer was accepted. Afterwards he applied to a committee of the council to be released from his contract. The committee resolved that subject to approval by the council, he be released from that date. He was then nominated. After his nomination the council approved the resolution of the committee releasing him. On argument of questions of law reserved:—**Held:** (1) the advertisement, tender & acceptance constituted a contract; (2) resp. had an interest in the contract; (3) the resolution, after the resp.'s nomination, of the resolution releasing

**PART VII. SECT. 2, SUB-SECT. 2.—**  
**C. (e).**

**400 i. What constitutes interest—In contract—Supply of materials to contractor.]—****NORTON v. TAYLOR** (1905), 2 C. L. R. 291.—**AUS.**

**400 ii. ———.]—**Where a member of a corpn., being a baker, supplied bread to fulfil a gaol contract held by another person in his own name & for his own benefit, the member of the corpn. was held not to be disqualified.—**R. (PIDDINGTON) v. RIDDELL** (1867), 4 P. R. 80.—**CAN.**

**400 iii. ———.]—****R. (FLURTT) v. GAUTHIER** (1869), 5 P. R. 24.—**CAN.**

**400 iv. ———.]—****RYAN v. WILLOUGHBY** (1900), 27 A. R. 135.—**CAN.**

**i. ———.]—**A municipality passed a bye-law to exempt from taxation, for a term of years, a mill to be built within its limits by a firm of which deft. was a member:—**Held:** there was a contract subsisting between deft. & the municipality, & he was therefore disqualified from holding the

office of reeve.—**R. (LEE) v. GILMOUR** (1881), 8 P. R. 514.—**CAN.**

**e. ——— Supply of goods to corporation.]—****Ex p. BOWRING** (1886), 7 N. S. W. L. R. 439; 2 N. S. W. W. N. 93.—**AUS.**

**h. ———.]—****Held:** the supply of goods on credit, even to a trifling amount, was a contract within Act 45 of 1882, s. 17, & the disqualifying effect of such a contract continued even after the price was paid & the contract concluded.—**Moss v. Sissons**



him did not relate back to the date of the resolution, because the interests of persons other than the parties to the contract might be affected, & therefore resp., at the date of his nomination had an interest in a contract with the council, & was disqualified & his election was void.—*Re GLOUCESTER MUNICIPAL ELECTION PETITION 1900, FORD v. NEWTH*, [1901] 1 K. B. 683; 70 L. J. K. B. 459; 84 L. T. 354; 65 J. P. 391; 49 W. R. 345; 17 T. L. R. 325; 45 Sol. Jo. 327, D. C.

404. ——— Benefit derived from advertisement.—Though no personal interest in contract.]—*ENGLAND v. INGLIS*, No. 399, *ante*.

405. ——— Managing directorship.]—An alderman, who is also a shareholder & managing director of cos. having current contracts with the borough council, if he is paid as managing director by salary & not by commission, is not disqualified for being an alderman under 1882 Act, ss 12 & 14, as a person having a share or interest in any contract with the council.—*LAPISH v. BRAITHWAITE*, [1926] A. C. 275; 95 L. J. K. B. 406; 134 L. T. 481; 90 J. P. 65; 42 T. L. R. 263; 70 Sol. Jo. 365; 24 L. G. R. 125, H. L.

406. ——— In employment—Sale of business in consideration of annual payments—Payable out of official salaries.]—L. owned a private business as accountant, & also held certain appointments under the corp'n. of a borough. As he was disqualified while he held these appointments from being elected mayor of the borough, he made an arrangement with those who had control of the appointments, in pursuance of which he resigned them in favour of his son & another as joint holders thereof, & he became a candidate for the office of mayor. He was shortly afterwards elected mayor & held that office for a year, continuing thereafter to be a councillor for upwards of five years. He had taken no part in the appointment of his successors to, or their continuance in, the aforesaid appointments. Subsequently by deed L., whilst mayor, sold to the joint holders of these appointments his private business as accountant in consideration of their paying him (*inter alia*) an annual sum for five years out of their official salaries. They accordingly paid him that annual sum for the stipulated period. The corp'n. of the borough brought an action against the exors. of L. to recover the sums so paid to him, as money had & received by him to the use of the corp'n.:—*Held*: there was no foundation for the claim. Under the deed L. had an interest in an employment with the corp'n., & was therefore disqualified for being mayor or councillor by 1882 Act, s. 12 (1) (c) (*per* CUR.).—*PONTEFRAC T CORPN. v. LOWDEN*

(1915), 84 L. J. K. B. 1800; 113 L. T. 272; 79 J. P. 392; 59 Sol. Jo. 398; 13 L. G. R. 721, C. A.  
—.]—*Compare* Nos. 15–22, 56, 57, *ante*.

407. Excepted interests—Lease—Letting for one day included.]—*NELL v. LONGBOTTOM*, No. 402, *ante*.

408. Duration of interest—Goods supplied—Though not paid for.]—Deft. in an action for penalties under 1882 Act, s. 14, was a town councillor & trustee of a Wesleyan chapel. A non-provided school was attached to the chapel; but the school building was also used for other purposes than those of the non-provided school. Fuel for warming the building was supplied by the trustees under an arrangement with the town council by which the latter paid the trustees for such of the fuel as was used for the purpose of warming the building during the times when it was used as a non-provided school. It was the habit of the trustees to procure from deft. the fuel required by small orders given from time to time. An order of this kind had been given on Jan. 4, 1904, & fulfilled on Jan. 11; another on Jan. 23, & fulfilled on Jan. 25; another on Feb. 2, & fulfilled on Feb. 3. The votes complained of were given on Feb. 1 & 5. On these dates the fuel ordered had not been paid for:—*Held*: there was a contract between the town council & the trustees; deft. had at times an interest in that contract, but he had not such an interest at the time when the votes complained of were given, & therefore he was not disqualified from voting on the dates alleged.—*COX v. TRUSCOTT* (1905), 92 L. T. 650; 69 J. P. 174; 21 T. L. R. 319; 3 L. G. R. 431.

*Annotation*:—*Re* *Lapish v. Braithwaite*, [1925] 1 K. B. 474.

409. In any contract—Existence of contract question of fact.]—*R. v. BLACKALL* (1851), 15 J. P. Jo. 322.

410. ——— Contract not under seal included.]—*R. v. FRANCIS*, No. 276, *ante*.

411. ——— Contract with council acting as local board of health.]—*LE FEUVRE v. LANKESTER*, No. 400, *ante*.

412. ——— Advertisement, tender & acceptance.]—*Re GLOUCESTER MUNICIPAL ELECTION PETITION 1900, FORD v. NEWTH*, No. 403, *ante*.

Excepted contracts—Lease of lands.]—*Compare* No. 22, *ante*.

413. ——— Security for payment of money—Covenant for payment of money for work done.]—

414. Extent of disqualification—Nomination & election—Though interest assignable.]—Petitioner & resp. were nominated in proper form for election

& *McKENZIE*, [1907] E. D. C. 156.—S. AF.

k. ——— Commission.]—*WOOD v. LITTLER* (1921), 29 C. L. R. 564.—AUS.

l. ——— Effect of assignment.]—A claim by deft. against the corp'n. *bond fide* assigned to a third party, before the election, does not disqualify.—*R. (MACK) v. MANNING* (1867), 4 P. R. 73.—CAN.

m. ——— ———.]—*R. v. FRANKLIN* (1872), 1 I. R. 6 C. L. 239.—IR.

n. ——— Surety for borough treasurer.]—A surety by bond to a corp'n. for their treasurer, & to the treasurer for the collector of taxes, is disqualified for a seat in the corp'n.—*R. (COLEMAN) v. O'HARE* (1855), 2 P. R. 18.—CAN.

o. ——— ———.]—*R. (FORD) v. MORAE* (1870), 5 P. R. 309.—CAN.

p. ——— Surety for corporation.]—Defts. were, at the time of their

election as reeves, sureties in a bond given by their respective townships for security for the costs of an appeal:—*Held*: they had an "interest in a contract with or on behalf of the corp'n."—*R. (HANER) v. ROBERTS, R. (TAYLOR) v. STEVENS* (1878), 7 P. R. 315.—CAN.

q. ——— Surety for inspector of licences.]—*R. v. KIRK* (1892), 24 N. S. R. 168.—CAN.

r. ——— ———.]—A surety to a contractor to a divisional council is a person concerned in or participating in the profit of a contract with the council, & is consequently disqualified for election as a councillor.—*DEACON v. GREWAR* (1898), 13 E. D. C. 132.—S. AF.

t. ——— Membership of club making contract.]—*R. (LIVINGSTONE) v. EAST* (1914), 29 W. L. R. 710; 18 D. L. R. 394.—CAN.

u. ——— ———.]—*R. (LIVINGSTONE) v. MCNAMARA* (1914), 29

W. L. R. 707; 18 D. L. R. 392; 7 W. W. R. 324.—CAN.

408 i. Duration of interest—Goods supplied—Though not paid for.]—*R. (ROLLO) v. BEARD* (1865), 3 P. R. 357.—CAN.

408 ii. ——— ———.]—*R. (MCGUIRE) v. BIRKETT* (1892), 21 O. R. 162.—CAN.

b. ——— Work done—Though not paid for.]—Where deft., when elected as councillor, had a claim upon the city for certain work done by him under a contract with the corp'n.:—*Held*: disqualified.—*R. (DAVIS) v. CARRUTHERS*, 1 P. R. 114.—CAN.

c. ——— ———.]—*R. (MOORE) v. MILLER* (1854), 11 U. C. R. 465.—CAN.

d. ——— ———.]—*R. (MCDONALD) v. ROBERTSON* (1902), 35 N. S. R. 348.—CAN.

e. In any contract—Effect of discharge under seal.]—A person cannot be said to be disqualified as a member



**Sect. 2.—Government of the municipal borough:**  
**Sub-sect. 2, C. (e), (f), (g) & (h), D. & E.]**

to the office of councillor for a ward in a borough. Petitioner at the time of his nomination was interested in a contract with the corpn. of the borough. Resp. objected to petitioner's nomination on ground that he was, by reason of his interest in the contract, disqualified for election. The mayor allowed the objection, & resp., being the only other person nominated, was declared elected:—*Held*: (1) petitioner was disqualified for nomination, none the less because he might by assigning his interest in the contract have got rid of his disqualification before the date of the poll; but (2) petitioner, although disqualified for election & nomination, having in fact been nominated in proper form, was a candidate within the meaning of 1882 Act, s. 77, & consequently entitled under s. 88 to present a petition for the purpose of questioning the election of resp.—*HARFORD v. LINSKEY*, [1899] 1 Q. B. 852; 68 L. J. Q. B. 599; 80 L. T. 417; 63 J. P. 263; 47 W. R. 653; 15 T. L. R. 306; 43 Sol. Jo. 381, D. C.

*Annotations*:—*As to* (1) *Refd. Re Gloucester Municipal Petn.* 1900, *Ford v. Newth*, [1901] 1 K. B. 683; *Hobbs v. Morey*, [1904] 1 K. B. 74. *As to* (2) *Refd. Cambridge County Council Petn.*, *Fordham v. Webber*, [1925] 2 K. B. 740.

**415. — Release from contract between nomination & election.]—***Re GLOUCESTER MUNICIPAL ELECTION PETITION 1900, FORD v. NEWTH*, No. 403, *ante*.

**416. — “Being” a councillor — “Holding the office of” councillor.]—**A person elected a member of a borough council although disqualified under 1882 Act, s. 12 (1) (c), for being elected or for being a councillor by reason of his having an interest in a contract with the council, is nevertheless a councillor within 1882 Act, ss. 14 (3), 15 (1), & qualified to be elected alderman & mayor of the borough where, under the provisions of sect. 73 his election is to be deemed to all intents good & valid because it has not been questioned within twelve months thereof; & within the meaning of the above sub-sects. he is “qualified to be a councillor.” “Being,” in sect. 12 (1) (c), means “holding the office of.”—*FORRESTER v. NORTON*, [1911] 2 K. B. 953; 80 L. J. K. B. 1288; 105 L. T. 375; 75 J. P. 510; 27 T. L. R. 542; 9 L. G. R. 991, D. C.

**417. Effect of disqualification — Whether absolute—Election not questioned within twelve months.]—***FORRESTER v. NORTON*, No. 416, *ante*.

**418. — Liability to penalty — Acting after interest terminated.]—**The disqualification under 1835 Act, s. 28, of any person who has any interest in a contract with the council of the borough, to be

elected or be an alderman or councillor of the borough, applies only during the continuance of the contract. So that by becoming interested in such a contract an alderman or councillor does not cease to be qualified or become disqualified within sect. 53, so as to incur penalties for acting after the termination of the contract.—*LEWIS v. CARR* (1876), 1 Ex. D. 484; 46 L. J. Q. B. 314; 36 L. T. 44; 40 J. P. 692; 24 W. R. 940, C. A.

*Annotations*:—*Consd. Fletcher v. Hudson* (1881), 7 Q. B. D. 611. *Folld. Pridmore v. Hay* (1890), 54 J. P. Jo. 697. *Consd. R. v. Rowlands*, [1906] 2 K. B. 292. *Refd. Cox v. Truscott* (1905), 69 J. P. 174.

**419. — Unless termination of interest colourable only.]—***PRIDMORE v. HAY* (1890), 54 J. P. Jo. 697.

—.]—*See, generally*, Sect. 1, sub-sect. 7, C., *ante*.

**Avoidance of corporate office.]—***See* Sect. 1, sub-sect. 7, G., *ante*.

**420. Duration of disqualification — Limited to continuance of contract.]—***LEWIS v. CARR*, No. 418, *ante*.

—.]—*See, also*, No. 408, *ante*.

**(f) Bankruptcy.**

**Bankruptcy.]—***See* BANKRUPTCY, Vol. IV., p. 177, Nos. 1644, 1647.

**Composition with creditors.]—***See* Sect. 1, sub-sect. 7, G., *ante*.

**(g) Corrupt Practice at Election.**

*See* Municipal Elections Corrupt & Illegal Practices Act, 1884 (c. 70), ss. 2, 3.

**421. Corrupt practice of agent — Disqualification for three years from date of report.]—**(1) If a candidate at a municipal election is reported by an election ct. to have been guilty by his agents of a corrupt practice at the election the effect of the report is that he is not capable of being elected to or holding any corporate office in the borough during a period of three years from the date of the report, & if he has been elected his election is void but he is not deprived of his right to vote at a Parliamentary election inasmuch as the case is governed by Municipal Elections Corrupt & Illegal Practices Act, 1884 (c. 70), s. 3 (2).

(2) Corrupt & Illegal Practices Prevention Act, 1883 (c. 51), ss. 6 (3) (a), 38 (5), extended to municipal elections by Municipal Elections Corrupt & Illegal Practices Act, 1884 (c. 70), which disqualify the person so reported from voting at a Parliamentary election during a period of seven years from the date of the municipal election, apply only where the person reported has been personally guilty of a corrupt practice.—*MORRIS*

of a municipal corpn., as having a contract with it, if he be plainly acquitted in equity from such contract, & a sealed instrument is all that is required to perfect his discharge at law.—*R. (HILL) v. BETTS* (1867), 4 P. R. 113.—CAN.

**f. — Whether judgment included.]—**A member of a municipal council against whom the corpn. held an unsatisfied judgment for costs was unseated as being disqualified.—*R. (MCNAMARA) v. HEFFERNAN* (1904), 24 C. L. T. 233; 7 O. L. R. 289; 3 O. W. R. 431.—CAN.

**g. — ]—***MASON v. MESSTON* (1908), 14 B. C. R. 22; 9 W. L. R. 113.—CAN.

**h. — ]—***R. (BALL) v. HUGHES* (1923), 53 O. L. R. 473.—CAN.

**k. — Contract with corporation**

—*To defray costs of litigation.* *BURGER v. DUMMER*, [1913] C. P. D. 765.—S. AF.

**l. Effect of disqualification — Liability to penalty—Whether intention material.]—**Under New South Wales Act, 2 Edw. 7, No. 35, s. 24, according to its true construction, a person holding a civic office is not liable to a penalty as being knowingly interested in a contract with his municipality when he has merely supplied materials to a contractor who chooses to buy them from him without any concerted arrangement that he should do so.—*NORTON v. TAYLOR*, [1906] A. C. 378.—AUS.

**m. Interest as ratepayer only — No disqualification.]—**No interest which springs solely from his being a ratepayer, can disqualify a councillor.—*Re MCLEAN & TOWNSHIP OF OPS* (1880), 45 U. C. R. 325.—CAN.

**PART VII. SECT. 2, SUB-SECT. 2.—**  
**C. (g).**

**n. What is—Payment to canvasser.]—***R. (JOHNS) v. STEWART* (1888), 16 O. R. 583.—CAN.

**o. — Bribery & treating.]—**Bribery & treating having been amply proven resp. was declared disqualified to hold a seat as a municipal councillor.—*MACLELLAN v. MACISAAC* (1914), 14 E. L. R. 450.—CAN.

**p. Result unaffected by corrupt practice—Effect.]—***R. (ST. LOUIS) v. REAUME* (1895), 26 O. R. 460.—CAN.

**q. Must be clearly proved.]—**The power of disqualification exercisable by a judge under Municipal Act, where a person, or a candidate, is found guilty of a corrupt practice is one which should be exercised only in a plain case, upon clearly proven facts.—*R. (MITCHELL) v. MC*

*v. SHREWSBURY (TOWN CLERK)*, [1909] 1 K. B. 342; 78 L. J. K. B. 234; 99 L. T. 964; 73 J. P. 28; 7 L. G. R. 125; 21 Cox, C. C. 751; 2 Smith, Reg. Cas. 123, D. C.

#### *Continuous Absence.*

See Sect. 1, sub-sect. 7, G., *ante*.

#### *D. Avoidance of Office.*

See, generally, Sect. 1, sub-sect. 7, G., *ante*.

By election as alderman.]—See 1882 Act, s. 14 (4).

#### *E. Removal.*

See, generally, CORPORATIONS, Vol. XIII., pp. 305 *et seq.*, 316 *et seq.*

**422. Power to remove—At common law.]—**The imputation, it was said, is a charge of corrupt & dishonest conduct in a public office, & that was always & still is a cause of amotion from the office. That this was the case before the passing of the Municipal Corporations Acts is beyond question; but deft. contends that the power of amotion no longer exists now that municipal officers are elected under statutory provisions & hold their offices not for life, as theretofore, but for limited periods, namely six years in the case of aldermen & three years in the case of councillors. 1882 Act, s. 39, provides for the avoidance of the office of mayor, alderman, or councillor in the case of bkpcy., insolvency, compounding with creditors, or temporary absence from the borough. These causes of loss of office are expressly provided for; but none of them, it is to be observed would have afforded the corpn. at common law ground for the removal of any of its members. The power of amotion for reasonable cause is incident to every corpn., unless it has been taken away by statute. I can find nothing in any statute taking it away, nor anything in any statute inconsistent with its existence (LOPES, L.J.).—BOOTH *v.* ARNOLD, [1895] 1 Q. B. 571; 64 L. J. Q. B. 443; 72 L. T. 310; 59 J. P. 215; 43 W. R. 360; 11 T. L. R. 246; 39 Sol. Jo. 314; 14 R. 326, C. A.

**423. — Since Municipal Corporation Acts.]—**Re NORTON & PENZANCE TOWN COUNCIL (1872), *Times*, June 10.

Annotation:—*Re*fd. Booth *v.* Arnold, [1895] 1 Q. B. 571.

**424. — —.]—**BOOTH *v.* ARNOLD, No. 422, *ante*.

**425. Grounds for removal—Any reasonable cause.]—**BOOTH *v.* ARNOLD, No. 422, *ante*.

**426. — Drunkenness.]—**R. *v.* GLOUCESTER CORPN. (1616), 3 Bulst. 189; 81 E. R. 159.

Annotations:—*Re*fd. R. *v.* Glide (1691), 12 Mod. Rep. 27; Sharp *v.* London Corpn. (1714), Gilb. 255.

[. 841; 33

r. *Qualification of petitioner—Degree of proof required.]—*MCLEAN *v.* DRY-

.. R.

#### PART VII. SECT. 2, SUB-SECT. 2.—E.

**423 i. Power to remove—Since Municipal Corporation Acts.]—**There is no provision in the Municipal Corporations Acts, 1908, granting power to a mayor or borough council to expel or suspend a member of the council.—WILKIE *v.* KIRLY (1914), 33 N. Z.

t. *Grounds for removal—Convic-*

a. — *Defective* — A defective declaration of qualification of candidate at a municipal election is

**427. S. P. R. *v.* TAYLOR** (1694), 3 Salk. 231; 91 E. R. 795.

**428. — —.]—**Where the imputation is an imputation not of misconduct in an office, but of unfitness for an office, & the office for which the person is said to be unfit is not an office of profit, but one merely of what has been called honour or credit, the action [for slander] will not lie, unless the conduct charged be such as would enable him to be removed or deprived of that office. It follows that in the present case the action is not maintainable (LORD HERSCHELL).

The first thing, to my mind, which we have to is this: whether he can be removed from the office of councillor because he is often drunk. I can find nothing in the statutes relating to borough councillors which enables anybody to be removed by reason of drunkenness (LINDLEY, L.J.).—ALEXANDER *v.* JENKINS, [1892] 1 Q. B. 797; 61 L. J. Q. B. 634; 66 L. T. 391; 56 J. P. 452; 40 W. R. 546; 8 T. L. R. 421; 36 Sol. Jo. 326, C. A.

Annotations:—*Consd.* Booth *v.* Arnold, [1895] 1 Q. B. 571 *Re*fd. Jones *v.* Jones, [1916] 2 A. C. 481.

**429. — Obstruction of business of council by riot.]—**HADDOCK'S CASE (1681), T. Raym. 435; 1 Vent. 355; 83 E. R. 227.

Annotations:—*Re*fd. R. *v.* Derby Corpn. (1734), Lee *temp.* Hard. 153; R. *v.* Westwood (1830), 7 Bing. 1. *Mentd.* Colchester Corpn. *v.* Seaber (1766), 3 Burr. 1866.

**430. — Bribery.]—**Bribery is a good cause to remove a corporator from his office.—R. *v.* TIVERTON CORPN. (1723), 8 Mod. Rep. 186; 88 E. R. 136.

**431. — Libel on & insult to mayor.]—**E. having written a letter alleged to be libellous on the mayor of B. & having insulted the mayor of B. in ct., the mayor & council amoved E. who was a common councilman from his office:—*Held*: (1) there could not be any cause to disfranchise a member of the corpn., unless it be for a thing done which works for the destruction of the body corporate, or to the destruction of the liberties & privileges thereof, & not any personal offence of any one member thereof; (2) E. was granted a *mandamus* to restore him.—EARLE'S (SIR THOMAS) CASE (1790), Carth. 173; 90 E. R. 705.

**432. — Misconduct in office.]—**BOOTH *v.* ARNOLD, No. 422, *ante*.

**433. Procedure—Right of officer to be heard.]—**Peremptory *mandamus* granted to a common councilman for not setting out in the return that the party was summoned.—R. *v.* KING'S LYNN CORPN. (1734), Cunn. 98; 94 E. R. 1086.

Annotations:—*Re*fd. R. *v.* Liverpool Corpn. (1759), 2 Burr. 723; R. *v.* Lyme Regis (1779), 1 Doug. K. B. 79.

not a ground for unseating him by the summary process under Municipal Act, 1866.—R. (HALSTED) *v.* FERRIS (1870), 5 P. R. 241.—CAN.

b. *Procedure—Estoppel of applicant.]—*Upon an application under Local Government Act, 1890, to oust from office, it is the ct.'s duty to consider whether the appct. has by his conduct precluded himself from the right to take the objections upon which he relies, & if the ct. is of opinion that he has so precluded himself, it should refuse the application.—*Re* HENDY, *Ex p.* CLAYTON (1902), 28 V. L. R. 105.—AUS.

c. — —.]—The ct. refused leave to file an information to disturb a person in the exercise of an office to which he was elected for one year, without opposition; the appct. having been present at such election, & made no objection.—*Re* KELLY *v.* MACAROW (1864), 14 C. P. 313, 457.—CAN.

d. — *How removed—Summons.* A summons under the Municipal Act is not an appropriate proceeding to unseat a deft. who has forfeited his seat by an act subsequent to the election, the election having been legal.—R. (MCGOUVERIN) *v.* LAWLOR (1870), 5 P. R. 208.—CAN.

e. — — *Petition.]—*SEX-SMITH *v.* MONTGOMERY (1893), 9 Man. L. R. 173.—CAN.

f. — — *Quo warranto.]—*Where a person not properly qualified has been elected & continues to act as a councillor the proper procedure for his removal is an information in the nature of a *quo warranto*.—*Re* MACK (1906), 39 N. S. R. 394.—CAN.

g. — *Interest of relator must be proved.]—*R. (BOYCE) *v.* PORTER, R. (BOYCE) *v.* ELLIS & NELSON (1915), 8 O. W. N. 307; 33 O. L. R. 575; 24 D. L. R. 118.—CAN.



**Sect. 2.—Government of the municipal borough:**  
**Sub-sect. 2, E. & F.; sub-sects. 3 & 4, A.]**

**434. Restoration—Jurisdiction of court.]—COULCHESTER TOWN & NORTHERN (1616), 1 Roll. Rep. 335; 81 E. R. 526.**

*F. Personal Liability for Corporate Acts.*  
*See Nos. 354–357, ante.*

#### SUB-SECT. 3.—THE ALDERMEN.

*See 1882 Act, s. 14.*

**435. Precedence inter se. — JONES & CAPEL'S CASE (1623), Benl. 125; 73 E. R. 985.**

**Qualification—Fit person.]—Compare Sub-sect. 2, E., ante.**

**Councillor or qualified as councillor.]—See 1882 Act, s. 14 (3); Sub-sect. 2, B., ante.**

**436. ——— Councillor elected when disqualified—Election not questioned within twelve months.]—FORRESTER v. NORTON, No. 416, ante.**

**Disqualifications—As councillors.]—See Sub-sect. 2, C., ante.**

**437. ——— Holding office under council — Election as alderman declined.]—BASTON'S CASE (prior to 1574), 3 Dyer, 332 b, n.; 73 E. R. 753.**

*Annotations:—Consd. Milward v. Thatcher (1787), 2 Term Rep. 81. Refd. Awdley's Case (1626), Noy, 78; R. v. Patteson (1832), 2 L. J. K. B. 33.*

**Election—By council.]—See 1882 Act, ss. 14, 60. ———.]—See, generally, ELECTIONS, Vol. XX., pp. 136 et seq.**

**438. ——— Enforcement by mandamus.]—R. v. GODALMING CORPN. (1845), 4 L. T. O. S. 342; 9 J. P. Jo. 84.**

**———.]—See, generally, CORPORATIONS, Vol. XIII., p. 322, No. 578; CROWN PRACTICE, Vol. XVI., pp. 314, 315; ELECTIONS, Vol. XX., pp. 136, 137, Nos. 1105–1109.**

**——— Not questioned within twelve months—Valid.]—See 1882 Act, s. 73.**

**439. Avoidance of office — By appointment to incompatible office—Town clerk.]—A jurat of the corpn. of H. may be elected town clerk of that corpn. But the two offices are incompatible, & the acceptance of the latter, though an inferior office, will vacate the former.—MILWARD v. THATCHER (1787), 2 Term Rep. 81; 100 E. R. 45.**

*Annotations:—Refd. R. v. Bristol Corpn. (1822), 1 Dow. & Ry. K. B. 389; R. v. Jones (1831), 1 B. & Ad. 677; R. v. Patteson (1832), 4 B. & Ad. 9. Mentd. R. v. Poole (1837), 1 Jur. 942.*

**440. ———.]—Where the town clerk's accounts are allowed by the aldermen, or where a town clerk acts ministerially under the aldermen, who are judicial officers, the offices are incompatible; & the appointment to the former office is equivalent to an amotion by the corpn. from the latter office; & if the person so appointed continue to exercise the office of alderman, this ct. will grant an information in the nature of a *quo warranto* against him.—R. v. PATEMAN (1788), 2 Term Rep. 777; 100 E. R. 419.**

*Annotations:—Refd. R. v. Jones (1831), 1 B. & Ad. R. v. Patteson (1832), 4 B. & Ad. 9; R. v. (1840), 4 ———.*

**434 i. Restoration — Jurisdiction of court.]—The election of resp. as a municipal councillor was set aside by a judge of the county ct. & resp.'s disqualification ordered on evidence which the majority of the ct., on appeal, considered of an unsatisfactory character:—Held: resp.'s appeal must be allowed & the order appealed from set**

**aside with costs.—CAMERON v. BEATON (1915), 48 N. S. R. 353.—CAN.**

#### PART VII. SECT. 2, SUB-SECT. 3.

**435 i. Precedence inter se.]—"Senior alderman" means senior in actual office.—Re BELFAST MUNICIPAL ELECTION, GRIBBIN v. KIRKER (1873), 1 R.**

**441. ———.]—In the borough of W. the town clerk is appointed by the mayor, aldermen, & bailiffs, to hold the office during their pleasure, with a salary, which they have power to alter in amount or withdraw altogether; & one of the town clerk's duties is to attend all corporate meetings of the mayor, aldermen, bailiffs, & burgesses, & draw up minutes of their proceedings under their inspection:—Held: the offices of aldermen & town clerk are incompatible, & an alderman, by accepting the latter, vacated the former office.—R. v. TIZZARD (1829), 9 B. & C. 418; 4 Man. & Ry. K. B. 400; 2 Man. & Ry. M. C. 335; 7 L. J. O. S. K. B. 275; 109 E. R. 155.**

*Annotations:—Consd. R. v. Jones (1831), 1 B. & Ad. 677; R. v. Patteson (1832), 4 B. & Ad. 9.*

*See 1882 Act, s. 17 (1).*

**442. ——— City & county treasurer — Appointment by corporation acting as justices.]—R. v. PATTESON, No. 726, post.**

**443. ——— By election as councillor.]—R. v. BANGOR CORPN., No. 394, ante.**

**———.]—See, generally, Sect. 1, sub-sect. 7, G., ante.**

**444. Resignation — When about to go out of office—Office not declared vacant—Right to vote at next election.]—PEASE v. LOWDEN, No. 284, ante.**

**445. Resolution for removal — Effect of subsequent rescission—Whether mandamus for restoration will issue.]—A town council, upon insufficient grounds, & by an illegal mode, passed a resolution removing an alderman, & declaring his office void. At the next meeting the council formally rescinded their previous resolution. The alderman obtained a rule for a *mandamus* to the corpn. to restore him, on the ground that he might be liable to proceedings, if he continued to act merely upon the rescission of the resolution:—Held: the corpn. had done all they could do, & there was no wrong which the *mandamus* could remedy.—R. v. RYDE CORPN. (1873), 28 L. T. 629; 37 J. P. 725.**

*Annotation:—Refd. Booth v. Arnold, [1895] 1 Q. B. 571.*

#### SUB-SECT. 4.—THE MAYOR.

##### A. In General.

**Precedence.]—See 1882 Act, ss. 15 (5), 257 (2).**

**Over borough justices.]—See 1882 Act, s. 155 (2).**

**Over county justices acting in business of borough.]—See 1882 Act, s. 155 (2).**

**446. ——— Borough business & county business arising within borough distinguished.**

**Where justices of the peace for the county in which a borough, not having a separate commission of the peace, is situate have issued a summons in a matter within their jurisdiction, the matter is county business & not borough business, although it may have arisen in respect of an offence committed within the borough, & the mayor has not, by virtue of his office, the right to take the chair when the matter comes up for determination.—LAWSON v. REYNOLDS, [1904] 1 Ch. 718; 73 L. J. Ch. 451; 90 L. T. 278; 68 J. P. 254; 52 W. R. 375; 20 T. L. R. 293; 2 L. G. R. 749.**

**7 C. L. 30.—IR.**

**b. Removal.]—On a motion to oust an alderman if the ct. is of opinion that he has been improperly elected the ct. has no discretion & must oust him.—Ex p. IRWIN (1901), 1 S. R. N. S. W. 310; 18 N. S. W. W. N. 174.—AUS.**

**447. — Effect of omission of name from burgess roll.]**—It is no objection to the qualification of a person elected to fill the office of mayor of a city under 1835 Act, that his name has been omitted from the citizen list for the municipal year in which he was so elected, it appearing that he had been duly chosen a councillor of the city on Nov. 9 in the preceding year, his name being enrolled in the burgess list of the then current municipal year, & that he had continued to hold the office of councillor, & to be entitled to be upon the citizen roll, up to the time of his election as mayor.—*R. v. DIXON* (1850), 15 Q. B. 33; 4 New Mag. Cas. 88; 19 L. J. Q. B. 363; 15 L. T. O. S. 86; 14 J. P. 638; 14 Jur. 811; 117 E. R. 370.

*Annotations:—*Consd. *Whalley v. Bramwell* (1850), 15 Q. B. 775. *Refd. R. v. Ireland* (1868), 9 B. & S. 19. *Mentd. R. v. Dublin Town Council* (1850), 15 L. T. O. S. 524.

**Disqualifications—As councillor.]**—See Sub-sect. 2, C., *ante*.

**Election.]**—See, generally, ELECTIONS, Vol. XX., pp. 134 *et seq.*

**Regulation—Bye-law inconsistent with charter.]**—See CORPORATIONS, Vol. XIII., p. 330, Nos. 676, 677.

**448. — Enforcement by mandamus — When granted—Mayor de facto without colour of right.]**—*Mandamus* may be granted to go to an election though there is a mayor *de facto* if he have no colour of right.—*BOSSINY (alias TINTAGEL) BOROUGH CASE* (1735), 2 Stra. 1003; 93 E. R. 996.

*Annotations:—*Consd. *Scarborough Corpn. Case* (1743), 2 Stra. 1180. *Refd. R. v. Oxford Corpn.* (1735), *Lee temp. Hard.* 178; *Aberystwith Case* (1740), 2 Stra. 1157.

**— — —.]**—See, generally, CROWN PRACTICE, Vol. XVI., p. 315, Nos. 1267–1274; ELECTIONS, Vol. XX., pp. 134, 135, Nos. 1080–1085.

**449. — Necessary party — Mayor de facto.]**—In rule for a *mandamus* to elect a mayor, a subsisting mayor *de facto* must always be a party.—*R. v. BANKES* (1764), 3 Burr. 1452; 1 Wm. Bl. 445; 97 E. R. 922.

**— — —.]**—See, generally, CROWN PRACTICE, Vol. XVI., p. 323.

**Election to corporate office generally.]**—See CORPORATIONS, Vol. XIII., pp. 322 *et seq.*

**Term of office.]**—See 1882 Act, s. 15 (3).

**450. — Effect of ouster — Whether liable to complete term.]**—*DURHAM (MAYOR) CASE* (1661), 1 Sid. 33; 82 E. R. 953.

**Avoidance of office.]**—See Sect. 1, sub-sect. 7, G *ante*.

**Remuneration.]**—See 1882 Act, s. 15 (b).

**451. — Provision for extraordinary expenditure as remuneration—Whether allowed.]**—A.-G. *v. BLACKBURN CORPN.*, No. 548, *post*.

**452. — — — No power of council to control expenditure.]**—A.-G. *v. CARDIFF CORPN.*, No. 558, *post*.

**453. Insignia of office — Duty to deliver to successor—Enforceable by mandamus.]**—*Ex p. DOWNTON (MAYOR)* (1850), 14 J. P. Jo. 319.

**454. — Provision out of borough fund—Illegal.]**—The purchase of a gold chain for the mayor of a borough out of the borough fund is illegal.—A.-G. *v. BATLEY CORPN.* (1872), 26 L. T. 392.

**455. Title to office—Duty to defend — When interests of corporation concerned.]**—*R. v. DAWES* (1769), 4 Burr. 2277; 98 E. R. 188.

**456. Powers — To bind corporation.]**—The mayor & commonalty of Southampton have an assignment from the Crown of a sum of money payable yearly out of the customs of the town: the mayor alone makes an acquittance on receiving it; this does not strictly bind the corp., but was allowed in this case on account of precedent. The mayor as mayor can do nothing regularly being only a part of the corp. aggregate who are one indivisible body, but usage and precedents are not to be neglected in things indifferent or not *mala in se*.—*ANON.* (1484), *Jenk.* 162; 145 E. R. 104.

**457. — To take proceedings — For damage to corporate property.]**—*ALLEN v. AYRE*, No. 299, *ante*.

**As returning officer—At election of councillors.]**—See ELECTIONS, Vol. XX., p. 123, Nos. 994, 995.

**As magistrate—Ex-officio justice—For borough.]**—See 1882 Act, s. 155 (1).

**458. — — — Borough without separate commission of the peace.]**—The mayor of a borough, without a commission of the peace, before whom a person was brought charged with embezzlement, remanded the accused to the next meeting of the justices of the peace for the county in which the borough was situated, & admitted him to bail, taking the recognisance of deft. in £100 for the appearance of the accused. The accused paid to deft. £100 to indemnify him against liability under the recognisances. The accused did not appear before the county justices, who, not recognising the authority of the mayor to remand prisoners for appearance before the county bench, took no steps on the information preferred before him, but proceeded on a fresh

#### PART VII. SECT. 2, SUB-SECT. 4.—A.

**448 i. Election—Enforcement by mandamus—When granted—Mayor de facto without colour of right.]**—A. was enrolled a burgess of Dublin, but his name was subsequently expunged. A. had, in the meantime, been elected successively a town councillor & lord mayor of Dublin. A *mandamus* was, on the circumstances, issued to the council of the borough of Dublin, to proceed to elect a lord mayor in the room of A. — *R. v. DUBLIN BOROUGH* (1851), 3 Ir. Jur. 201.—IR.

**of office.]**—*Held*: until actual election of the alderman, whether on the first Tuesday in May or in case of contest, on the day following, the

to  
FITZGERALD,  
MOORE (1868), 7 N. S. W.  
223.—AUS.

councillor or township is entitled as his services to the allowance provided for by the

statute only.—*CORPN. OF ST. VINCENT v. GRIER* (1867), 13 Gr. 173.—CAN.

**451 i. — Provision for extraordinary expenditure as remuneration—Whether allowed.]**—The ct., in the exercise of its discretion, refused, under the circumstances of the case, to restrain a municipal corp. from acting upon a bye-law for the payment of money to the mayor as remuneration for services, the money not being provided for on the face of the estimates.—*HEFFERNAN v. TOWN OF WALKERTON* (1903), 23 C. L. T. 222; 6 O. L. R. 79; 2 O. W. R. 17, 434.—CAN.

**451 ii. — — —.]**—MUNICIPALITY OF DISTRICT OF SOUTH VANCOUVER *v. RAE* (No. 2) (1906), 12 B. C. R. 184; 4 W. L. R. 98.—CAN.

**m. Powers — To override council — Payment of solicitor.]**—Where a town council has, by a majority vote, authorised the payment of an account rendered by a firm of solrs. for professional services performed for the town, the mayor has no authority to refuse to sign a cheque for such claim.

—*CORNING v. TOWN OF YARMOUTH* (No. 1) (1912), 12 E. L. R. 205.—CAN.

**n. As magistrate—Ex officio justice—For borough.]**—The Reeves of municipalities in unorganised districts are, under the legislation relating thereto, *ex officio* justices of the peace in their respective municipalities.—*R. v. MCGOWAN* (1892), 22 O. R. 497.—CAN.

**o. Occupies fiduciary position.]**—The mayor of Toronto secretly contracted to purchase at a discount a large amount of the debentures of the city, which were expected to be issued under a future bye-law of the city council:—*Held*: he was a trustee for the city of the profit he derived.—*CITY OF TORONTO v. BOWES* (1854), 4 Gr. 489; *affd.*, 6 Gr. 1; 11 Moo. P. C. C. 463.—CAN.

**p. Nationality.]**—An Indian who is a British subject, & otherwise qualified, has an equal right with any other British subject to hold the position



**Sect. 2.—Government of the municipal borough:**  
**Sub-sect. 4, A. & B.; sub-sect. 5. Sect. 3:**  
**Sub-sects. 1 & 2, A.]**

information, & issued a warrant against the accused which was not executed. It did not appear that deft.'s recognisance had been either forfeited or discharged or that he had paid anything under it. The accused having been adjudicated bkpt., pltf., as trustee, sued to recover the £100 from deft.:—*Held*: by 1835 Act, s. 57, the mayor was a justice of the peace for the borough, & the recognisance was valid; the £100 was paid to deft. in pursuance of a contract which was contrary to public policy, but the contract had not been executed, & therefore pltf. was entitled to recover.—*WILSON v. STRUGNELL* (1881), 7 Q. B. D. 548; 50 L. J. M. C. 145; 45 L. T. 219; 45 J. P. 831; 14 Cox, C. C. 624.

*Annotations*:—*Mentd.* *Herman v. Jeuchner* (1885), 15 Q. B. D. 561; *Consolidated Exploration & Finance Co. v. Musgrave*, [1900] 1 Ch. 37; *R. v. Porter*, [1910] 1 K. B. 369.

— **For county—As chairman of district council.**—See 1894 Act, ss. 21 (3), 22; *Chairmen of District Councils Act*, 1896 (c. 22), s. 1.

— **Chairman of borough sessions.**—See 1882 Act, s. 155 (2).

— **Threats to—Ground for criminal information.**—See *CRIMINAL LAW*, Vol. XV., p. 703, No. 7598.

#### *B. Mayor de facto.*

**459. Mayor de facto—Validity of acts.**—The acts of a mayor *de facto* are good until he is displaced.—*KNIGHT v. WELLS CORPN.* (1696), 1 Lut. 508; 125 E. R. 267.

*Annotation*:—*Mentd.* *Colchester Corpn. v. Seaber* (1766), 3 Burr. 1866.

See, now, 1882 Act, s. 42 (1).

**460. — Presumption that mayor de jure.**—Person in possession of the office of mayor shall be deemed legally so till the contrary appear.—*PIPER v. DENNIS* (1698), Holt, K. B. 170; 12 Mod. Rep. 253; 90 E. R. 992.

**461. Necessary party to mandamus to elect.**—*R. v. BANKES*, No. 449, *ante*.

#### SUB-SECT. 5.—THE DEPUTY MAYOR.

See 1882 Act, s. 16.

#### SECT. 3.—OFFICERS AND SERVANTS.

##### SUB-SECT. 1.—IN GENERAL.

See 1882 Act, ss. 17–21; P. H. Act, 1875, s. 189, &, generally, *CORPORATIONS*, Vol. XIII., pp. 307 *et seq.*

**462. Officer & servant distinguished.**—A declaration stated, that the corpn. of L. from time immemorial until Jan. 1, 1836, when 5 & 6 Will. 4, c. 63, s. 9, came into operation, had, by persons by them in that behalf appointed, the sole & exclusive privilege of measuring, &, from Jan. 1, 1836, of weighing, all coals imported into the port of L.; & also the right & privilege of appointing to perform such work a sufficient number of fit & proper persons, & from time to time of fixing a reasonable rate of payment for such work, to be proportioned, previous to Jan. 1, 1836, to the measured quantity, & subsequently to that day to the weight of the coals; such payments to be made to the persons who should do the work, & to be for their own use & benefit. The declaration then alleged a right & privilege of the corpn. that every owner of a vessel arriving in the port of L. with coals, should give notice to the corpn., in order that the work might be done by the said meters. It then averred that the corpn. had fixed a rate of payment for every score of tons weight, & had appointed a reasonable number of coal meters, of whom pltf. was one; that deft. imported several tons of coal into the port of L., & that, although it was his duty, on the arrival of a vessel, & before landing the coals, to give notice, he did not do so, whereby pltf. was prevented from weighing the coals, & of earning the amount payable in respect thereof. The pleas traversed the right of the corpn. to weigh the coals, & also the appointment of pltf. as coal meter. Evidence was given of a custom to measure all coals imported into the port of L. before Jan. 1, 1836, & after that date to weigh them; & that the corpn. had ordered that the meters should be paid at a rate per ton on coals weighed instead of per chaldron as before. In proof of pltf.'s appointment as a meter, he gave in evidence an entry, not under seal, in the corpn. books, stating that he was so appointed. Pltf. had ever since acted as a coal meter:—*Held*: (1) the right of the corpn. by custom to measure coals imported was not converted by 5 & 6 Will. 4, c. 63, into a right to

of reeve of a municipality.—*R. (GIBB) v. WHITE* (1870), 5 P. R. 315.—CAN.

**q. Withdrawal of candidature.**—A candidate for reeve, who is proposed & seconded at the nomination, may, with the consent of his proposer & seconder & of the electors present, withdraw from his candidature.—*R. (COYNE) v. CHISHOLM* (1871), 5 P. R. 328.—CAN.

**r. Purchase at tax sale—Whether permitted.**—*Semble*: the mayor of a town or city cannot purchase at a tax sale of lands in his municipality.—*GREENSTREET v. PARIS* (1874), 21 Gr. 229.—CAN.

**t. Acceptance of office—What is.**—The acceptance of office by a mayor elect referred to in R. S. O. 1877, c. 174, s. 180, within a month from which a writ of *quo warranto* to try the validity of his election must issue, is a formal acceptance by the statutory declaration of qualification & office.—*R. (CLANCY) v. MCINTOSH* (1881), 46 U. C. R. 98.—CAN.

#### PART VII. SECT. 2, SUB-SECT. 5.

**a. Election—Powers of mayor.**—*Held*: under 22 Vict. c. 99, the reeve of the Gore of Toronto, being a member of the county council of Peel, to which

the village of Brampton sent members, had sufficient interest in the election of a deputy reeve for that village to enable him to question it.—*R. (HART) v. LINDSAY* (1859), 18 U. C. R. 51.—CAN.

#### PART VII. SECT. 3, SUB-SECT. 1.

**462 i. Officer & servant distinguished.**—“Official” is intended to apply to such officers as the city clerk, treasurer, assessor, etc., whose powers & acts are primarily of an executive & coercive or quasi-coercive character, & are binding upon & affect the rights of the inhabitants & ratepayers of the municipality. The city engineer is an employee or servant, not an “officer.”—*SPEAKMAN v. CALGARY* (1908), 1 Alta. L. R. 454; 9 W. L. R. 264.—CAN.

**b. Liability of corporation—For acts of officers & servants.**—A municipal corpn. is not civilly responsible for acts of its officers or servants other than those done within the scope of their authority as such.—*MONTREAL CITY v. MULCAIR* (1898), 28 S. C. R. 458.—CAN.

**c. —**—*BOWLES v. CITY OF WINNIPEG (Man.)*, [1919] 1 W. W. R. 198; 45 D. L. R. 94.—CAN.

**d. —**—*Assault.*—A muni-

cipal corporation is liable for assaults committed by its servants.—*MONTREAL CORPN. & DOOLAN* (1871), 13 L. C. J. 71; *affd.*, 18 L. C. J. 124.—CAN.

**e. —**—*Negligence.*—*HARRIS v. MARTER* (1874), 2 Pug. 165.—CAN.

**f. —**—*Howarth v. MCGUGAN* (1893), 23 O. R. 396.—CAN.

**g. —**—*RAY v. BURCHELL* (1900), 8 Nfld. L. R. 364.—NFLD.

**h. —**—*Contract.*—*ELLIS v. CITY OF HALIFAX* (1896), 29 N. S. R. 90.—CAN.

**k. —**—*CURRIE v. RURAL MUNICIPALITY OF WRETFORD & LASHER*, [1917] 2 W. W. R. 823.—CAN.

**l. —**—*FORD v. OAMARU (MAYOR & CORPN.)* (1881), 1 N. Z. L. R. 97 (S. C.).—N.Z.

**m. —**—*Illegal distress.*—A municipality is responsible for the acts of its officers in illegally placing arrears of taxes on the roll of a collector & subsequent distress therefor.—*CASTON v. CITY OF TORONTO CORPN.* (1898), 30 O. R. 16.—CAN.

**n. —**—*Poundkeeper—Independent public officer.*—*BURNE v.*

weigh; (2) as the payment in respect of the measurement was for the benefit of the meter only, he was an officer & not a mere servant of the corpn., & therefore an appointment under seal was necessary.—**SMITH v. CARTWRIGHT** (1851), 6 Exch. 927; 20 L. J. Ex. 401; 17 L. T. O. S. 258; 15 J. P. 564; 155 E. R. 823, Ex. Ch.

*Annotation*:—**Generally**, **Mentd.** **McMahon v. Lennard** (1858), 6 H. L. Cas. 970.

**Superannuation.**—*See, generally*, Local Government & Other Officers Superannuation Act, 1922 (c. 59).

— **Poor law officers.**—*See* POOR LAW.

**Liability of corporation—For acts of officers & servants—Meat improperly condemned.**—*See* FOOD & DRUGS, Vol. XXV., p. 113.

— — — — — *See, generally*, CORPORATIONS, Vol. XIII., pp. 403 *et seq.*

**Corporate office.**—*See* Sect. 1, sub-sect. 7, *ante*.

## SUB-SECT. 2.—OFFICERS.

### A. In General.

**463. Appointment—Necessity for seal.**—**SMITH v. CARTWRIGHT**, No. 462, *ante*.

— **Officers to be appointed by corporation—As urban authority.**—*See* P. H. Act, 1875, s. 189; Part V., Sect. 3, *ante*.

**Security to be given.**—*See* 1882 Act, s. 20.

— **Discharge of surety—Under fidelity guarantee.**—*See, generally*, GUARANTEE, Vol. XXVI., pp. 159 *et seq.*, 165 *et seq.*, 172, 173, 188 *et seq.*

**Remuneration—Additional remuneration.**—*Compare* Part V., Sect. 3, sub-sect. 1, *ante*.

**464. — Contract for—Whether implied—Officer of former corporation continued in employment.**—**JONES v. CARMARTHEN CORPN.**, No. 483, *post*.

**465. — How recovered.**—1835 Act, s. 92, enacts, "that after the election of the treasurer in any borough, the rents & profits of all hereditaments, & the interest of all moneys belonging to the corpn., shall be paid to the treasurer, & by him carried to the account of the 'Borough Fund,' which fund shall be applied towards payment of the salary of the mayor, etc., & of the respective salaries of the town clerk & treasurer,

& of every other officer whom the council shall appoint":—**Held**: an officer appointed by the council with a salary cannot maintain an action of debt against the corpn. for arrears of such salary.

**Semble**: the remedy of the person claiming such salary is by *mandamus* to the corpn., requiring them to pay it out of the borough fund; & if that be not sufficient, to levy a borough rate for the purpose.—**ADDISON v. PRESTON CORPN.** (1852), 12 C. B. 108; 21 L. J. C. P. 146; 19 L. T. O. S. 184; 16 J. P. 280; 16 Jur. 643; 138 E. R. 842.

*Annotation*:—**Mentd.** **Darlow v. Shuttleworth**, [1902] 1 K. B. 721.

**466. Responsibility—Joint officers.**—How far one joint officer shall be answerable for the acts of the other.

A *mandamus* went to the two bailiffs of a town to admit a man into the office of chamberlain. No return was made to it. Upon which an attachment was moved for, & the ct. granted it against them both, though affidavit was made that one of them was always willing to make a return, but could not, because the other had got the *mandamus* into his own hands, & would not let him have it. The reason the ct. gave was, that they were both to be considered as one officer to them.—**R. v. BRIDGNORTH (BAILIFFS)** (1728), 1 Barn. K. B. 53; 94 E. R. 37; *sub nom.* **BRIDGENORTH (BAILIFFS) CASE**, 2 Stra. 808.

**467. Determination of appointment—By surrender of charter—New charter granted in new name.**—**HOWARD'S (SIR CHARLES) CASE** (1627), as reported in Hut. 86; 123 E. R. 1119.

*Annotations*:—**Mentd.** **R. v. Patteson** (1832), 4 B. & Ad. 9; **Pease v. Courtney**, [1904] 2 Ch. 503.

**Duty to account & deliver up books, etc.**—*See* 1882 Act, s. 21 (3), (4).

**468. — Remedy for breach—Whether summary procedure sole remedy.**—1835 Act, s. 60, which gives a summary remedy against a corporate officer who refuses to comply with the provisions of the Act, as to giving up to the town council of the borough all documents in the custody of such officer, & paying over moneys, etc., does not take away the right of action which the corpn. have against such officer for the breach of duty so imposed by that sect.—**LICHFIELD CORPN. v. SIMPSON** (1845), 8 Q. B. 65; 15 L. J. Q. B. 78;

**HALCOMBE TOWN BOARD** (1890), 9 N. Z. L. R. 223.—N.Z.

**o. Misconduct—Powers of commission to investigate.**—**CHAMBERS v. WINCHESTER** (1907), 10 O. W. R. 909; 15 O. L. R. 316.—CAN.

## PART VII. SECT. 3, SUB-SECT. 2.—A.

**463 i. Appointment—Necessity for seal.**—**BROUGHTON v. BRANTFORD CORPN.** (1869), 19 C. P. 434.—CAN.

**463 ii. —**—The appointment of a consulting engineer must be made under the common seal of the corpn.—**CRAWSHAW v. PORT CHALMERS CORPN.** (1872), Mac. 718.—N.Z.

**p. Remuneration—Alteration by resolution.**—**TETLEY v. CITY OF VANCOUVER** (1897), 5 B. C. R. 276.—CAN.

**q. Responsibility.**—Where assessors or other officers of municipalities omit to follow the plain directions in Acts of Parliament, & any loss thereby arises to the municipality, it would seem that the party causing such loss would be answerable therefor to the municipality.—**CHRISTIE v. JOHNSTON** (1866), 12 Gr. 534.—CAN.

— — — — — **of a town**  
pality will be responsible to the  
corpn. for loss of interest occasioned by

his neglect to deposit in the bank moneys collected by him for the town.—**EMERSON TOWN v. WRIGHT** (1907), 5 W. L. R. 365.—CAN.

**t. Determination of appointment—Whether absence sufficient.**—The mere absence from the parish of a parish officer does not create a vacancy.—**R. v. CLOSE** (1880), 19 N. B. R. 502.—CAN.

**a. — Office held "during pleasure."**—Municipal officers appointed by the council hold office during the pleasure of the council, & may be removed without notice & without cause.—**WILLSON v. YORK** (1881), 46 U. C. R. 289.—CAN.

**b. —**—**VERNON v. TOWN OF SMITH'S FALLS CORPN.** (1891), 21 O. R. 331.—CAN.

**c. —**—**DAVIS v. CITY OF MONTREAL** (1897), 27 S. C. R. 539.—CAN.

— — — — — **NORTH VANCOUVER v. KEENE** (1903), 24 C. L. T. 197; 10 B. C. R. 276.—CAN.

**e. —**—**NEWBY v. BROWNLEE** (1916), 34 W. L. R. 278; 10 W. W. R. 249.—CAN.

**f. —**—**DICKENSON v. RURAL MUNICIPALITY OF STONEHENGE**

No. 73 (Sask.), [1920] 1 W. W. R. 235; 50 D. L. R. 383; 13 Sask. L. R. 1.—CAN.

— **GARDNER v. NIAGARA FALLS CITY** (1923), 55 O. L. R. 53.—CAN.

**h. —**—**MUNICIPALITY OF RATNAGIRI v. VASUDEO BALKRISHNA LOTLIKAR** (1915), 1 L. R. 39 Bom. 600.—IND.

**k. Duty to deliver up papers.**—*Mandamus* lies to compel the delivery of papers by a publication officer to his successor.—**R. (PACAUD) v. DUBORD** (1885), 3 Man. L. R. 15.—CAN.

**l. Disqualification—Officer failing to account within proper time.**—A collector of rates who had not paid over the amount collected by him & settled his accounts with the treasurer on or before the third Monday in Dec. of the year for which he had been serving, was ineligible for any township office.—**R. v. RYAN** (1849), 6 U. C. R. 296.—CAN.

**m. — Commissioner—Subsisting account between municipality & candidate.**—Under the Calgary City charter, the fact of the existence of an account between the city & a candidate for the office of comr., whether disputed or not, does not disqualify the candidate



## LOCAL GOVERNMENT.

### Sect. 3.—Officers and servants: Sub-sect. 2, A. & B. (a), (b), (c) & (d).]

6 L. T. O. S. 122; 10 J. P. 120; 9 Jur. 989; 115 E. R. 798.

*Annotations*:—*Mentd. Marshall v. Nicholls* (1852), 18 Q. B. 882; *Wiley v. Crawford* (1861), 1 B. & S. 253; *Great Northern Fishing Co. v. Edgehill* (1883), 11 Q. B. D. 225.

#### B. The Town Clerk.

##### (a) In General.

**Appointment.**—See 1882 Act, s. 17.

**469. — Qualification of one candidate questioned—Right to have name submitted.**—There being a vacancy in the office of town clerk, in the borough of B., L., one of the councillors before the passing of 6 & 7 Will. 4, c. 104, tendered his resignation of his office of councillor to the council, who refused to accept it, on the ground that he could not, under 1835 Act, resign. At a subsequent meeting of the council, held for the purpose of electing a town clerk, L. & S. were nominated as candidates; but the mayor, considering that L. was incapable of being elected, refused to submit his name to the council, & declared that S. was elected to the office:—*Held*: he was bound to submit both names to the council; & therefore, S. was not duly elected.—*R. v. SHEBBEARE* (1837), 6 L. J. K. B. 105; 1 J. P. 102; 1 Jur. 7.

**470. — Presumption that meeting appointing duly summoned.**—(1) On a rule for an information in the nature of a *quo warranto*, for exercising the office of town clerk under an election at a meeting of the council, it will be presumed proper notices of the meeting had been given, according to 1835 Act, s. 69, unless the contrary appears on the affidavits.

(2) Rescinding a resolution for the appointment of a town clerk, is a valid displacing of him from the office.

(3) The meeting at which the new town clerk was appointed & the old one displaced, having been an adjournment of the [quarterly] meeting at which the old town clerk had been appointed, *qu.*: whether it was necessary that notice should have been given to the old town clerk, or to the members of the town council.—*R. v. THOMAS* (1838), 8 Ad. & El. 183; 3 Nev. & P. K. B. 288; 1 Will. Woll. & H. 212; 7 L. J. Q. B. 141; 2 J. P. 299; 2 Jur. 347; 112 E. R. 807.

*Annotation*:—*Generally, Mentd. Re Bishop, R. v. Edye* (1848), 18 L. J. Q. B. 6.

**As vacation of incompatible office—Alderman.**—See Nos. 439–441, *ante*.

**471. Title to office—Who may question.**—Any burgess is a competent relator in *quo warranto* against a party exercising the office of town clerk, though the right of electing to that office be in a select body.

The town clerk, as soon as he is chosen, is a ministerial officer, in whom all the burgesses have an interest (LORD TENTERDEN, C.J.).—*R. v. DAVIES* (1828), 1 Man. & Ry. K. B. 538; 1 Man. & Ry. M. C. 205; 6 L. J. O. S. K. B. 170.

**472. Authority to bind corporation.**—In pursuance of a resolution of the town council of K., passed on July 17, 1872, & entered in the corp'n. books, & sealed with the corporate seal, a market, & the tolls thereof, belonging to the corp'n. were, on July 18, 1872, put up to lease by auction for

the term of one year, with an option to the lessee to extend the term to three years. By the conditions of auction a lease was to be granted on or before Aug. 17, 1872, the rent to be paid by equal monthly payments, the first payment to be made to the clerk of the lessors, "immediately on the fall of the hammer," & the lessee to be always one month's rent in advance; & in case of failure by the lessee to perform any of the conditions, the rent then already paid was to be absolutely forfeited, & the lease to be null & void. The lessee was also, "at the fall of the hammer," to produce two sureties, to be approved of by the lessors or their clerk, for the payment of rent & performance of covenants, & who were also forthwith to sign the conditions & lease. Deft., as the highest bidder, became the purchaser or renter of the said market & tolls for one year, & thereupon the contract at the foot of the conditions was signed by him, & also by the town clerk, although the latter was not authorised by the corp'n. under seal so to do. Deft. also paid one month's rent in advance to the town clerk; but, not being prepared with the required sureties, a week's time was given to him by the town clerk to produce them, which period was subsequently further extended. A report of the above lettings to deft., & his payment of the month's rent, was made to the corp'n., & was adopted by them by a resolution of Aug. 7, 1872, entered in the corp'n. books, & sealed with the corp'n. seal. By some mistake the keys of the market buildings were without the authority of the corp'n., & contrary to the instructions of the town clerk, handed by the market keeper to deft., who retained them for some days, but who never otherwise obtained possession of the market, & never received any tolls. Deft. finally failed to produce his sureties, the corp'n. relet the premises to another person, & brought an action against deft. to recover damages for his breach of contract:—*Held*: as the contract was not under the corp'n. seal, or signed by an agent of the corp'n. duly & expressly authorised by them under seal for that purpose, & as the resolution of Aug. 7 was after the breach, & so too late to operate as a ratification, & there was no such part performance as to entitle deft. in equity to a specific performance on the part of pl'ts., the contract was void for want of mutuality, & pl'ts.' action thereon was not sustainable.—*KIDDERMINSTER CORPN. v. HARDWICK* (1873), L. R. 0 Exch. 13; 43 L. J. Ex. 9; 29 L. T. 611; 22 W. R. 160.

*Annotations*:—*Folld. Oxford Corp'n. v. Crow*, [1893] 3 Ch. 535. *Reid. Melbourne Banking Corp'n. v. Brougham* (1879), 4 App. Cas. 156.

**473. —**—A lessee of buildings belonging to a municipal corp'n. wrote letters on May 10 & 13, 1892, to the mayor & the chairman of the public improvements committee of the corp'n., which had not been appointed under seal, offering to surrender his lease, pull down the existing buildings, & erect new buildings, provided the corp'n. would grant him a new lease on specified terms. On May 13, 1892, the town clerk wrote to the lessee that the committee accepted his proposals, subject to the council's approval. On May 27, 1892, the lessee wrote to the town clerk modifying the terms of his original proposals. On June 1, 1892, the council approved, but not under seal,

—*Re GRAVES.*

*sary.*—The town clerk of a municipality established under 18 Vict. No. 15, is an officer necessary for carrying out the purposes for which the municipality is formed & his appointment need not be under seal.—*R. v. EAST COLLINGWOOD MUNICIPAL COUN-*

*CIL* (1861), 1 W. & W. 1.—*AUS.*

*o. Appointment of interim town clerk—Pending dispute as to validity of removal of town clerk.*—*ROTHESAY MAGISTRATES v. CARSE* (1902), 4 F. (Ct. of Sess.) 641; 39 Sc. L. R. 450; 9 S. L. T. 498.—*SCOT.*

### PART VII. SECT. 3, SUB-SECT. 2.— B. (a).

*n. Appointment—Whether seal neces-*

the committee's acceptance of the original proposals, & this approval was communicated to the lessee by letter. On July 21, 1892, deft., by letter, withdrew his proposals:—*Held*: the contract, not having been under the seal of the corpn., or signed on their behalf by any person authorised under seal to do so, or ratified under seal, or part performed or acted on, could not be enforced by the corpn.—*OXFORD CORPN. v. CROW*, [1893] 3 Ch. 535; 69 L. T. 228; 42 W. R. 200; 8 R. 279.

*Annotation*:—*Reid. Hoare v. Lewisham Corpn.* (1901), 85 L. T. 281.

*See, also*, No. 613, *post*.

**474. Town clerk also clerk of the peace—Agreement to procure share of duties for another—Whether valid.**—An attorney, town clerk, & clerk of the peace for the borough of L. in the county of L., upon the dissolution of a partnership which had existed between him & two other persons, entered into an agreement to pay to one of them, D., a certain sum of money, & to use his endeavours to procure for him one fourth of the prosecutions arising in the town clerk's office. In an action by D. on this agreement, it appeared that the magistrates of the borough of L. commit some offenders to be tried at the borough sessions, others at the county sessions, & others at the county assizes:—*Held*: (1) the agreement extended to all prosecutions "arising in the town clerk's office," wherever they might be tried, & letters written before the agreement was signed could not be given in evidence to show that the parties intended the agreement to be applicable to the prosecutions of the borough sessions only; (2) deft., as clerk of the peace of the borough, could not legally enter into such an agreement as that set out in the declaration.

*Qu.*: whether it would have been legal had he been town clerk only, & not clerk of the peace.—*HUGHES v. STATHAM* (1825), 4 B. & C. 187; 6 Dow. & Ry. K. B. 219; 3 Dow. & Ry. M. C. 124; 3 L. J. O. S. K. B. 179; 107 E. R. 1029.

**475. Town clerk not clerk of the peace—Agreement to procure share of prosecutions for another—Whether valid.**—*HUGHES v. STATHAM*, No. 474, *ante*.

**Duties of clerk of the peace.**—*See* 1882 Act, s. 222, & generally, *MAGISTRATES*.

#### (b) Incompatible Offices.

**Alderman.**—*See* Nos. 439–441, *ante*, & Nos. 476, 477, *post*.

**Councillor.**—*See* 1882 Act, s. 17 (1).

**Elective auditor.**—*See* 1882 Act, s. 25 (2).

**Treasurer.**—*See* 1882 Act, s. 18 (4).

**476. Appointment to incompatible office—Appointment as town clerk terminated.**—*BASTON'S CASE* (prior to 1574), 3 Dyer, 332 b, n.; 73 E. R. 753.

*Annotations*:—*Consd. Milward v. Thatcher* (1787), 2 Term Rep. 81. *Reid. Awdley's Case* (1826), Noy, 78; R. v. Patteson (1832), 2 L. J. K. B. 33.

**477. ———.**—*R. & VERIER v. SANDWICH CORPN.* (1866), 2 Keb. 92; 84 E. R. 58; *VERRIOR v. SANDWITCH (MAYOR)*, 1 Sid. 305.

1 B.  
1. 9.

#### PART VII. SECT. 3, SUB-SECT. 2. B. (c).

480 i.  
effect of

Act,

all such officers hold office during the pleasure of the council, & may be removed at any time without notice or cause shown therefor, & without the council incurring any liability thereby.—*HELLEMS v. CITY OF ST. CATHARINES CORPN.* (1894), 25 O. R. 583.—*CAN.*

480 ii. ———.—*Re CURRY*, [1924]

**478. ——— To oust from office of town clerk—Jurisdiction of court.**—*BASTON'S CASE* (prior to 1574), 3 Dyer, 332 b, n.; 73 E. R. 753.

*Annotations*:—*Consd. Milward v. Thatcher* (1787), 2 Term Rep. 81. *Reid. Awdley's Case* (1826), Noy, 78; R. v. Patteson (1832), 2 L. J. K. B. 33.

**479. ———.**—*AWDLEY'S CASE* (1826), Noy, 78; 74 E. R. 1045; *sub nom. AUDLEY'S CASE*, Lat. 123; *sub nom. AWDELEY v. JOYE*, Poph. 176.

*Annotation*:—*Reid. R. v. Patteson* (1832), 2 L. J. K. B. 33.

**Appointment of person holding incompatible office—Alderman—First office vacated.**—*See* Nos. 439–441, *ante*.

#### (c) Removal.

*See* 1882 Act, s. 17 (2).

**480. Whether cause must be assigned—Clerk removable at pleasure.**—A town clerk *durante bene placito* is removable without cause.—*R. v. STRATFORD-UPON-AVON CORPN.* (1670), 1 Lev. 291; 83 E. R. 413; *sub nom. R. v. DEIGHTON*, 2 Keb. 656; *sub nom. DIGHTON v. STRATFORD CORPN.*, 1 Sid. 461; 2 Keb. 641; *sub nom. DIGHTON'S CASE*, T. Raym. 188; 1 Vent. 77, 82.

*Annotation*:—*Mentd. R. v. Darlington School* (1844), 6 Q. B. 682.

**481. Notice of intention to remove—Whether necessary—Removal at adjourned meeting.**—*R. v. THOMAS*, No. 470, *ante*.

**482. Mode of removal—Rescission of resolution of appointment.**—*R. v. THOMAS*, No. 470, *ante*.

#### (d) Remuneration.

*See, generally*, 1882 Act, s. 20.

**483. Right to—In respect of statutory duties—Where no salary paid.**—1835 Act directed certain things to be done by the town clerk, & provided that all moneys actually disbursed by him in carrying the provisions of the Act into effect should be repaid to him out of the borough fund; but was silent as to any remuneration for the duties imposed. No salary was attached to the office of town clerk, who had always charged the corpn. for his services, & during three years had been remunerated by them for duties performed under the Municipal Act, of a similar kind with those in respect of which he now claimed to be remunerated by the corpn.:—*Held*: the duties were imposed by the legislature without remuneration, & therefore, the corpn. were not liable in respect thereof. Also, the corpn. not being liable to the payments made during the previous years, no contract could be implied therefrom.—*JONES v. CARMARTHEN CORPN.* (1841), 8 M. & W. 605; 10 L. J. Ex. 401; 151 E. R. 1180; *previous proceedings* (1839), 3 J. P. 754.

*Annotations*:—*Appld. Thomas v. Swansea Corpn.* (1842), 12 L. J. Ex. 73. *Reid. R. v. Stamford Corpn.* (1844), 6 Q. B. 433; *Newington L. B. v. Eldridge* (1879), 12 Ch. D. 349; *Munton v. Truro* (1886), 17 Q. B. D. 783.

**484. ——— Where salary paid.**—The town council of a borough resolved "that one hundred guineas be fixed as the salary of the town clerk for his attendance on the business of the council & committees, & that he be paid the usual charges in defending & bringing actions." On motion to review the taxation of the town clerk's

2 D. L. R. 823; 57 N. S. R. 210.—*CAN.*

#### PART VII. SECT. 3, SUB-SECT. 2.— B. (d).

*p. No agreement as to — Action against clerk—No right to counterclaim for remuneration.*—*TOWN OF SYDNEY v. HILL* (1893) 25 N. S. R. 433.—*CAN.*



*Sect. 3.—Officers and servants: Sub-sect. 2, B. (d) (e),*

*bills:—Held:* the master proceeded on the right principle, in considering the salary as a remuneration for all business, except the bringing & defending actions.—*THOMAS v. SWANSEA CORPN.* (1842), 2 Dowl. N. S. 470; 12 L. J. Ex. 73; 7 J. P. 709; *subsequent proceedings* (1843), 11 M. & W. 83.

**485.** ——— *As registration officer.]*—The town clerk of a municipal corpn. is not entitled to any remuneration for his mere expenditure of time & trouble in carrying into effect the provisions of Parliamentary Voters Registration Act, 1843 (c. 18); but, under sect. 55, he is entitled to recover in the manner therein provided, the "expenses incurred by him," that is, money necessarily paid by him in carrying the Act into effect.—*R. v. TRINITY & ST. MARY UNITED PARISHES, BOROUGH OF HULL (GOVERNORS OF THE POOR)* (1853), 21 L. T. O. S. 101.

—————.]—*See, now, Representation of the People Act, 1918 (c. 64), ss. 12 (2), 13 (2), 15.*

**486. Agreement as to—Necessity for seal—Re-appointment on higher salary.]—A resolution, on the re-appointment of a town clerk by a corpn. after 1835 Act, to increase his salary in compensation for the loss of former emoluments, is not valid unless executed under seal.—*R. v. STAMFORD CORPN.* (1844), 6 Q. B. 433; 3 L. T. O. S. 281; 9 J. P. 359; 8 Jur. 909; 115 E. R. 165.**

*Annotations:—Refd. R. v. Bristol & Exeter Ry.* (1845), 3 Ry. & Can. Cas. 777; *R. v. Prest* (1851), 15 Jur. 554; *Dyde v. St. Pancras Board of Grdus.* (1872), 27 L. T. 342.

**487.** ——— *Retainer for extra work.]*—*R. v. PREST*, No. 542, *post.*

**488.** ——— *Whether implied—From previous payments.]*—*JONES v. CARMARTHEN CORPN.*, No. 483, *ante.*

**489.** ——— *Construction—Remuneration by salary—& charges in respect of actions.]*—*THOMAS v. SWANSEA CORPN.*, No. 484, *ante.*

**490.** ——— *Whether Parliamentary business included.]*—By the resolution appointing an attorney to be town clerk with an annual salary, exclusive of money out of pocket, it was stated to be "for the discharge of all duties, routine & appurtenant to the office, as set forth in the report presented by the committee to the council on that day." By the report a former report was appended, in which it was stated that "professional business appurtenant to the office of town clerk consists of Parliamentary proceedings, perusing the daily votes of the House of Commons, & watching the bills likely to effect the interests of the borough":—*Held:* the town clerk could not charge beyond money out of pocket for Parliamentary business performed by order of the council of the borough, in the borough & in London, concerning certain bills in Parliament affecting the borough.—*MORGAN v. BIRMINGHAM CORPN.* (1857), 28 L. T. O. S. 272; 21 J. P. 166; 5 W. R. 291.

*q. Reduction—Discretion of council.]—Re PORT HOOD TOWN CLERK* (1912), 11 E. L. R. 544.—*CAN.*

*r. Pension—Not liable to execution.]*—The pension payable to a retired town clerk, under 32 & 33 Vict. c. 79, is not assignable or chargeable with debts, & an order for a receiver over same will be discharged with costs.—*BRENAN v. MORRISSEY* (1890), 26 L. R. Ir. 618.—*IR.*

**PART VII. SECT. 3, SUB-SECT. 2.—B. (e).**

*t. In connection with corporation books, etc.—Duty to allow inspection.]*—

A ratepayer applied to the clerk to inspect the minutes of the meetings of council & for certified copies of certain resolutions, tendering the proper fees:—*Held:* the clerk could not excuse himself for refusing the demand on the ground that the reeve had taken away the books.—*Re CUDDY* (1895), 10 Man. L. R. 422.—*CAN.*

*a. ——— Delivery of books wrongfully retained—Enforceable by mandamus.]*—*R. v. CUNNINGHAM* (1885), 18 L. R. Ir. 373.—*IR.*

*b. ———.]*—The town clerk not having made up the municipal list in accordance with the Act, the

**491. Additional remuneration—Whether payable out of borough fund.]—*R. v. PREST*, No. 542, *post.***

**492.** ——— *Whether agreement under seal necessary.]*—*R. v. PREST*, No. 542, *ante.*

**493. Reimbursement of expenses—As registration officer—Necessary expenses.]—*R. v. TRINITY & ST. MARY UNITED PARISHES, BOROUGH OF HULL (GOVERNORS OF THE POOR)*, No. 485, *ante.***

**494.** ——— *What are.]*—Under Parliamentary Voters Registration Act, 1843 (c. 18), s. 48, the town clerk of a borough, incidentally to his office, is to cause the lists of voters to be copied & printed, & to have the names arranged & numbered; &, if he hires a person to do this for him, to make copies for the printer, & to superintend the printing, he is not entitled to be reimbursed the expense by the parish officers under Parliamentary Voters Registration Act, 1843 (c. 18), s. 55, unless he cannot, by the reasonable labour of himself & his ordinary assistants, perform the duty without extra aid. But he is entitled to be reimbursed for the expense of printing.—*R. v. ALLDAY* (1857), 7 E. & B. 799; 26 L. J. Q. B. 292; 29 L. T. O. S. 179; 22 J. P. 159; 3 Jur. N. S. 961; 5 W. R. 625; 119 E. R. 1443.

—————.]—*See, now, Representation of the People Act, 1918 (c. 64), s. 15.*

*Acceptance of fee or reward—Beyond salary & allowances—Liability to penalty.]*—*See* Nos. 61, 62, *ante.*

*(e) Duties, Rights and Liabilities.*

*In connection with corporation books, etc.—Custody.]*—*See* 1882 Act, ss. 17 (3), 203, &, *generally, CORPORATIONS*, Vol. XIII., p. 348.

*Duty to allow inspection.]*—*See* 1882 Act, s. 233, &, *generally, CORPORATIONS*, Vol. XIII., pp. 302 *et seq.*, 348, 422 *et seq.*

————— *Production—In legal proceedings.]*—*Sec, generally, CORPORATIONS*, Vol. XIII., p. 425.

————— *Delivery of books wrongfully retained—Enforceable by mandamus.]*—*See CROWN PRACTICE*, Vol. XVI., p. 315, No. 1275.

—————.]—*See, further, Sub-sect. 2, A., ante.*

*Liability to account.]*—*See Sub-sect. 2, A., ante.*

**495. Authentication of documents—Document signed without previous authority—Subsequent adoption.]**—Pltf. was the owner of some houses in M.; the surveyor to the city certified in writing that there was imminent danger from them, & thereupon the town clerk, in the name of the corpn., directed the surveyor to cause the houses to be secured in such manner as he should think requisite. The directions by the town clerk to the surveyor were given without any express antecedent authority from the corpn. The corpn. by its subsequent proceedings adopted & acted upon the directions of the town clerk. Pltf. sued the corpn. for wrongfully taking down his houses, & proposed to show that there was not imminent

mayor suspended him & called upon him to hand over the books to him or to his successor. The clerk refused & the mayor reported the matter to the council & he was dismissed:—*Held:* they were justified in dismissing him.—*SMETHURST v. WYALONG MUNICIPAL DISTRICT* (1902), 2 S. R. N. S. W. 469; 19 N. S. W. W. N. 300.—*AUS.*

*c. Duty to act as chairman—At election of district councillor.]*—At a township meeting for the election of township officers, the first duty of the meeting is to elect a district councillor, & the town clerk *ex officio* may preside as chairman of the meeting until such



danger from them at the time when the surveyor to the city gave the certificates:—*Held*: (1) the certificates were conclusive as to whether danger was imminent, & the corpn. was bound to act upon them; (2) by force of the statutory provisions, the directions by the town clerk to the surveyor must be deemed the acts of the corpn., which had also ratified his proceedings.—*CHEETHAM v. MANCHESTER CORPN.* (1875), L. R. 10 C. P. 249; 44 L. J. C. P. 139; 32 L. T. 28; 39 J. P. 343.

*Annotation*:—*As to* (2) *Reid*. *Hopkins v. Smethwick L. B. of Health* (1890), 24 Q. B. D. 712.

*Returns to Minister of Health.*—*See* 1882 Act, s. 28.

### C. The Treasurer.

*See, generally*, 1882 Act, ss. 18, 26, 27.

**496. Appointment—Enforceable by mandamus.]**

—*R. v. BRISTOL CORPN.* (1843), 2 L. T. O. S. 155.

**Incompatible offices.]—See** 1882 Act, ss. 18 (1), (4), 25 (2).

**Remuneration.]—See** 1882 Act, s. 20.

**497. — Right to — Where none voted by council.]—A** borough which was governed by 1882 Act, & was also an urban authority under 1875 Act, had in Mar. 1903, exhausted all its borrowing powers & had in addition a large fluctuating overdraft at its bankers in respect of expenses previously incurred. The borough kept its banking account in the name of its treasurer, & during 1903 & 1904 the bank charged interest quarterly on the overdraft, & the treasurer in his accounts with the borough debited the borough & credited himself with the charges for interest, & his accounts were audited under 1882 Act, ss. 25–28, by the borough auditors, who passed the charges for interest, & the audited accounts were submitted to & approved by the borough council. In an action against the treasurer by the A.-G., suing on relation of a burgess, impeaching his accounts in respect of the charges for interest on the overdraft & claiming an injunction to restrain him from making any further payments for such interest out of the borough funds:—*Held*: (1) the corpn. were not necessary parties to the action, as no relief was asked for against them; (2) the treasurer was not merely the servant of the council, but, as custodian of the borough funds, owed a duty & stood in a fiduciary position to the burgesses as a body, & could not plead the orders of the council for an unlawful act; (3) the overdraft & the payments of interest thereon were illegal, & plffs. were entitled to the injunction notwithstanding that the payments might be quashed by *certiorari* under 1882 Act,

s. 141 (2), or by appeal to quarter sessions against the rates; (4) deft. could not retain the charges for interest by way of his remuneration under 1882 Act, s. 20, no remuneration in fact having been voted to him by the council; (5) the fact that defts. accounts had been audited under the Act was no bar to the action, there being nothing in the Act which made such audit finally binding & conclusive on the borough & the burgesses.

Deft.'s next contention is that the accounts have been audited under the Act [1882 Act], & that plff. cannot question such audit. My attention has not been called to any sect. making such audit finally binding & conclusive on the borough & the burgesses thereof, & it would be very unfortunate if there were any such, for the audit provided by 1882 Act is quite ineffective. Under 1875 Act, s. 247, the legislature provided a system of audit which gives auditors extensive powers, including powers to surcharge, but sect. 246 exempts urban authorities who are the council of a borough from this liability, & 1882 Act, s. 27, merely provides that the auditors shall audit the accounts, without more. They have no power to surcharge, & even if they ought, as LORD RUSSELL, C.J., says in *Thomas v. Devonport Corpn.*, No. 597, *post*, to make public any illegal payments by report to the council & the burgesses, this is a duty of imperfect obligation; there is nothing to compel them to do so, & very little to induce them, & so far as I know they have not done anything of the sort in the present case. It is difficult to understand why the legislature in 1882 should have authorised a system of auditing which is quite illusory when they had seven years before created an efficient method (FARWELL, J.).—*A.-G. v. DE WINTON*, [1906] 2 Ch. 106; 75 L. J. Ch. 612; 70 J. P. 368; 54 W. R. 499; 22 T. L. R. 446; 50 Sol. Jo. 405; 4 L. G. R. 549.

*Annotations*:—*As to* (3) *Apld.* *R. v. Locke*, [1910] 2 K. B. 201. *As to* (5) *Reid.* *R. v. Roberts*, [1908] 1 K. B. 407.

**Security to be given.]—See** 1882 Act, s. 20.

**498. — Liability of sureties — Payment by treasurer to surety—Notice that money money of corporation.]—D.** being appointed treasurer to a corpn. in 1841, A., B., & C. became his sureties to the extent of £2,000. D. opened a banking account, in which he was described as treasurer; but this designation was added without his authority, & was afterwards struck out. It was understood between D. & the corpn. that he should always have a considerable balance in his hands, of which he might make interest for his own profit. In Aug. 1848, D. drew out £2,300 from his banking account, & placed the same in another bank in the name of his son, a minor. In the

chosen.—*Re* BIGGAR  
U. C. R. 144.—CAN.

ertificate as to sufficiency of  
—Municipal Act, C. S. U. C.  
authorises the clerk of the council  
examine & finally determine  
their petitions are signed by the  
the number of owners of property  
benefited by the improvements  
for, & a certificate being given

(1910), 14 W. L. R. 222.—CAN.

g. *Security to be given — Effect of bond executed before appointment.]—*COUNTY OF ESSEX CORPN. *v.* STRONG (1861), 21 U. C. R. 149.—CAN.

h. — *Liability of sureties — No liability where treasurer reappointed to different county.]—*COUNTY OF ONTARIO CORPN. *v.* PAXTON (1876), 27 C. P. 104.—CAN.

k. —.] — *SHELburne MUNICIPALITY v. MARSHALL* (1886), 7 R. & G. 171.—CAN.

l. *Liability as custodian of borough fund.]—Deft.*, being treasurer of a municipality, kept his moneys in his house, there being no proper place for depositing the same provided by the municipality:—*Held*: the treasurer was not liable to make good the amount of loss sustained by the accidental burning of his house, & the destruction therein of the moneys of the municipi-

pality.—*HOUGHTON CORPN. v. FREE-LAND* (1879), 26 Gr. 500.—CAN.

m. *Proceedings against — For non-payment to corporation.]—*INGERSOLL VILLAGE CORPN. *v.* CHADWICK (1860), 19 U. C. R. 278.—CAN.

n. *Right to all funds — Arising under bye-law.]—Held*: all moneys collected for the erection of school houses under any bye-law of the district municipal council were payable, not to the superintendent, but to the district treasurer.—*BROWN v. STYLES* (1851), 2 C. P. 346.—CAN.

o. *Whether authorised to bind corporation — Order for teacher's salary.]—*MUNSON *v.* TOWN OF COLLINGWOOD (1859), 9 C. P. 497.—CAN.

p. — *Tax sale.]—A* treasurer of a town has no authority to bind the municipal corpn. by a contract to pay the cost of advertising his list of lands for sale for arrears of taxes.—*CANADIAN BANK OF COMMERCE v.*

of documents —  
office clerk.]—*MAJOR v.*  
JURY OF TAURANGA (CHAIRMAN,  
JUNCILLORS & INHABITANTS) (1887),  
N. Z. L. R. 121.—N.Z.

PART VII. SECT. 3, SUB-SECT. 2.—C.

1. *Remuneration*



**Sect. 3.—Officers and servants: Sub-sect. 2, C. D.; sub-sect 3. Sect. 4.]**

same month, D. obtained his son's indorsement of a receipt, & withdrew the £2,300 from his name & placed it in that of his daughter, who was of age. On Sept. 29, 1848, A. received notice of D. being a defaulter in his accounts with the corpn. A. called upon D. & required an explanation & indemnity. D. then gave to A. the deposit receipt for £2,300 upon which, it being signed by the daughter, A. received that sum from the bank. In a suit by the corpn. against D. & his sureties:—*Held*: there was sufficient evidence to show that the £2,300 was part of the corpn. moneys, & A. ought to have made further inquiry, & therefore the sum must be restored to the corpn.—**BERWICK-UPON-TWEED CORPN. v. MURRAY** (1857), 7 De G. M. & G. 497; 26 L. J. Ch. 201; 3 Jur. N. S. 1; 5 W. R. 208; 44 E. R. 194; *sub nom.* **BERWICK CORPN. v. MURRAY, SAME v. DOBIE**, 28 L. T. O. S. 277, L. C.; *previous proceedings* (1850), 19 L. J. Ch. 281.

*Annotation*:—**Refd.** General Steam Navigation Co. v. Rolt (1860), 6 C. B. N. S. 550.

— **On fidelity guarantees.**—*See, generally*, GUARANTEE, Vol. XXVI., pp. 159 *et seq.*, 165 *et seq.*, 172, 173, 188 *et seq.*

— **Whether condition precedent to appointment.**—*Compare* No. 726, *post*.

**499. Payment in mistaken belief of authority—Right of corporation to ratify.**—The treasurer of a corpn. paid their clerk, deft., the amount of his year's salary, both parties believing at the time that the treasurer had the authority of the corpn. to make such payment; but the treasurer had no such authority, & the corpn. afterwards repudiated the payment & dismissed deft. from their service. In an action against deft. for the recovery of certain moneys paid to him on account of the corpn.:—*Held*: the corpn. was entitled, at the trial, to ratify the act of their treasurer, & consequently, deft. could not set off the amount of his salary as due to him from the corpn.—**SIMPSON v. EGGINGTON** (1855), 10 Exch. 845; 24 L. J. Ex. 312; 19 J. P. 776; 156 E. R. 683.

*Annotation*:—**Refd.** *Re* Rowe, *Ex p.* Derenburg, [1904] 2 K. B. 483.

**500. Liability as custodian of borough fund—For ultra vires payments—Payments ordered by council.**—**A.-G. v. DE WINTON**, No. 497, *ante*.

The borough fund, *see* Sect. 5, sub-sect. 1, *post*.

**501. Right of reimbursement—Interest charged on overdraft in name of treasurer—Overdraft ultra vires.**—**A.-G. v. DE WINTON**, No. 497, *ante*.

**502. Proceedings against—For unlawful payments—Ordered by council—Whether council neces-**

**sary parties.**—**A.-G. v. DE WINTON**, No. 497, *ante*.

#### D. Other Officers.

*See* 1882 Act, s. 19.

**503. Bailiff—Residential qualification—Sufficiency.**—Deft. having prior connections with a borough town, previous to his election to the office of bailiff, for which residence is a necessary qualification, took a house at first for four years, but afterwards at his landlord's request, for one, & slept there one night before the election, & did not return again for near a month afterwards, when he stayed two days, but retained possession of his house under his lease the whole time: the taking of the house appearing to the ct. to be *bonâ fide*:—*Held*: a sufficient legal residence to satisfy the qualification required.—**R. v. SARGENT** (1793), 5 Term Rep. 466; 101 E. R. 262.

*Annotations*:—**Distd.** **R. v. Richmond** (1796), 6 Term Rep. 560. **Refd.** **R. v. Stapleton** (1853), 22 L. J. M. C. 102; **Ganendro Mohun Tagore v. Rajah Juttendro Mohun Tagore** (1874), L. R. 1 Ind. App. 387.

**504. ————**—*See* [1882 Act, s. 19].—An information in nature of *quo warranto* granted in order to try whether a residence in a borough previous to an election which required residence were *bonâ fide* or not; it appearing that deft., though in treaty for a house in the borough, had only hired lodgings there, & had resided there a very few nights in his journey to & from other places.—**R. v. RICHMOND (DUKE)** (1796), 6 Term Rep. 560; 101 E. R. 703.

**505. ———— Whether quo warranto lies—Though not corporate office.**—An information in the nature of a *quo warranto* may be granted at common law within Municipal Offices Act, 1710 (c. 25), against a party for exercising the office of a bailiff in the borough of M. although it was not a corporate office.—**R. v. HIGHMORE** (1822), 5 B. & Ald. 771; 1 Dow. & Ry. K. B. 438; 106 E. R. 1373.

*Annotations*:—**Consd.** **R. v. M'Kay** (1826), 5 B. & C. 640. **Refd.** **R. v. Attwood** (1833), 4 B. & Ad. 481; **Darley v. R.** (1846), 12 Cl. & Fin. 520.

**506. Chamberlain—Misconduct as—Whether ground for removal from corporate office.**—The chamberlain of a corpn. cannot be removed from the office of a capital burgess for misconduct as chamberlain. None of the members of a corpn. can be removed upon a general charge of obstinately refusing to obey several orders & laws made by the corpn. for the good of the corpn. The common council of a corpn. have not of common right a power to remove any of the members of the corpn.—**R. v. DONCASTER CORPN.**

**TOWN OF TORONTO JUNCTION** (1902), 22 C. L. T. 97; 3 O. L. R. 309; 1 O. W. R. 74.—**CAN.**

**q. Liability to account.**—The condition was, that a treasurer, his exors. or administrators, at the expiration of his office, upon request to him or them made, should give a just account of all moneys received, & should pay & deliver all balances due:—*Held*: "upon request to him or them made" applied both to the giving an account & to the paying over.—**COUNTY OF BRUCE PROVISIONAL CORPN. v. CROMAR** (1863), 22 U. C. R. 321.—**CAN.**

**r. Sex.**—A woman may perform the duties of town treasurer.—**HAGARTY v. MCGRATH & TOWN OF NORTH SYDNEY** (1909), 7 E. L. R. 79.—**CAN.**

#### PART VII. SECT. 3, SUB-SECT. 2.—D.

**t. Township superintendent—Right to sue collector.**—A township super-

intendent appointed under 7 Vict. c. 29, since repealed by 9 Vict. c. 20, s. 45, cannot sue the collector of the township for moneys received by him, not in the nature of penalties.—**SHIRLEY v. HOPE** (1847), 4 U. C. R. 240.—**CAN.**

**a. Warden—By whom elected.**—A majority of the whole number forming the provisional municipal council of a county must vote at the election of warden.—**R. v. STARRATT** (1858), 7 C. P. 487.—**CAN.**

**b. Physician—Salary—Not liable to attachment.**—The salary of a physician of a municipal corpn., holding his appointment at their will, at an annual salary, payable quarterly, cannot be attached.—**SHANLY v. MOOR** (1863), 3 P. R. 223.—**CAN.**

**c. Division court clerk—Not entitled to an office.**—There is no obligation upon a municipality to provide an office for the clerk of the

division ct.—**GRIFFIN v. CITY OF HAMILTON** (1875), 37 U. C. R. 519.—**CAN.**

**d. Recorder—Acting as attorney for municipality—Municipality entitled to his costs.**—**HALIFAX CITY v. ROMANS** (1880), 2 R. & G. 271; 1 C. L. T. 708.—**CAN.**

**e. Registrar—Right of municipality to proportion of fees.**—**COUNTY OF HASTINGS v. PONTON** (1880), 5 A. R. 543.—**CAN.**

**f. Stipendiary magistrate—May not impose fine—Where fine augments fund from which salary payable.**—**TUPPER v. MURPHY** (1882), 3 R. & G. 173.—**CAN.**

**g. ————**—*Held*: a stipendiary magistrate, *non obstante* his appointment by the Lieutenant-Governor in Council, is an "officer of the town" within Town's Incorporation Act, 1900, c. 71.—*Re* **PELTON** (1913), 12



(1729), 2 Ld. Raym. 1564; 1 Barn. K. B. 264; 92 E. R. 513.

*Annotations* :—*Reid*. R. v. Ward (1730), 1 Barn. K. B. 411; R. v. Doncaster Corpn. (1752), Say. 37.

**507. Chemist—Appointment disqualification for office of councillor—Though value of contract small.**—*NELL v. LONGBOTTOM*, No. 402, *ante*.

**Clerk of the peace.**—*See* MAGISTRATES.

**Coroner.**—*See* CORONERS, Vol. XIII., pp. 233, 234.

**508. Power to discontinue appointment.**—The layer keeper of S. was an officer employed to keep the layers or beds for shipping in the port free from obstacles & in a proper state. He was appointed, by custom, at a leet & baron ct. held yearly in May & Oct. by the steward of the seignory of G., the lord of which, the Duke of Beaufort, was lord of the borough & manor of S. These were coextensive. The jury of the ct., composed of aldermen, burgesses & residents, presented two persons to the steward, one of whom he elected to be layer keeper. The portreeve, & the head officer of the borough before 1835 Act, sat with the steward, but took no part in the proceedings. The layer keeper was sworn to execute the office for the year ensuing, & until another should be chosen in his stead, or he should be lawfully discharged. By Act of Parliament, to the introduction of which the Duke & the corpn. were parties, trustees were appointed for managing & improving the harbour but the office & rights of the layer keeper were expressly reserved. Under the authority of this Act a harbour master was appointed, who performed all the actual duties formerly discharged by the layer keeper. Tolls, other than those received by the layer keeper, were paid by the shipping which used the port to the portreeve, who paid the corpn. a rent for moorage, etc., & to the water bailiff, an officer of the Duke.

Pltf. had, for some years before the passing of 1835 Act, been annually appointed layer keeper. In May, 1836, he was reappointed under protest from the mayor of the then corpn. In Oct. 1838, the corpn. prevented the holding of the ct. leet & ct. baron; & in consequence no ct.

was held till May, 1842, when they were resumed. No appointment of layer keeper took place from May, 1836, till May, 1842, when pltf. was re-appointed. In Oct. 1836, the town council resolved that the appointment of layer keeper should be vested in the corpn., & the revenue added to the corpn. fund. The corpn. accordingly received the layer keeper's dues from Jan. 1837, to June, 1842. Pltf. sued them for the amount in *assumpsit* for money had & received :—*Held* : (1) pltf. had not ceased to be layer keeper by the omission to appoint from 1836 to 1842; (2) the office had not been, & could not be, discontinued by the corporation under 1835 Act, s. 58; (3) the cessation or suspension of the layer keeper's services had not affected the right to receive the tolls; (4) the action, in point of form, was well brought.—*HALL v. SWANSEA CORPN.* (1844), 5 Q. B. 526; Dav. & Mer. 475; 13 L. J. Q. B. 107; 2 L. T. O. S. 345; 8 J. P. 503; 8 Jur. 213; 114 E. R. 1348.

*Annotations* :—*Reid*. *Lowe v. L. & N. W. Ry.* (1852), 18 Q. B. 632; *Lawford v. Billericay R. C.*, [1903] 1 K. B. 772.

#### SUB-SECT. 3.—SERVANTS.

**509. Distinguished from officers.**—*SMITH v. CARTWRIGHT*, No. 462, *ante*.

**Appointment.**—*See* P. H. Act, s. 189.

**Remuneration.**—*See* P. H. Act, s. 189, & compare Nos. 83, 220, *ante*.

#### SECT. 4.—CONTRACTS.

*See, generally*, CONTRACT, Vol. XII., pp. 1 *et seq.*

**Contracts of corporations.**—*See, generally*, CORPORATIONS, Vol. XIII., pp. 378 *et seq.*

— **Under Public Health Acts.**—*See, generally*, CORPORATIONS, Vol. XIII., pp. 384 *et seq.*

**Contracts of employment.**—*See* MASTER & SERVANT.

**As urban authority.**—*See* Part V., Sect. 2, sub-sect. 5, *ante*.

E. L. R. 540; 11 D. L. R. 623; 47 N. S. R. 103.—CAN.

**h. Solicitor—Action for costs—Employment must be proved.**—Pltf. sued a rural municipality for services as a solr., but no resolution or bye-law of the council employing him was produced, nor did the council adopt or derive any benefit from his services :—*Held* : he was not entitled to recover.—*CURRAN v. RURAL MUNICIPALITY OF NORTH NORFOLK* (1892), 8 Man. L. R. 256.—CAN.

**k. — Removal—Whether cause must be assigned.**—The power conferred upon the council of an incorporated town to dismiss from office the town solr. cannot be exercised unless due cause is alleged & shown.—

**l. Fence viewers—Oath of qualification—Condition precedent to action.**—

#### PART VII. SECT. 3, SUB-SECT. 3.

**... appointment—reference to ex-soldier "other things being equal"—Duty of council.**—*GARDNER v. COUNCIL OF KOGARAH MUNICIPALITY* (No. 2) (1925), 25 S. R. N. S. W. 597; 17 N. S. W. L. G. R. 93.—

**n. — Whether seal necessary.**—*Held* : a timekeeper is not such a "superior officer" that his employment

by a corpn. must be under seal.—*GORDON v. TORONTO, MANITOBA & NORTH WEST LAND CO.* (1885), 2 Man. L. R. 318.—CAN.

**o. — By resolution—Tax collector.**—The appointment of a tax collector may be done by resolution.—*FOSTER v. RENO* (1910), 17 O. W. R. 707; 2 O. W. N. 351; 22 O. L. R. 413.—CAN.

**p. Determination of appointment—Office held "during pleasure"—Right to salary.**—*DEMSEY v. CITY OF TORONTO* (1848), 6 U. C. R. 1.—CAN.

**q. — — — — —**—Under Edmonton City charter in the absence of a special bye-law every servant of the corpn. shall hold office or employment at the pleasure of the council or comrs. or departmental heads, & a servant can accordingly be dismissed at any time & without cause.—*LAWLER v. CITY OF EDMONTON* (1914), 29 W. L. R. 661; 7 W. W. R. 291; 20 D. L. R. 710; 7 Alta. L. R. 376.—CAN.

**r. — Whether notice necessary.**—*HACKETT v. CITY OF EDMONTON* (1915), 30 W. L. R. 551.—CAN.

**t. Duration of appointment.**—The councils have no power under this section to limit the term of office of county officials, independently of the term of office as it existed under former legislation.—*LETTENEY v. DILLON* (1885), 6 R. & G. 146.—CAN.

**a. Removal—By resolution.**—The removal of a clerk of a municipal

corpn. may be by a resolution, it not being essential that a bye-law should be passed for such a purpose.—*VILLAGE OF LONDON WEST v. BARTRAM* (1895), 26 O. R. 161.—CAN.

#### PART VII. SECT. 4.

**b. Contracts of corporations—Supply of electricity.**—A contract by a council with an independent contractor, for the supply of electricity within its area is *ultra vires*.—*KEMPSEY MUNICIPAL COUNCIL v. KEMPSEY ELECTRIC LIGHT & POWER CO.* (1920), 21 S. R. N. S. W. 114; 37 N. S. W. W. N. 254.—AUS.

**c. — Resolution of council.**—*BARTLETT v. AMHERSTBURG TOWNSHIP* (1856), 14 U. C. R. 152.—CAN.

**d. — — — — —**—*FETTERLY v. MUNICIPALITY OF RUSSELL & CAMBRIDGE* (1857), 14 U. C. R. 433.—CAN.

**e. — — — — —**—*MCLEAN v. BRANTFORD TOWN COUNCIL* (1858), 16 U. C. R. 347.—CAN.

**f. — — — — —**—*BUTLER & MCLORG v. CITY OF SASKATOON*, [1918] 1 W. W. R. 297; 11 Sask. L. R. 1; 38 D. L. R. 480.—CAN.

**g. — Order signed by — — — — — Whether binding on council.**—Pltf. brought an action for the use & occupation of a room in his hotel as a ct. room, & proved that the sheriff of the county had engaged the room, & that the chairman of the municipal council had signed an order for the



**Sect. 4.—Contracts. Sect. 5: Sub-sect. 1, A. & B.**  
(a) i. & ii.]

**Necessity for seal.]—See, generally, CORPORATIONS, Vol. XIII., pp. 284, 285, 380 et seq.**

**— Fresh contract for extras.]—See BUILDING CONTRACTS, Vol. VII., p. 378, Nos. 181–184.**

**510. — Seal affixed by pretended mayor—Whether valid.]—If a person pretending to be mayor of a corpn., put the corpn. seal to a deed, yet it is not, by that, the deed of the corpn. (HOLT, C.J.).—ANON. (1700), 12 Mod. Rep. 423; 88 E. R. 1425.**

**Limitation of contractual powers.]—See 1882 Act, s. 12 (2), Part II., Sect. 4; Part V., Sect. 2, sub-sect. 5, ante, & generally, CORPORATIONS, Vol. XIII., pp. 354 et seq.**

**— Purchase & holding land.]—See Sect. 1, sub-sect. 8, B. (a), ante.**

**511. Validity of contract — Contract “as local board” — Binding on corporation.]—ANDREWS v. RYDE CORPN., No. 242, ante.**

**Ratification—By seal.]—See, generally, CORPORATIONS, Vol. XIII., pp. 390, 391.**

**—.]—See, generally, CONTRACT, Vol. XII., pp. 595, 596.**

## SECT. 5.—FINANCE.

### SUB-SECT. 1.—THE BOROUGH FUND.

#### A. Payments In.

*See, generally, 1882 Act, s. 139.*

**Fines & penalties—For offences against Act—Not otherwise provided for.]—See 1882 Act, s. 139.**

**512. — Whether forfeited recognisance included.]—By a charter of Edward IV. the Crown granted to the corpn. of Dover “all penalties forfeited & to be forfeited, etc., of all & every the barons, etc., in whatsoever cts. the same barons, etc., should happen to be adjudged.” By a charter of Charles II. “all fines, forfeitures, etc., in the cts. aforesaid arising etc.” were also granted to the corpn.:—*Held*: under neither of these**

payment of his charge:—*Held*: not recoverable.—**DARK v. HURON & BRUCE MUNICIPAL COUNCIL (1858), 7 C. P. 378.—CAN.**

**h. — Whether other contracts void.]—PRETORIA TOWNSHIPS, LTD. v. PRETORIA MUNICIPALITY, [1913] T. P. D. 713.—S. AF.**

**k. — Must be intra vires.]—MUNICIPALITY OF KINLOSS TOWNSHIP v. STAUFFER (1858), 15 U. C. R. 414.—CAN.**

**l. —.]—PIGOTT v. TOWN OF BATTLEFORD (1913), 24 W. L. R. 365; 12 D. L. R. 171.—CAN.**

**m. — Necessity to prove identity of vendor.]—The name of the seller or his agent must appear in a contract of purchase by a municipal corpn.—**HOUCK v. TOWN OF WHITBY (1868), 14 Gr. 671.—CAN.****

**n. — Variation of contract.]—GOODWIN v. CITY OF OTTAWA (1878), 18 C. P. 561.—CAN.**

**o. —.]—As a statutory body which is practically a trustee for the ratepayers, a municipal corpn. has no power to vary a contract unless satisfied that such a course would be for their benefit.—**PETONE BOROUGH v. LOWER HUTT BOROUGH, 1918] N. Z. L. R. 844.—N.Z.****

**p. — Contract rendered illegal by subsequent bye-law.]—By the terms of the contract the building, when erected, would not have conformed to the provisions of a bye-law of the city passed two days after the contract was signed:—*Held*: the bye-law made the contract illegal, & therefore the corpn. could not recover.—**SPEARS &****

**SPEARS v. WALKER (1884), 11 S. C. R. 113.—CAN.**

**q. — Urgent necessity.]—LAWRENCE v. VILLAGE OF LUCKNOW (1887), 13 O. R. 421.—CAN.**

**r. — Delay in performance.]—MACDOUGALL & CO. v. MUNICIPALITY OF PENTICTON (1914), 27 W. L. R. 713; 7 W. W. R. 486; 16 D. L. R. 436; 20 B. C. R. 401.—CAN.**

**t. Necessity for seal — Retainer of counsel.]—MANNING v. CITY OF WINNIPEG (1910), 15 W. L. R. 33; *affd.* (1911), 17 W. L. R. 329.—CAN.**

**a. —.]—MCBRIAN v. OTTAWA CITY WATER COMRS. (1876), 40 U. C. R. 80.—CAN.**

**b. — Fresh contract for extras.]—KILPATRICK v. CITY OF WINNIPEG (1887), 4 Man. L. R. 103.—CAN.**

**c. —.]—BERNARDIN v. NORTH DUFFERIN MUNICIPALITY (1891), 19 S. C. R. 581.—CAN.**

**d. —.]—UNITED TRUST CO. v. CHILLIWACK (1896), 5 B. C. R. 128.—CAN.**

**e. Promissory note — Whether corporation liable.]—*Held*: a promissory note signed by a corpn. in settlement of a judgment against the municipality, was null, the legislature having empowered municipalities to raise money in a different way.—**PACAUD & HALIFAX SOUTH CORPN. (1866), 17 L. C. R. 56.—CAN.****

**f. Instrument under seal — Effect.]—MILESTONE v. CITY OF MOOSE JAW (1908), 1 Sask. L. R. 440; 8 W. L. R. 901.—CAN.**

**g. Necessity for bye-law.]—A muni-**

charters did a forfeited recognisance to appear to answer a charge of misdemeanour pass to the corpn.—**R. v. DOVER CORPN. (1835), 1 Cr. M. & R. 726; 5 Tyr. 279; 4 L. J. Ex. 94; 149 E. R. 1273.**

*Annotation*:—**Consd. Re Nottingham Corpn., [1897] 2 Q. B. 502.**

**513. —.]—By a charter of Henry IV. the Crown granted to the corpn. of Nottingham “all fines for trespasses & other offences whatsoever, & also fines for licence to agree, & all amercements, ransoms & forfeited issues, forfeitures year day waste & estrepement.”**

By a charter of Henry VI. the Crown granted to the corpn. “all issued fines & amercements from whatsoever pledges & mainpernors” of persons dwelling in the borough:—*Held*: under neither of these charters did a forfeited recognisance to appear to answer a charge of felony or misdemeanour pass to the corpn.—**Re NOTTINGHAM CORPN., [1897] 2 Q. B. 502; 66 L. J. Q. B. 883; 77 L. T. 210; 13 T. L. R. 580; sub nom. R. v. NOTTINGHAM CORPN., 61 J. P. 725, D. C.**

**— Recovered summarily—In borough having separate quarter sessions.]—See MAGISTRATES.**

**514. Enforcement — By mandamus — When granted.]—The ct. will not grant a mandamus commanding a party to pay money to the treasurer of a borough, under 1835 Act, s. 92, unless the application be made, either by the treasurer, or after he has been required to demand the payment. Though the party applying for the mandamus be ultimately entitled to the money.—**R. v. FROST (1838), 8 Ad. & El. 822; 1 Per. & Dav. 75; 1 Will. Woll. & H. 664; 2 J. P. 726; 2 Jur. 966; 112 E. R. 1049.****

*Annotation*:—**Mentd. R. v. Peterborough Corpn. (1875), 44 L. J. Q. B. 85**

#### B. Payments Out.

##### (a) Out of Fund.

###### i. In General.

*See 1882 Act, s. 140, & generally, CORPORATIONS, Vol. XIII., pp. 362 et seq., Nos. 972–986.*

**515. General rule — Limited by statute.]—The**

municipal corpn. has no power, without a bye-law assented to by the electors, to enter into contracts involving expenditure not payable out of the ordinary rates of the current financial year.—**Re OLVER & CITY OF OTTAWA (1893), 20 A. R. 529.—CAN.**

**aa. —.]—Re MCEWAN & CITY OF CALGARY (1913), 25 W. L. R. 401; 5 W. W. R. 87; 13 D. L. R. 791; 6 Alta. L. R. 136.—CAN.**

**bb. —.]—WATEROUS ENGINE WORKS CO. v. TOWN OF PALMERSTON CORPN. (1892), 21 S. C. R. 556.—CAN.**

**cc. —.]—A municipal corpn. cannot purchase a fire engine unless the purchase is sanctioned by bye-law.—**WATEROUS ENGINE CO. v. TOWN OF CAPREOL, [1923] 3 D. L. R. 575; 52 O. L. R. 247.—CAN.****

**dd. —.]—PORTAGE LA PRAIRIE CORPN. v. GARLAND, [1925] 1 D. L. R. 645; 1 W. W. R. 419; 34 Man. L. R. 642.—CAN.**

**ee. Purchase by councillor — Necessity for authority.]—The purchase of hay by a councillor of a municipal district without the authority of the resolution of the council provided for in Municipal Districts Seed Grain Act, 1918, c. 10, s. 8, does not render the district liable for the purchase price thereof.—**STRONG v. MUNICIPAL DISTRICT OF PATRICIA, No. 485, & McLAREN, [1921] 2 W. W. R. 672.—CAN.****

## PART VII. SECT. 5, SUB-SECT. 1.—B. (a) i.

**515 i. General rule — Limited by statute.]—A city council is a trustee of**

funds belonging to the municipal corpsns. of boroughs named in Schedules A & B. of 1835 Act became, upon the passing of that Act, subject to certain public trusts, to be exercised by the new council, only in the manner & for the purposes prescribed by the Act.

An appropriation of such funds made by the old corpns., after the passing of the Act, but before the election of the new council, & having for its object to endow the churches & chapels of the Established Church within the borough with fixed stipends, for their several ministers, is not an appropriation warranted by the Act, & is, therefore, a breach of trust.

The ordinary jurisdiction of the ct. over such a transaction, by means of an information seeking to have the funds recalled, & the appropriation rescinded, as being a breach of trust, is not ousted by the special remedies provided in certain cases by 1835 Act, s. 97. *Semble*: those remedies would not be applicable in any case to a transaction of this description.

Where property is devoted to trusts which are to arise at a future time, & be exercised by trustees who are not yet *in esse*, any intermediate act done by the holders of such property, inconsistent with the security of the property, or the performance of the trusts when they shall arise, will be set aside; & if the trusts are of a public nature, the ct. will entertain this jurisdiction upon an information by the A.-G., notwithstanding that the trustees, after they have come into *esse*, themselves decline to interfere.

As it was thought right that the new council should have a power of calling in question acts relative to the corporate property, carried into effect before the period of their election, it was absolutely necessary to give them a distinct legislative authority for this purpose; because, the identity of the corpns. continuing, notwithstanding the alterations effected by the Act, any such attempt, on the part of the new council, would be an attempt by the corpns. to impeach its own act (LORD COTTENHAM, C.).—A.-G. v. ASPINALL (1837), 2 My. & Cr. 613; 1 J. P. 4; 1 Jur. 812; 40 E. R. 773; *sub nom.* A.-G. v. LIVERPOOL CORPN., A.-G. v. ASPINALL, 7 L. J. Ch. 51, L. C.

*Annotations*:—Apld. A.-G. v. Wilson (1837), 9 Sim. 30. *Consd.* A.-G. v. Wilson (1840), Cr. & Ph. 1; Parr v. A.-G. (1842), 8 Cl. & Fin. 409; A.-G. v. De Winton, [1906] 2 Ch. 106. *Refd.* R. v. Liverpool Corpns. (1839), 9 Ad. & El. 435; Holdsworth v. Dartmouth Corpns. (1840), 11 Ad. & El. 490; Armitstead v. Durham (1848), 11 Beav. 556; Arnold v. Gravesend Corpns. (1856), 2 K. & J. 574; A.-G. v. Avon Corpns. (1863), 33 Beav. 67; A.-G. v. Newcastle-on-Tyne Corpns. & N. E. Ry. (1889), 23 Q. B. D. 492. *Mentd.* Stevens v. Chown, Stevens v. Clark, [1901] 1 Ch. 894.

**516. Enforcement—By mandamus.**—The fees payable to the clerk of the justices, under 1835 Act, in cases where there is no specific provision as to the mode in which they are to be paid, as well as in cases where there are no means of obtaining

payment from the parties in the first instance liable to pay them, are expenses chargeable on the borough fund by sect. 92, as being expenses necessarily incurred in carrying into effect the provisions of that Act; & a *mandamus* will lie to enforce payment of them.—R. v. GLOUCESTER CORPN. (1844), 5 Q. B. 862; Dav. & Mer. 677; 13 L. J. Q. B. 233; 3 L. T. O. S. 54; 8 J. P. 855; 8 Jur. 573; 114 E. R. 1474.

*Annotation*:—*Refd.* Reddish v. Hitchinor (1878), 43 J. P. 41.

## ii. Costs of Legal Proceedings.

See 1882 Act, s. 226 (3).

**517. Resolution to defend all suits at cost of corporation—No suit pending at time of resolution—Whether court will interfere.**—A.-G. v. LIVERPOOL CORPN. (1729), 1 Barn. K. B. 236; 94 E. R. 161.

**518. Though unsuccessful.**—Where a town council had removed a town clerk from his office, by resolution, for misconduct, & refused his claim of compensation:—*Held*: the costs of an attorney employed in opposing a *mandamus* to assess compensation were properly chargeable to the borough fund, under 1835 Act, s. 92, although the jury found the issues ultimately raised on the *mandamus* for the late town clerk: it not being shown that the town council acted otherwise than *bonâ fide* in the removal. The attorney having been retained generally by a resolution of the town council, & having also been authorised & retained by resolution of the town council to take proceedings in opposition to the rule *nisi* for the *mandamus*:—*Held*: this was a sufficient retainer to warrant the payment to him of the costs of defending the issues, & it was no objection to the order for payment made in consequence, that it was an order for payment on account, the attorney not having delivered a bill, & it not appearing that the sum ordered to be paid exceeded the sum due to the attorney.—R. v. LICHFIELD TOWN COUNCIL (1847), 10 Q. B. 534; 2 New Pract. Cas. 176; 16 L. J. Q. B. 333; 9 L. T. O. S. 123; 11 J. P. 758; 11 Jur. 888; 116 E. R. 204.

*Annotation*:—*Consd.* R. v. Tamworth Corpns. (1868), 17 W. R. 231.

—*See, now*, 1882 Act, Sched. V., Part II. (6).

**519.** —*Costs of litigation, undertaken bonâ fide & on reasonable grounds, for the defence of corporate rights may be paid out of the borough fund of a municipal corporation under 1835 Act, s. 92, though such litigation is eventually unsuccessful.*—R. v. TAMWORTH CORPN., *Ex p.* TAMWORTH CORPN. (1868), 19 L. T. 433; 17 W. R. 231.

**520. Necessity for previous sanction by council.**—R. v. LICHFIELD TOWN COUNCIL, No. 525, *post*.

the funds of the corpns., & as such, has no power to apply them for any other object, than such as the city charter contemplates.—MCMILLAN v. CITY OF WINNIPEG (Man.), [1919] W. W. R. 591; 45 D. L. R. 351.—CAN.

**o. Money paid out on unauthorised order.**—*Semble*: moneys paid by a treasurer on the order of the reeve, which the municipal council had no authority to direct to be paid, will be considered township moneys still in its hands.—TOWNSHIP OF EAST NISBURN v. HORSEMAN (1858), 9 C. P. 121.—CAN.

**p. Loans by corporation—Rate of interest to be paid.**—Municipal J.—VOL. XXXIII.

corpns. are not restricted, any more than individuals, as to the rate of interest to be received upon money lent by them; they may take any rate of interest agreed upon.—NORTH GWILLIMBURY CORPN. v. MOORE (1865), 15 C. P. 445.—CAN.

**q. Expenditure exceeding appropriation—Excess not payable.**—POTTS v. VILLAGE OF DUNNVILLE (1876), 38 U. C. R. 96.—CAN.

**r. Appropriation—Demand of annulment—Right of elector within prescribed time.**—DECHENE v. MONTREAL CITY, [1894] A. C. 640.—CAN.

**t. Salaries of councillors.**—Municipal councillors cannot vote salaries to

themselves unless expressly authorised by statute.—TOWN OF AMHERST v. READ, TOWN OF AMHERST v. FILLMORE (1897), 40 N. S. R. 154.—CAN.

**a. Expenditure conditional on certificate of treasurer—Absence of certificate—Expenditure illegal.**—HULL CITY v. R., [1923] 4 D. L. R. 801; [1923] S. C. R. 666; *reversg.*, [1923] Exch. C. R.

## PART VII. SECT. 5, SUB-SECT. 1.—B. (a) ii.

**b. Expenses of criminal justice.**—A municipality is liable for the fees & expenses of a justice of the peace or a constable, payable in relation to the prosecution of indictable offences,



**Sect. 5.—Finance: Sub-sect. 1, B. (a) ii., iii., iv. v., vi., vii. & viii.]**

**521. If proceedings not unreasonable.]**—At a ct. held in Oct. 1856, before the mayor & assessors of the city of Rochester, for the revision of the Burgess list, the names of several burgesses were expunged, & they obtained rules calling upon the succeeding mayor & assessors to show cause why writs of *mandamus* should not issue, commanding them to hold fresh cts. of revision. The corpn., under their common seal, retained pltf., an attorney, to show cause & otherwise defend these rules, & he accordingly did so, & the ct. having made the rules absolute, he appealed to a ct. of error, who affirmed the judgment. Pltf. having sued the corpn. for his costs:—*Held*: he was entitled to judgment; & there being nothing to show that the litigation on the part of the corpn. was not justifiable, the expenses were payable out of the borough fund.—**LEWIS v. ROCHESTER CORPN.** (1860), 9 C. B. N. S. 400; 30 L. J. C. P. 169; 3 L. T. 300; 7 Jur. N. S. 680; 9 W. R. 100; 142 E. R. 157.

*Annotation*:—**Refd.** A.-G. v. Newcastle-on-Tyne Corpn. & N. E. Ry. (1889), 23 Q. B. D. 492.

**522. — & bona fide — Though unsuccessful.]**—**R. v. TAMWORTH CORPN., Ex p. TAMWORTH CORPN., No. 519, ante.**

**523. Quo warranto directed to council invalidly elected—Proceedings abandoned on validation of election by statute on criminal information.]**—**R. v. SUNDERLAND TOWN COUNCIL** (1838), 2 J. P. 345, 502.

**524. Defence of individual members of corporation.]**—**R. v. PARAMORE** (1839), 10 Ad. & El. 286; 113 E. R. 111.

*Annotation*:—**Refd.** R. v. York (1842), 2 Q. B. 847.

**525. Prosecution for assault on mayor — In execution of office.]**—(1) *Semble*: the council of a borough may prosecute at the expense of the corpn. for an assault upon the mayor in the execution of his duty. But the opinion of the council must be taken before the prosecution is instituted; & if this be not done, they cannot afterwards order payment of the costs out of the corporation funds.

(2) The council of a borough, having borrowed money to pay debts incurred by the corporation since the passing of 1835 Act & not within 7 Will. 4 & 1 Vict. c. 78, s. 28, cannot order repayment of such loan out of the borough fund.

(3) An order signed by the mayor, at a meeting of the town council properly convened, & in which the majority concurred, for payment of the above expenses & sum of money out of the borough fund, may be removed by *certiorari*, within 7 Will. 4 & 1 Vict. c. 78, s. 44, though it is not signed by the three members of the council, & countersigned by the town clerk according to 1835 Act, s. 59.—**R. v. LICHFIELD TOWN COUNCIL** (1843), 4 Q. B. 893; 1 Dav. & Mer. 491; 12 L. J. Q. B. 308; 1 L. T. O. S. 287; 7 Jur. 670; 114 E. R. 1133;

*subsequent proceedings, sub nom. R. v. DUN* (1844), 5 Q. B. 959.

*Annotations*:—As to (1) **Refd.** R. v. Tamworth Corpn. *Ex p. Tamworth Corpn.* (1868), 19 L. T. 433. As to (2) & (3) **Refd.** *Pallister v. Gravesend Corpn.* (1850), 9 C. I. 774.

**526. Opposing mandamus for compensation—Though unsuccessful.]**—**R. v. LICHFIELD TOWN COUNCIL, No. 518, ante.**

**527. Sufficiency of retainer of solicitor.]**—**R. v. LICHFIELD TOWN COUNCIL, No. 518, ante.**

**528. Payment on account — Though solicitor's bill not delivered.]**—**R. v. LICHFIELD COUNCIL, No. 518, ante.**

*See, also, No. 536, post.*

**529. Costs given against council — Right of relator to charging order.]**—By a decree, made on the hearing of an information against a corpn., debts. were ordered to pay the relator his costs of such information. An advowson belonging to the corpn. had been sold, under the powers of 1835 Act, & the amount of the proceeds stood to the credit of the corpn. at the Bank of England:—*Held*: the relator was entitled to have a charging order for the amount of these costs upon this fund.—**A.-G. v. THETFORD CORPN.** (1860), 2 L. T. 370; 24 J. P. 611; 8 W. R. 467.

iii. *Costs in relation to Parliamentary Bills.*

*See Borough Funds Acts, 1872 (c. 91), & 1903 (c. 14).*

**530. Bill threatening existence of corporation.]**—A municipal corpn. is justified in using the borough fund for the purpose of opposing a bill in Parliament whereby its existence, property, or privileges are sought to be imperilled or diminished, both by virtue of 1835 Act, s. 92, by which the employment of the borough fund is authorised in payment of "all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act," & by virtue of the general law by which the owners of property in trust are authorised to be re-imbursed out of the trust estate for any expenses necessarily incurred for its protection or otherwise.—**A.-G. v. BRECON CORPN.** (1878), 10 Ch. D. 204; 48 L. J. Ch. 153; 40 L. T. 52; 43 J. P. 366; 27 W. R. 332.

*Annotations*:—**Expld. & Distd.** A.-G. v. Swansea Corpn., [1898] 1 Ch. 602. **Consd.** Leith Council v. Leith Harbour & Docks Comrs., [1899] A. C. 508. **Refd.** R. v. White (1883), 11 Q. B. D. 309; A.-G. v. Rickmansworth U. D. C. (1902), 86 L. T. 521; Brooks, Jenkins v. Torquay Corpn., [1902] 1 K. B. 601. **Mentd.** A.-G. v. Thomson, [1913] 3 K. B. 198.

**531. Bill prejudicial to corporation property.]**—**A.-G. v. BRECON CORPN., No. 530, ante.**

**532. Bill attacking corporation privileges.]**—**A.-G. v. BRECON CORPN., No. 530, ante.**

**533. Gas bill not affecting price paid by corporation—Possible effect on price paid by inhabitants.]**—A municipal corpn. opposed before Parliament a bill promoted by a gas co., which would or might effect an alteration in the price of gas to con-

only where they have been certified to be correct by the A.-G. or other counsel acting for the Crown, & have been ordered to be paid by the judge presiding at the ct. in which the indictment is presented.—**McLEOD v. KINGS, MORISON v. KINGS** (1900), 35 N. B. R. 163.—**CAN.**

**PART VII. SECT. 5, SUB-SECT. 1.—B. (a) iii.**

**530 i. Bill threatening existence of corporation.]**—A council may properly authorise the employment of counsel & payment of other expenses in opposing a bill introduced into the legislature

to abolish the municipality & apportion its territory among the adjoining municipalities.—**McDONALD RURAL MUNICIPALITY** (1894), 10 Man. L. R. 294; *affd.* 10 Man. L. R. 382.—**CAN.**

**530 ii. —.]**—A corpn. is justified, if acting *bona fide*, in applying their funds in opposing parliamentary bills which would affect their existence, & materially injure their powers as a corpn., though no such power is expressly given to it by their incorporating act.—**BOWER v. SLIGO COMRS.** (1) (1869), 1 R. 4 C. L. 489.—**IR.**

**530 iii. —.]**—**LEITH MAGISTRATES & TOWN COUNCIL v. LEITH HARBOURS**

& DOCKS COMRS. (1899), 1 F. (Ct. of Sess.) 65; 36 Sc. L. R. 956 7 S. L. T. 154, H. L.—**SCOT.**

**531 i. Bill prejudicial to corporation property.]**—Where it was shown that the provisions of a bill would have the effect of reducing the income of the corpn.:—*Held*: the corpn. were justified in opposing the bill, & applying the borough funds for that purpose.—**R. v. DUBLIN TOWN COUNCIL** (1863), 9 L. T. 123.—**IR.**

**c. Amendment of statute by order in council—Prejudicial to interests of corporation—Expenses of protesting delegation properly paid.]**—**MILLMINE v.**

in the borough, without obtaining the consent required by Borough Funds Act, 1872 (c. 91), s. 4. There was no surplus of the borough fund within 1835 Act, s. 92:—*Held*: the corpn. could not pay the expenses of opposing the bill out of the borough fund, as the bill did not propose to interfere with the price to be paid by the corpn. for gas, which was a subject-matter for arbn. under the Gasworks Clauses Act, 1871 (c. 41), s. 24.—*A.-G. v. SWANSEA CORPN.*, [1898] 1 Ch. 602; 67 L. J. Ch. 356; 78 L. T. 412; 62 J. P. 408; 46 W. R. 534; 14 T. L. R. 322.

*Annotation*:—*Reid. A.-G. v. Rickmansworth U. D. C.* (1902), 86 L. T. 521.

iv. *Expenses of Quarter Sessions.*

See MAGISTRATES, pp. 380 *et seq.*, *post*.

v. *Expenses under Vagrancy Acts.*

See POOR LAW.

vi. *Costs of Appeals from Licensing Justices.*

*Costs of justices.*—See INTOXICATING LIQUORS, Vol. XXX., pp. 64, 65.

534. — *Whether costs of clerk included.*—The licensing justices of the borough of B. having refused an application for an alehouse license, appct. appealed. The justices directed their clerk to appear at the ct. of quarter sessions & oppose the appeal, & to incur the necessary expenses in so doing. The clerk accordingly appeared by counsel on behalf of the justices, but the decision of the justices was reversed. The ct., purporting to act under Alehouse Act, 1828 (c. 61), made an order in blank for the clerk's costs to be paid by the treasurer of B., & then continued the sessions by adjournment until after the taxation of the costs by the officer of the ct. The officer taxed the costs, but the treasurer of B. was not summoned to be present & was not present at such taxation, & the taxation was never expressly adopted by the ct.:—*Held*: the order of the ct. of quarter sessions was bad because that ct. had not exercised the jurisdiction given it to "order payment of such sum as should in the opinion of such ct. be sufficient to indemnify such justice from all costs . . . such justice may have been put to."

It was bad also as directing the justices clerk's costs & not the justices' costs to be paid (RIDLEY, J.).—*R. v. WINDER*, [1900] 2 Q. B. 666; 69 L. J. Q. B. 729; 64 J. P. 741; 48 W. R. 605; 44 Sol. Jo. 486; *sub nom. R. v. WINDER*, *Ex p. BOLTON CORPN.*, 83 L. T. 171; 16 T. L. R. 400, D. C.

*Annotation*:—*Reid. R. v. West Riding JJ.*, [1904] 1 K. B. 115.

*Costs of chief constable.*—See INTOXICATING LIQUORS, Vol. XXX., p. 65, No. 503.

*enses in connection with Elections and Election Petitions.*

See 1882 Act, sched. V., Part I. (2), Part II. (1) (2), & *generally*, ELECTIONS, Vol. XX., pp. 46, 187, 188.

EDDY (1920), 47 O. L. 275; 52 L. R. 312; 18 O. W. N. 70.—CAN.  
Promotion of bill — Expenses — out of corporation trust

for extension of Expenses of annexation

of burghs to be included.—*KEMP v. GLASGOW CITY CORPN.*, [1920] A. C. 836.—SCOT.

PART VII. SECT. 5, SUB-SECT. 1.—B. (a) viii.

g. *Charges or expenses of borough constabulary.*—*ST. JOHN (MAYOR, ETC.) v. PATCHELL* (1882), 22 N. B. R. 173.—CAN.

h. *Remuneration — Authority determining.*—It is for the city council,

535. *What expenses allowed.*—*R. v. TAMWORTH CORPN.* (1869), 33 J. P. Jo. 774; *previous proceedings, sub nom. R. v. TAMWORTH CORPN.*, *Ex p. TAMWORTH CORPN.* (1868), 19 L. T. 433.

viii. *Expenses of the Borough Police.*

See 1882 Act, sched. V. (5), & *generally*, POLICE.

536. *Allowances to constables — Whether costs of criminal libel action included.*—A member of the constabulary force of the borough of Liverpool was made the subject of a libellous article in a newspaper, in reference to his conduct as inspector of public-houses, in giving a good character to an appct. for a license, at the meeting of the magistrates of the borough in Licensing Session, whom he knew to have been the keeper of a house of ill fame. Upon an intimation from, though without the official sanction of his superior authorities, he took criminal proceedings by way of summons before a magistrate against the publisher of the libel, & incurred expenses thereon. The watch committee, with the subsequent approbation of the town council, made an order on the borough treasurer for the payment of a sum of money on account of such expenses. The Liverpool Borough Fund had a surplus:—*Held*: such order was not in respect of an "allowance" nor a charge or expense for the purposes of the constabulary force within the meaning of 1835 Act, s. 82, nor an application of the fund for the public benefit of the inhabitants of the borough within s. 92, & a rule must go for a *certiorari* to bring up the order for the purpose of being quashed.—*R. v. LIVERPOOL CORPN.* (1872), 41 L. J. Q. B. 175; 20 W. R. 389; *sub nom. WILLMER v. LIVERPOOL CORPN.*, 26 L. T. 101.

*Annotations*:—*Reid. R. v. Exeter Corpn.* (1880), 6 Q. B. D. 135; *A.-G. v. Tynemouth Corpn.*, [1898] 1 Q. B. 604.

537. *Charges or expenses of borough constabulary—Whether costs of criminal libel action included.*—*R. v. LIVERPOOL CORPN.*, No. 536, *ante*.

538. *Order for payment—By whom made.*—An order on the treasurer of a borough for the payment of charges & expenses incurred for the purposes of the constabulary force, under 1835 Act, must be made by the watch committee, subject to the approbation of the town council.—*R. v. STAMFORD TOWN COUNCIL* (1843), 4 Q. B. 900, n.; 13 L. J. Q. B. 177; 1 L. T. O. S. 229; 8 J. P. 5; 8 Jur. 558; 114 E. R. 1136; *subsequent proceedings, sub nom. R. v. THOMPSON* (1844), 5 Q. B. 477.

*Annotation*:—*Reid. Willmer v. Liverpool Corpn.* (1872), 26 L. T. 101.

539. — *Power of watch committee to make—Expense disallowed by predecessors.*—On Aug. 13, the watch committee resolved to authorise the chief constable to obtain legal assistance at the licensing sessions. On Aug. 21 the council passed a like resolution. The chief constable successfully opposed some licensees, five of whom appealed to quarter sessions. On Oct. 10, the watch committee, having taken the opinion of counsel, refused to authorise the chief constable to act as resp. On Oct. 15 the council resolved to allow

not for the comrs. of police, to determine the remuneration to be paid to the police force.—*Re PRINCE & CITY OF TORONTO CORPN.* (1866), 25 U. C. R. 175.—CAN.

k. *Appropriation for police — Expenditure exceeding appropriation Position of unpaid constable.*—In an action against the city corpn. to recover the salary of the chief constable:—*Held*: the action failed because the money appropriated was



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him to so act, & pay his costs. When the appeals came on he appeared & opposed them, & they were dismissed with costs. The amount recovered on taxation was £132 5s. less than he had to pay. On Nov. 19 the watch committee resolved to pay these costs. This action was brought by plffs. as ratepayers to restrain this payment:—*Held*: in these circumstances, there was no right to use the borough funds for this purpose, for one watch committee has no power to apply to the council to pay certain moneys which a former watch committee has said ought not to be paid.—*A.-G. & NEWCASTLE BREWERIES, LTD. v. TYNE-MOUTH CORPN.* (1897), 76 L. T. 566; 13 T. L. R. 412; 41 Sol. Jo. 530, D. C.; *on appeal, sub nom. A.-G. v. TYNE-MOUTH CORPN.*, [1898] 1 Q. B. 604, C. A.; *sub nom. TYNE-MOUTH CORPN. v. A.-G.*, [1899] A. C. 203, H. L.

*Annotations*:—*Refd.* *Evans v. Conway JJ.*, [1900] 2 Q. B. 224. *Mentd.* *Allsop v. Preston JJ.* (1899), 64 J. P. 25; *A.-G. v. De Winton*, [1906] 2 Ch. 106; *R. v. Woodhouse*, [1906] 2 K. B. 501; *Attwood v. Chapman*, [1914] 3 K. B. 275.

**ix. Other Payments.****540. Endowment of churches within borough.]**

—*A.-G. v. ASPINALL*, No. 515, *ante*.

**541. Debt incurred prior to 1835 Act.]**—In an action of debt against a corpn. regulated by above Act on a bond by them to pltf. for payment of £1,249 it appeared on special verdict, that, before the passing of the Act pltf. being an alderman of the borough, *quo warranto* informations were filed against him & several of his friends & relations, to try their right to be members of the corpn., & they were ultimately ousted; that pltf., without authority from the now defts., caused the information to be defended; & that before the passing of the Act, certain members of the corpn., then being the governing body, & having the custody of the common seal, & lawful power to affix it to instruments, did, on pltf.'s application, affix the seal to the bond & deliver it to him by way of reimbursement of the costs of such defences, & for no other consideration; that divers of the then burgesses of the corpn. had no notice of the bond being given for that cause; & that the sealing & delivery thereof was without fraud, unless the sealing & delivery for the cause aforesaid was a fraud in law upon defts., or the inhabitants, or the members of the corpn. who did not concur:—*Held*: (1) on the facts found, the corpn. were liable on the bond before above Act; (2) the corpn. as subsisting under the statute, were still liable, & the liability was a "lawful debt," chargeable on the borough Fund, within above Act, s. 92.—*HOLDSWORTH v. DARTMOUTH CORPN.* (1840), 11 Ad. & El. 490; 3 Per. & Dav. 308; 9 L. J. Q. B. 121; 4 J. P. 138; 4 Jur. 605; 113 E. R. 501; *subsequent proceedings, sub nom. CLIFTON DARTMOUTH HARDNESS CORPN. v. HOLDSWORTH* (1844), 13 L. J. Ch. 178, L. C.

*Annotation*:—*Refd.* *Arnold v. Gravesend Corpn.* (1856), 2 K. & J. 574.

*See, generally*, Sect. 5, sub-sect. 5, *post*.

exhausted & pltf. had not shown that his salary at a fixed sum was included in the amount granted to the board or in the council's own estimates.—*NEWHALL v. PETERBOROUGH CITY* (1924), 55 O. L. R. 235.—CAN.

**PART VII. SECT. 5, SUB-SECT. 1.—B. (a) ix.**

1. *Maintenance of corporation buildings.*—*A.-G. OF VICTORIA (BRADLEY)*

*v. GRELING (MAYOR)* (1914), 18 C. L. R. 553.—AUS.

*m. Clerk of the peace — Fees — Not connected with administration of justice.*—*Re CLERK OF THE PEACE v. WESTERN DISTRICT MUNICIPAL COUNCIL* (1843), 1 U. C. R. 162.—CAN.

*n. Corporation taking over district under statute—Liability for surveying fees.*—*ROACH v. MUNICIPAL COUNCIL*

**542. Costs of settling dispute — Not included in town clerk's salary.]**—The council of a borough passed a resolution prescribing the duties of the town clerk, & fixing his salary for the discharge of such duties at £250. Among other functions, he was "to act as the professional adviser of the mayor & council in the business of the council," & he was to "be paid the usual professional charges for conducting or opposing bills in Parliament, conducting action or suits at law or in equity, & preparing leases, conveyances of securities"; & to "be paid all travelling & other expenses out of pocket." A town clerk, being an attorney, was appointed after the passing of this resolution. Payment of a borough rate being resisted by a township within the borough, with an intimation that the overseers would not pay anything except under legal obligation, the council directed their finance committee to take such proceedings as they might deem expedient for enforcing payment & maintaining the validity of the rate; the committee were likewise authorised to give bonds of indemnity to overseers & others employed in the collection. The committee directed the town clerk to prepare a bond of indemnity to the overseers of the above township, under counsel's advice. The bond was prepared, & objected to by the overseers. The town clerk, under the direction of the committee, went to London & attended conferences between counsel for the overseers & for the corpn., with a view to an arrangement. Finally, the form of the rate was altered; proceedings were taken on behalf of the council to compel payment; & the rate was levied. The town clerk then delivered a bill to the corpn. including charges, for instructing & advising with counsel upon the bond of indemnity & upon the forms of rates; correspondence & conferences with the solr. for the overseers on the subject of the rate; expenses & loss of time in proceeding to London for the purpose of attending the conferences, in advising on several occasions with counsel, & in journeys to Wakefield & Manchester for the purpose of conferring with the clerks of the peace & town clerks of those boroughs upon the proper forms of rates. The services had been performed under the instructions of the finance committee. The committee ordered payment of the charges, & they were paid. On *certiorari*, bringing their order before this ct., under 7 Will. 4 & 1 Vict. c. 78, s. 44:—*Held*: (1) the charges, so far as they regarded business done in the direct course of settling a dispute, might properly be allowed by the corpn., as not covered by the salary given for the performance of the ordinary duties of town clerk; (2) such charges were payable out of the borough fund; (3) no objection that the order was made not by the council generally, but by a finance committee having their sanction; (4) nor, at least after payment, that there was no retainer under seal for extra services.—*R. v. PREST* (1850), 16 Q. B. 32; 20 L. J. Q. B. 17; 16 L. T. O. S. 210; 15 Jur. 554; 14 J. P. Jo. 750; 117 E. R. 787.

*Annotations*:—*As to* (1) *Consd. Lewis v. Rochester Corpn.* (1860), 9 C. B. N. S. 401; *R. v. Ramsgate Corpn.* (1889), 23 Q. B. D. 66. *Refd.* *It. v. Newbury Town Council*

*OF HAMILTON* (1851), 8 U. C. CAN.

*o. Councillors' travelling expenses.*—Municipal corpns. cannot remunerate their members for travelling expenses in attending the council, but only for attendance in council.—*Re PATTERSON & COUNTY OF GREY CORPN.* U.

*p. School rate deficiency.*—local municipality must make up



(1850), 15 J. P. 115; Bournemouth Comrs. v. Watts (1884), 14 Q. B. D. 87. *As to* (2) *Refd.* A.-G. v. Tynemouth Corp., [1898] 1 Q. B. 604. *As to* (4) *Refd.* R. v. Newbury Town Council (1850), 15 J. P. 115; R. v. Norwich Corp., (1882), 30 W. R. 752; R. v. Ramsgate Corp., (1889), 23 Q. B. D. 66.

**543. Fees payable to clerk to borough justices.]**—R. v. GLOUCESTER CORPN., No. 516, *ante*.

**544. Costs of street widening—Under local Act.]**—By a local Act, passed in 1851, certain property before vested in Comrs., was vested in the corp., of Birmingham. Powers were given to the council of purchasing land for the purposes of the Act, & of executing certain improvement works specified in a schedule; the expenses of the works for making new approaches to the town hall, & for enlarging & altering the existing streets, to be defrayed by a "street" improvement rate," not exceeding 6*d.* in the pound, & mortgageable to the extent of £100,000; & all other expenses of carrying the Act into execution to be defrayed by a "borough improvement rate," not exceeding 2*s.* in the pound, & mortgageable to the extent of £150,000. From the street improvement rate certain classes of persons were wholly exempted, & canal & railway cos. were partly exempted. Nothing therein contained was to alter any of the powers, privileges, & authorities vested in the corp. by any past or future Acts in relation to municipal corps. By another local Act, passed in 1861, certain other specified improvements were provided for, & it was declared that the expense of, amongst other things, widening & improving certain specified streets was to be defrayed out of the "street improvement rate." Municipal Corporation Mortgage Act, 1860 (c. 16), empowers corps. generally, with the approbation of the Treasury, upon application made after due notice given, to make purchases of land for public purposes; but nothing therein contained is to "repeal, abridge, or affect," any power or authority of any body corporate or council, under any local Act. The Corp. of Birmingham having contracted for the purchase of land for the widening of a street, not comprised in the works specified in the local Acts of 1851, & 1861, & having, after due notice given, & after all parties interested in the scheme had been heard before a Comr. deputed by the Treasury, obtained the sanction of the Treasury to the purchase of the land, & the charging of the borough fund with the purchase-money:—*Held*: upon construction of the statutes, the corp. were lawfully empowered to raise the purchase-money out of the "borough fund."—A.-G. v. BIRMINGHAM CORPN. (1866), L. R. 3 Eq. 552.

**Payment out of surplus.]**—See 1882 Act, 143 (2), & generally, Sect. 5, sub-sect. 1, B. (b), *ante*.

**545. Provision of mayoral chain.]**—A.-G. v. BATLEY CORPN., No. 454, *ante*.

**546. Pension for charity schoolmaster.]**—Under a scheme approved by the High Ct. of Ch., a corp. school was to be maintained out of the surplus income of a hospital & the appointment of a headmaster was to be in the corp., but no provision was made for the grant of any pension to the headmaster so appointed. Upon a rule for *certiorari* to bring up & quash a resolution of the corp., ordering payment out of the borough

fund of a pension to a master appointed by them:—*Held*: the pension did not come within any of the purposes specified in 1835 Act to which that fund was applicable, & could not be held to be for the public convenience of the inhabitants, & the resolution was, therefore, void.—R. v. BROWN (1875), 39 J. P. Jo. 388.

**547. Dinners for jurors.]**—The corp. of B., as lords of the manor, entertained juries of the manor at dinner, etc., & charged the expense to the borough fund:—*Held*: the corp. had no authority to defray the charge out of the borough fund.—R. v. BIDEFORD CORPN. (1883), 47 J. P. Jo. 756.

**548. Extraordinary expenditure—Additional remuneration to mayor—For jubilee celebrations.]**—A municipal corp. passed resolutions to the effect that, pursuant to 1882 Act, s. 15 (4), a certain sum should be paid to the mayor by way of remuneration, & the mayor should be requested to take such steps as he might deem proper for the due celebration of the jubilee of Her Majesty's reign. Some of the burgesses moved to restrain the corp. from applying any part of the borough fund in the celebration of the jubilee:—*Held*: the provisions of 1882 Act had not been contravened, & an interlocutory injunction would not be granted.

*Qu.*: whether 1882 Act, s. 141 (2), contemplates the allowing of extraordinary expenditure if reasonable.—A.-G. v. BLACKBURN CORPN. (1887), 57 L. T. 385; 3 T. L. R. 676.

*Annotation*:—*Consd.* A.-G. v. Tynemouth Corp., [1898] 1 Q. B. 604.

**549. "Rights . . . by virtue of any legal proceedings"—Whether judgment included—Judgment for money not legally payable out of fund.]**—1882 Act, s. 140 (4), does not authorise payment out of the borough fund of a judgment given for a sum of money which was not legally payable out of such fund.—A.-G. v. NEWCASTLE-UPON-TYNE CORPN. & NORTH EASTERN RY. CO. (1889), 23 Q. B. D. 492; 58 L. J. Q. B. 558; 54 J. P. 292, C. A.; *affd. sub nom.* NEWCASTLE-UPON-TYNE CORPN. v. A.-G., A.-G. v. NEWCASTLE-UPON-TYNE CORPN. & NORTH EASTERN RY. CO., [1892] A. C. 568, H. L.

*Annotations*:—*Consd.* A.-G. v. Manchester Corp., [1906] 1 Ch. 643. *Mentd.* *Re* Thompson, Bedford v. Teal (1890), 45 Ch. D. 161; A.-G. v. Tynemouth Corp., [1898] 1 Q. B. 604; A.-G. v. L. C. C., [1901] 1 Ch. 781; A.-G. v. Hastings Corp., (1902), 67 J. P. 165; A.-G. v. De Winton, [1906] 2 Ch. 106.

**550. Payment to free bridge of tolls.]**—A municipal corp., which was subject to 1882 Act & a local improvement Act agreed with a railway co. to pay the co. a certain annual sum for fifteen years in consideration that the co. would throw open the roadway of a bridge belonging to them within the borough for the use of foot passengers free from toll. The local Act authorised rates for certain purposes not including such a bridge as the agreement referred to, & provided that the money accruing from the general rate should be applied to certain specified purposes " & subject thereto for the improvement or benefit of the borough in such manner as the corp. from time to time think fit in as full & ample a manner as any borough rate authorised by the Municipal Corporations Acts is made applicable." An action having been brought by the A.-G. at the instance of relators

to apply out of their general fund any licence in the school rate of any township.—ARTHUR SCHOOL TRUSTEES v. TOWNSHIPS OF ARTHUR & LUTHER (1899), 9 C. P. 532.—CAN.

*Councillor employed by corporation—Solicitor.]*—A solr. who is a

member of a municipal council cannot recover from the corp. for services rendered them, because he is a trustee.—PETERBOROUGH TOWN v. BURNHAM (1861), 12 C. P. 103.—CAN.

*r. Apprehension of felons.]*—Township municipalities have no power

to expend any portion of their funds in payment of rewards for the apprehension of felons.—CORNWALL v. WEST NISSOURI TOWNSHIP CORPN. (1875), 25 C. P. 9.—CAN.

*t. Construction of bridge—Without statutory authority—Payment for work*



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him to so act, & pay his costs. When the appeals came on he appeared & opposed them, & they were dismissed with costs. The amount recovered on taxation was £132 5s. less than he had to pay. On Nov. 19 the watch committee resolved to pay these costs. This action was brought by plffs. as ratepayers to restrain this payment:—*Held*: in these circumstances, there was no right to use the borough funds for this purpose, for one watch committee has no power to apply to the council to pay certain moneys which a former watch committee has said ought not to be paid.—*A.-G. & NEWCASTLE BREWERIES, LTD. v. TYNE-MOUTH CORPN.* (1897), 76 L. T. 566; 13 T. L. R. 412; 41 Sol. Jo. 530, D. C.; *on appeal, sub nom. A.-G. v. TYNE-MOUTH CORPN.*, [1898] 1 Q. B. 604, C. A.; *sub nom. TYNE-MOUTH CORPN. v. A.-G.*, [1899] A. C. 293, H. L.

*Annotations*:—*Reid. Evans v. Conway JJ.*, [1900] 2 Q. B. 224. *Mentd. Allsop v. Preston JJ.* (1899), 64 J. P. 25; *A.-G. v. De Winton*, [1906] 2 Ch. 106; *R. v. Woodhouse*, [1906] 2 K. B. 501; *Attwood v. Chapman*, [1914] 3 K. B. 275.

## ix. Other Payments.

## 540. Endowment of churches within borough.]

—*A.-G. v. ASPINALL*, No. 515, *ante*.

541. Debt incurred prior to 1835 Act.] — In an action of debt against a corpn. regulated by above Act on a bond by them to pltf. for payment of £1,249 it appeared on special verdict, that, before the passing of the Act pltf. being an alderman of the borough, *quo warranto* informations were filed against him & several of his friends & relations, to try their right to be members of the corpn., & they were ultimately ousted; that pltf., without authority from the now defts., caused the information to be defended; & that before the passing of the Act, certain members of the corpn., then being the governing body, & having the custody of the common seal, & lawful power to affix it to instruments, did, on pltf.'s application, affix the seal to the bond & deliver it to him by way of reimbursement of the costs of such defences, & for no other consideration; that divers of the then burgesses of the corpn. had no notice of the bond being given for that cause; & that the sealing & delivery thereof was without fraud, unless the sealing & delivery for the cause aforesaid was a fraud in law upon defts., or the inhabitants, or the members of the corpn. who did not concur:—*Held*: (1) on the facts found, the corpn. were liable on the bond before above Act; (2) the corpn. as subsisting under the statute, were still liable, & the liability was a "lawful debt," chargeable on the borough Fund, within above Act, s. 92.—*HOLDSWORTH v. DARTMOUTH CORPN.* (1840), 11 Ad. & El. 490; 3 Per. & Dav. 308; 9 L. J. Q. B. 121; 4 J. P. 138; 4 Jur. 605; 113 E. R. 501; *subsequent proceedings, sub nom. CLIFTON DARTMOUTH HARDNESS CORPN. v. HOLDSWORTH* (1844), 13 L. J. Ch. 178, L. C.

*Annotation*:—*Reid. Arnold v. Gravesend Corpn.* (1856), 2 K. & J. 574.

See, generally, Sect. 5, sub-sect. 5, *post*.

exhausted & pltf. had not shown that his salary at a fixed sum was included in the amount granted to the board or in the council's own estimates.—*NEWHALL v. PETERBOROUGH CITY* (1924), 55 O. L. R. 235.—CAN.

## PART VII. SECT. 5, SUB-SECT. 1.—B. (a) ix.

1. Maintenance of corporation buildings.]—*A.-G. OF VICTORIA (BRADLEY*

*v. GREELONG (MAYOR)* (1914), 18 C. L. R. 553.—AUS.

m. Clerk of the peace — Fees — Not connected with administration of justice.] *Re CLERK OF THE PEACE v. WESTERN DISTRICT MUNICIPAL COUNCIL* (1843), 1 U. C. R. 162.—CAN.

n. Corporation taking over district under statute—Liability for surveying fees.]—*ROACH v. MUNICIPAL COUNCIL*

542. Costs of settling dispute — Not included in town clerk's salary.]—The council of a borough passed a resolution prescribing the duties of the town clerk, & fixing his salary for the discharge of such duties at £250. Among other functions, he was "to act as the professional adviser of the mayor & council in the business of the council," & he was to "be paid the usual professional charges for conducting or opposing bills in Parliament, conducting action or suits at law or in equity, & preparing leases, conveyances of securities"; & to "be paid all travelling & other expenses out of pocket." A town clerk, being an attorney, was appointed after the passing of this resolution. Payment of a borough rate being resisted by a township within the borough, with an intimation that the overseers would not pay anything except under legal obligation, the council directed their finance committee to take such proceedings as they might deem expedient for enforcing payment & maintaining the validity of the rate; the committee were likewise authorised to give bonds of indemnity to overseers & others employed in the collection. The committee directed the town clerk to prepare a bond of indemnity to the overseers of the above township, under counsel's advice. The bond was prepared, & obtained by the overseers. The town clerk, under the direction of the committee, went to London & attended conferences between counsel for the overseers & for the corpn., with a view to an arrangement. Finally, the form of the rate was altered; proceedings were taken on behalf of the council to compel payment; & the rate was levied. The town clerk then delivered a bill to the corpn. including charges, for instructing & advising with counsel upon the bond of indemnity & upon the forms of rates; correspondence & conferences with the solr. for the overseers on the subject of the rate; expenses & loss of time in proceeding to London for the purpose of attending the conferences, in advising on several occasions with counsel, & in journeys to Wakefield & Manchester for the purpose of conferring with the clerks of the peace & town clerks of those boroughs upon the proper forms of rates. The services had been performed under the instructions of the finance committee. The committee ordered payment of the charges, & they were paid. On *certiorari*, bringing their order before this ct., under 7 Will. 4 & 1 Vict. c. 78, s. 44:—*Held*: (1) the charges, so far as they regarded business done in the direct course of settling a dispute, might properly be allowed by the corpn., as not covered by the salary given for the performance of the ordinary duties of town clerk; (2) such charges were payable out of the borough fund; (3) no objection that the order was made not by the council generally, but by a finance committee having their sanction; (4) nor, at least after payment, that there was no retainer under seal for extra services.—*R. v. PREST* (1850), 16 Q. B. 32; 20 L. J. Q. B. 17; 16 L. T. O. S. 210; 15 Jur. 554; 14 J. P. Jo. 750; 117 E. R. 787.

*Annotations*:—As to (1) *Consd. Lewis v. Rochester Corpn.* (1860), 9 C. B. N. S. 401; *R. v. Ramsgate Corpn.* (1889), 23 Q. B. D. 66. *Reid. R. v. Newbury Town Council*

OF HAMILTON (1851), 8 U. C. R. 229.—CAN.

o. Councillors' travelling expenses.]—Municipal corpn. cannot remunerate their members for travelling expenses in attending the council, but only for attendance in council.—*Re PATTERSON & COUNTY OF GREY CORPN.* (1859), 18 U. C. R. 189.—CAN.

p. School rate deficiency.]—A local municipality must make up &



(1850), 15 J. P. 115; Bournemouth Comrs. v. Watts (1884), 14 Q. B. D. 87. *As to (2) Reidd. A.-G. v. Tynemouth Corpn.*, [1898] 1 Q. B. 604. *As to (4) Reidd. R. v. Newbury Town Council* (1850), 15 J. P. 115; *R. v. Norwich Corpn.* (1882), 30 W. R. 752; *R. v. Ramsgate Corpn.* (1889), 23 Q. B. D. 66.

**543. Fees payable to clerk to borough justices.]**

—*R. v. GLOUCESTER CORPN.*, No. 516, *ante*.

**544. Costs of street widening—Under local Act.]**

—By a local Act, passed in 1851, certain property before vested in Comrs., was vested in the corpn. of Birmingham. Powers were given to the council of purchasing land for the purposes of the Act, & of executing certain improvement works specified in a schedule; the expenses of the works for making new approaches to the town hall, & for enlarging & altering the existing streets, to be defrayed by a "street" improvement rate," not exceeding 6*d.* in the pound, & mortgageable to the extent of £100,000; & all other expenses of carrying the Act into execution to be defrayed by a "borough improvement rate," not exceeding 2*s.* in the pound, & mortgageable to the extent of £150,000. From the street improvement rate certain classes of persons were wholly exempted, & canal & railway cos. were in part exempted. Nothing therein contained was to alter any of the powers, privileges, & authorities vested in the corpn. by any past or future Acts in relation to municipal corpns. By another local Act, passed in 1861, certain other specified improvements were provided for, & it was declared that the expense of, amongst other things, widening & improving certain specified streets was to be defrayed out of the "street improvement rate." Municipal Corporation Mortgages Act, 1860 (c. 16), empowers corpns. generally, with the approbation of the Treasury, upon application made after due notice given, to make purchases of land for public purposes; but nothing therein contained is to "repeal, abridge, or affect," any power or authority of any body corporate or council, under any local Act. The corpn. of Birmingham having contracted for the purchase of land for the widening of a street, not comprised in the works specified in the local Acts of 1851, & 1861, & having, after due notice given, & after all parties interested in the scheme had been heard before a Comr. deputed by the Treasury, obtained the sanction of the Treasury to the purchase of the land, & the charging of the borough fund with the purchase-money:—*Held*: upon construction of the statutes, the corpn. were lawfully empowered to raise the purchase-money out of the "borough fund."—*A.-G. v. BIRMINGHAM CORPN.* (1866), L. R. 3 Eq. 552.

—**Payment out of surplus.]**—See 1882 Act, s. 143 (2), & generally, Sect. 5, sub-sect. 1, B. (b), *post*.

**545. Provision of mayoral chain.]**—*A.-G. v. BATLEY CORPN.*, No. 454, *ante*.

**546. Pension for charity schoolmaster.]**—Under scheme approved by the High Ct. of Ch., a corpn. school was to be maintained out of the surplus income of a hospital & the appointment of headmaster was to be in the corpn., but no provision was made for the grant of any pension to the headmaster so appointed. Upon a rule for *certiorari* to bring up & quash a resolution of the corpn., ordering payment out of the borough

fund of a pension to a master appointed by them:—*Held*: the pension did not come within any of the purposes specified in 1835 Act to which that fund was applicable, & could not be held to be for the public convenience of the inhabitants, & the resolution was, therefore, void.—*R. v. BROWN* (1875), 39 J. P. Jo. 388.

**547. Dinners for jurors.]**—The corpn. of B., as lords of the manor, entertained juries of the manor at dinner, etc., & charged the expense to the borough fund:—*Held*: the corpn. had no authority to defray the charge out of the borough fund.—*R. v. BIDEFORD CORPN.* (1883), 47 J. P. Jo. 756.

**548. Extraordinary expenditure—Additional remuneration to mayor—For jubilee celebrations.]**—A municipal corpn. passed resolutions to the effect that, pursuant to 1882 Act, s. 15 (4), a certain sum should be paid to the mayor by way of remuneration, & the mayor should be requested to take such steps as he might deem proper for the due celebration of the jubilee of Her Majesty's reign. Some of the burgesses moved to restrain the corpn. from applying any part of the borough fund in the celebration of the jubilee:—*Held*: the provisions of 1882 Act had not been contravened, & an interlocutory injunction would not be granted.

*Qu.*: whether 1882 Act, s. 141 (2), contemplates the allowing of extraordinary expenditure if reasonable.—*A.-G. v. BLACKBURN CORPN.* (1887), 57 L. T. 385; 3 T. L. R. 676.

*Annotation*:—*Consd. A.-G. v. Tynemouth Corpn.*, [1898] 1 Q. B. 604.

**549. "Rights . . . by virtue of any legal proceedings"—Whether judgment included—Judgment for money not legally payable out of fund.]**—1882 Act, s. 140 (4), does not authorise payment out of the borough fund of a judgment given for a sum of money which was not legally payable out of such fund.—*A.-G. v. NEWCASTLE-UPON-TYNE CORPN. & NORTH EASTERN RY. CO.* (1889), 23 Q. B. D. 492; 58 L. J. Q. B. 558; 54 J. P. 292, C. A.; *affd. sub nom. NEWCASTLE-UPON-TYNE CORPN. v. A.-G.*, *A.-G. v. NEWCASTLE-UPON-TYNE CORPN. & NORTH EASTERN RY. CO.*, [1892] A. C. 568, H. L.

*Annotations*:—*Consd. A.-G. v. Manchester Corpn.*, [1906] 1 Ch. 643. *Mentd. Re Thompson, Bedford v. Teal* (1890), 45 Ch. D. 161; *A.-G. v. Tynemouth Corpn.*, [1898] 1 Q. B. 604; *A.-G. v. L. C. C.*, [1901] 1 Ch. 781; *A.-G. v. Hastings Corpn.* (1902), 67 J. P. 165; *A.-G. v. De Winton*, [1906] 2 Ch. 106.

**550. Payment to free bridge of tolls.]**—A municipal corpn., which was subject to 1882 Act & a local improvement Act agreed with a railway co. to pay the co. a certain annual sum for fifteen years in consideration that the co. would throw open the roadway of a bridge belonging to them within the borough for the use of foot passengers free from toll. The local Act authorised rates for certain purposes not including such a bridge as the agreement referred to, & provided that the money accruing from the general rate should be applied to certain specified purposes " & subject thereto for the improvement or benefit of the borough in such manner as the corpn. from time to time think fit in as full & ample a manner as any borough rate authorised by the Municipal Corporations Acts is made applicable." An action having been brought by the A.-G. at the instance of relators

to apply out of their general fund any deficiency in the school rate of any township.—*ARTHUR SCHOOL TRUSTEES v. TOWNSHIPS OF ARTHUR & LUTHER* (1859), 9 C. P. 532.—*CAN.*

*Councillor employed by corporation—Solicitor.]*—A solicitor, who is a

member of a municipal council cannot recover from the corpn. for services rendered them, because he is a trustee.—*PETERBOROUGH TOWN v. BURNHAM* (1861), 12 C. P. 103.—*CAN.*

*r. Apprehension of felons.]*—Township municipalities have no power

to expend any portion of their funds in payment of rewards for the apprehension of felons.—*CORNWALL v. WEST NISSOURI TOWNSHIP CORPN.* (1875), 25 C. P. 9.—*CAN.*

*t. Construction of bridge—Without statutory authority—Payment for work*



**Sect. 5.—Finance: Sub-sect. 1, B. (a) ix., (b) & (c); sub-sects. 2 & 3.]**

against the corpn., claiming an injunction to restrain the corpn. from making the payments out of moneys derived from the rates & a declaration that the agreement was *ultra vires* & void:—**Held**: there must be a declaration that the corpn. were not entitled to pay any moneys, which might become payable under the agreement, out of the borough fund, nor to make any borough rate nor any general or improvement rate under 1882 Act or the local Act for the purpose of such payments; but the agreement was not *ultra vires* or void, & the foregoing declaration was not to prevent the corpn. from paying such moneys out of any surplus which there might be of the borough fund or of the rates after applying the same respectively to the purpose for which they might respectively be made under the provisions of those Acts, with liberty to pltf. to apply for an injunction if necessary.—**NEWCASTLE-UPON-TYNE CORPN. v. A.-G., A.-G. v. NEWCASTLE-UPON-TYNE CORPN. & NORTH EASTERN RY. CO.,** [1892] A. C. 568; 62 L. J. Q. B. 72; 67 L. T. 728; 56 J. P. 836; 1 R. 31, H. L.; *affg.* S. C. *sub nom.* A.-G. v. NEWCASTLE-UPON-TYNE CORPN. & NORTH EASTERN RY. CO. (1889), 23 Q. B. D. 492, C. A.

**Annotations**:—**Expld.** A.-G. v. Hastings Corpn. (1902), 67 J. P. 165. **Consd.** A.-G. v. Manchester Corpn., [1906] 1 Ch. 643. **Refd.** A.-G. v. Tynemouth Corpn., [1898] 1 Q. B. 604; A.-G. v. L. C. C., [1901] 1 Ch. 781. **Mentd.** *Re* Thompson, Bedford v. Teal (1890), 45 Ch. D. 161; A.-G. v. De Winton, [1906] 2 Ch. 106.

(b) *Out of Surplus.*

**551. Rights of freeman in—Enforceable by action of debt.]—SWANSEA CORPN. v. HOPKINS** (1841), 8 M. & W. 901; 151 E. R. 1306, Ex. Ch.; *affg.* S. C. *sub nom.* HOPKINS v. SWANSEA CORPN. (1839), 4 M. & W. 621; 1 Horn & H. 432; 8 L. J. Ex. 121; 3 J. P. 532.

**Annotations**:—**Refd.** Addison v. Preston Corpn. (1852), 12 C. B. 108; Prestney v. Colchester Corpn. & A.-G. (1882), 21 Ch. D. 111. **Mentd.** Braithwaite v. Skinner (1839), 5 M. & W. 313; Hutchinson v. Gillespie (1856), 11 Exch. 798; Goodman v. Saltash Corpn. (1882), 7 App. Cas. 633. —**See, now,** 1882 Act, s. 205.

**552. Whether surplus available—Jurisdiction of court.]—R. v. GUILDFORD TOWN COUNCIL** (1862), 26 J. P. Jo. 100.

**553. — Whether limited to one year.]—**During the progress of the Liverpool Tramways Act, 1871, through Parliament, the Liverpool town council authorised the town clerk to make terms for the purchase of tramways with the co. promoting the bill. Amongst other terms of arrangement he agreed that the corpn. should pay the expenses of the bill if they resolved to take the tramways according to their powers in the bill. The council consented to these terms, & after the Act was passed resolved to take the tramways; they afterwards resolved to pay the expenses agreed to. The surplus of the borough funds in the year of these resolutions was less than the amount of the expenses, but in the subsequent years the surplus was greater than that amount. Upon *mandamus* to the town council to pay these expenses:—**Held**: there was nothing in 1835 Act to prevent the payment of this claim.—**R. v. LIVERPOOL CORPN.** (1873), 28 L. T. 500; 37 J. P. 773; *sub nom.* R. v. LIVERPOOL CORPN., *Re* LIVERPOOL TRAMWAYS CO., LTD., 21 W. R. 674.

*done.*]—**ELWORTHY v. CITY OF VICTORIA CORPN.** (1896), 5 B. C. R. 123.—**CAN.**

**a. Entertainment of guests.]—****McMILLAN v. CITY OF WINNIPEG (Man.),** [1919] 1 W. W. R. 691; 45 D. L. R. 351.—**CAN.**

**PART VII. SECT. 5, SUB-SECT. 1.—**  
**B. (b).**

**b. Investment in building society.]—**A municipal council has no power to invest its surplus moneys in the shares

**554. Benefit of inhabitants—Whether confined to expenses for purposes of Act.]—**In the borough of S., a waterworks co. established under a statute had power to make rules & regulations, & the corpn. opposed these on the co. applying for confirmation, and the opposition was partly successful. The corpn. also opposed a bill of the co. in Parliament, & caused the bill to be withdrawn. These expenses were sought to be charged on the borough fund:—**Held**: as the expenses were not necessarily incurred in carrying into effect the provisions of 1835 Act, they were not chargeable on the borough fund. **Semble**: the expenses might have been paid out of any surplus fund.—**R. v. SHEFFIELD CORPN.** (1871), L. R. 6 Q. B. 652; 40 L. J. Q. B. 247; 36 J. P. 37, 229; *sub nom.* **ROBERTS v. SHEFFIELD CORPN.,** 24 L. T. 659; 19 W. R. 1159.

**Annotations**:—**Consd.** A.-G. v. Brecon Corpn. (1878), 10 Ch. D. 204; A.-G. v. Tynemouth Corpn., [1898] 1 Q. B. 604. **Refd.** R. v. Liverpool Corpn. (1872), 41 L. J. Q. B. 175; R. v. Liverpool Corpn. (1873), 28 L. T. 500; R. v. Norwich Corpn. (1882), 30 W. R. 752; Ward v. Sheffield Corpn. (1887), 19 Q. B. D. 22; A.-G. v. Swansea Corpn., [1898] 1 Ch. 602.

**555. — Costs of police officers—Libel action.]—****R. v. LIVERPOOL CORPN.,** No. 536, *ante*.

**556. — Opposing licensing appeal—By direction of council.]—**(1) A municipal corpn. cannot, where there is no surplus of the borough fund, legally pay thereout costs incurred by the chief constable in opposing by direction of the council appeals against the refusal of justices to renew the licenses of publicans. **Qu.**: whether if there be a surplus it can legally be applied to payment of such costs.

(2) An improper payment by the order of the town council may be called in question by injunction at the suit of the A.-G. on the relation of a person interested, as well as by *certiorari* under 1882 Act, s. 141.—**TYNEMOUTH CORPN. v. A.-G.,** [1899] A. C. 293; 68 L. J. Q. B. 752; 80 L. T. 633; 63 J. P. 404; 15 T. L. R. 370; 43 Sol. Jo. 531, H. L.; *affg.* S. C. *sub nom.* A.-G. v. TYNEMOUTH CORPN., [1898] 1 Q. B. 604, C. A.

**Annotations**:—**As to (2)** **Refd.** A.-G. v. De Winton, [1906] 2 Ch. 106. **Generally, Refd.** Allsop v. Preston JJ. (1899), 64 J. P. 25. **Mentd.** Evans v. Conway JJ., [1900] 2 Q. B. 224; R. v. Woodhouse, [1906] 2 K. B. 501; Attwood v. Chapman, [1914] 3 K. B. 275.

**557. — Payment to free bridge of tolls.]—****NEWCASTLE-UPON-TYNE CORPN. v. A.-G., A.-G. v. NEWCASTLE-UPON-TYNE CORPN. & NORTH EASTERN RY. CO.,** No. 550, *ante*.

**558. — Payment of interest on contribution to college—Expenditure authorised by local Act.]—**The corpn. of Cardiff were empowered by their special Act to contribute £10,000 towards the purchase of a site for a college, & passed a resolution that that sum should be paid on certain property being conveyed to the college authorities. The intended purchase remained in abeyance, & the college was carried on at suitable premises rented for the purpose by the council of the college:—**Held**: (1) the payment of a sum of £400 out of the borough fund by the corpn. to the college, being one year's interest at 4 per cent. on the proposed contribution of £10,000, could not be justified, either under the special Act, or as a payment "for the public benefit of the inhabitants & improvement of the borough" within 1882 Act, s. 143; (2) the payment out of the borough fund of a sum of £650, which by a

of a building society formed under Friendly Societies Act, 1867.—**Re NEWCASTLE PERMANENT INVESTMENT & BUILDING SOCIETY** (1897), 18 N. S. W. Eq. 76.—**AUS.**

resolution of the corpn. was added to the mayor's salary for the year 1893 for the purpose of celebrating the marriage of the Duke & Duchess of York, which in fact was not paid to the mayor, but was carried to a separate account & expended for that purpose under the direction of a marriage committee, was not illegal.

(3) A payment made in form by way of addition to a mayor's salary is not legal unless it is a *bond fide* increase of salary.—A.-G. v. CARDIFF CORPN., [1894] 2 Ch. 337; 63 L. J. Ch. 557; 70 L. T. 591; 10 T. L. R. 420; 8 R. 268.

**559. Improvement of borough—Payment of interest on contribution to college—Expenditure authorised by local Act.]**—A.-G. v. CARDIFF CORPN., No. 558, *ante*.

(c) *Control by Court.*

**560. Jurisdiction of court.]**—*Qu.*: whether the ct. has jurisdiction, notwithstanding the provisions of 1835 Act, to restrain misapplications of the borough fund of a corpn. In the ordinary management of the borough fund a ct. of equity ought not to interfere; but in a case of misapplication calling for a specific remedy, *semble*: the jurisdiction of the ct. is not excluded by 1835 Act.—A.-G. v. NORWICH CORPN. (1837), 1 Keen, 700; 48 E. R. 477; *on appeal*, 2 My. & Cr. 406; 1 J. P. 164; 1 Jur. 398, L. C.

*Annotations*:—**Reid.** A.-G. v. Wigan Corpn. (1854), 2 Eq. Rep. 224; *Lewis v. Rochester Corpn.* (1860), 9 C. B. N. S. 401; *R. v. Sheffield Corpn.* (1871), L. R. 6 Q. B. 652; A.-G. v. Newcastle-on-Tyne Corpn. & N. E. Ry. (1889), 23 Q. B. D. 492. **Mentd.** *Foot v. Bessant* (1838), 3 Y. & C. Ex. 320; *Holdsworth v. Dartmouth Corpn.* (1840), 11 Ad. & El. 490; *Bennett v. Harrison* (1843), 7 Jur. 436; *Foss v. Harbottle* (1843), 2 Hare, 461; *R. v. Leeds Corpn.* (1843), 4 Q. B. 796; *Fraser v. Murdoch* (1881), 6 App. Cas. 855.

**561. ——— Breach of trust.]**—(1) 1835 Act creates a public trust of the property of municipal corpsns. & the funds raised for the purposes of the Act, subject, like other property held in trust, to the jurisdiction of the Ct. of Ch.

(2) Although 1835 Act contains provisions for correcting abuses in respect of the borough property, there is nothing in it to exclude the ordinary jurisdiction of the Ct. of Ch. to prevent breaches of trust.—*PARR v. A.-G.* (1842), 8 Cl. & Fin. 409; 8 E. R. 159; *sub nom.* A.-G. v. PARR, 6 Jur. 245, H. L.; *affg.* S. C. *sub nom.* A.-G. v. POOLE CORPN. (1838), 4 My. & Cr. 17; *subsequent proceedings, sub nom.* A.-G. v. POOLE CORPN. (1844), 8 Beav. 75.

*Annotations*:—**Mentd.** *Lund v. Blanshard* (1844), 4 Hare, 9; *Inman v. Wearing* (1850), 3 De G. & Sm. 729; *Pratt v. Keith* (1864), 3 New Rep. 406.

**562. ———.]**—The borough fund created under 1835 Act is a trust fund, & this ct. has authority & jurisdiction to compel the parties who receive & apply the fund to account for the sums they receive, & the application of them.—A.-G. v. LICHFIELD CORPN. (1848), 11 Beav. 120; 17 L. J. Ch. 472; 50 E. R. 762.

**563. Effect of statutory remedy—Whether other remedy excluded.]**—A.-G. v. NORWICH CORPN., No. 560, *ante*.

**564. ———.]**—*PARR v. A.-G.*, No. 561, *ante*.

**565. ———.]**—*TYNEMOUTH CORPN. v. A.-G.*, No. 556, *ante*.

**566. ———.]**—A.-G. v. DE WINTON, No. 497, *ante*.

**567. ——— For particular cases—Whether jurisdiction of court limited.]**—A.-G. v. ASPINALL, No. 515, *ante*.

**568. Who may apply—Town council—For removal by certiorari.]**—The town council may apply for a *certiorari* to remove an order of a previous council.—*R. v. BRIDGEWATER CORPN.* (1839), 10 Ad. & El. 281; 2 Per. & Dav. 558; 113 E. R. 109.

*Annotations*:—**Reid.** *R. v. Leeds Corpn.* (1843), 7 J. P. 704; *R. v. Gloucester Corpn.* (1859), 33 L. T. O. S. 145; *R. v. Tamworth Corpn., Ex p. Tamworth Corpn.* (1868), 19 L. T. 433; *R. v. Liverpool Corpn.* (1872), 41 L. J. Q. B. 175; *Willmer v. Liverpool Corpn.* (1872), 26 L. T. 101.

**569. ——— Attorney General—For injunction.]**—On a bill for an injunction, to restrain an improper application of the borough funds, as the inhabitants have an interest, the A.-G. has a right to sue.—A.-G. v. EASTLAKE (1853), 11 Hare, 205; 2 Eq. Rep. 145; 22 L. T. O. S. 20; 18 J. P. 262; 17 Jur. 801; 1 W. R. 323; 68 E. R. 1249.

*Annotations*:—**Mentd.** *Beaumont v. Oliveira* (1869), 4 Ch. App. 309; A.-G. v. West Hartlepool Improvement Comrs. (1870), L. R. 10 Eq. 152; *Re St. Bride's Church, Fleet St.* (1877), 35 Ch. D. 147, n.; *Elias v. Griffith* (1878), 8 Ch. D. 521; A.-G. v. Dartmouth Corpn. (1883), 48 L. T. 933; *Re St. Botolph Without Bishopsgate Parish Estates* (1887), 35 Ch. D. 142; *Smith v. Kerr*, [1902] 1 Ch. 774.

**570. ——— On relation of party interested.]**—*TYNEMOUTH CORPN. v. A.-G.*, No. 556, *ante*.

**571. ———.]**—*HOLDEN v. BOLTON CORPN.* (1887), 3 T. L. R. 676.

**572. How effected—By quo warranto.]**—A.-G. v. ASPINALL, No. 515, *ante*.

**573. ——— Removal by certiorari—Who may apply—Council—To remove order of predecessors.]**—*R. v. BRIDGEWATER CORPN.*, No. 568, *ante*.

**574. ——— Though resolution irregular.]**—*R. v. LICHFIELD TOWN COUNCIL*, No. 518, *ante*.

**575. ——— Grounds for granting or refusing—Civil proceedings pending.]**—*Re CANTERBURY TOWN COUNCIL, Ex p. FRIEND* (1853), 21 L. T. O. S. 144; 17 J. P. Jo. 373.

——— Costs—Liability of individual councillors.]—*See* Nos. 355, 356, *ante*.

———.]—*See, now*, 1882 Act, s. 141 (2).

**576. ——— By injunction—Who may apply—Attorney-General.]**—A.-G. v. EASTLAKE, No. 569, *ante*.

**577. ———.]**—*TYNEMOUTH CORPN. v. A.-G.*, No. 556, *ante*.

**578. ——— Not excluded by statutory remedy.]**—A.-G. v. DE WINTON, No. 497, *ante*.

SUB-SECT. 2.—THE BOROUGH RATE.

*See* RATES & RATING.

SUB-SECT. 3.—BORROWING.

*See* 1882 Act, ss. 106, 120; Local Authorities (Financial Provisions) Act, 1921 (c. 67), ss. 3–7; & *see, also*, 1888 Act, s. 72; Ministry of Health Act, 1919 (c. 21), s. 3 (1) A.

**579. Power to borrow—For completion of works—Whether power to pay off mortgagees included—Construction of local Act.]**—The corpn. of a city being possessed of a canal, borrowed money

PART VII. SECT. 5, SUB-SECT. 3.

**a. Power to borrow—Sanction of loan—Division of borough—Sanction inapplicable to new part.]**—A.-G. v. NORTH SYDNEY BOROUGH (1893), 14 N. S. W. Eq. 154; 9 N. S. W. W. N. 177.—AUS.

**d. ——— For payment of existing debt.]**—*Held*: the council had no power to borrow money for the payment of an existing debt.—*Re LAMBTON MUNICIPAL DISTRICT, Ex p. COMMERCIAL BANK OF AUSTRALIA* (1896), 17 N. S. W. L. R. 187; 13 N. S. W. W. N. 72.—AUS.

**e. ——— For ordinary purposes.]**—

A municipal council has power to borrow & to incur debts as necessarily incidental to the carrying on of its ordinary business.—*AUSTRALIAN JOINT STOCK BANK v. CROODACE* (1899), 20 N. S. W. L. R. 361; 16 N. S. W. W. N. 125.—AUS.

—.] — *ARMSTRONG v.*



## LOCAL GOVERNMENT.

### Sect. 5.—Finance:

upon mtge. of the rents & tolls, & of other property belonging to the corpn., for the purpose of improving such canal. The corpn. afterwards obtained an Act of Parliament, empowering them to raise further sums of money, to be applied towards completing the works so commenced, " & to other the purposes of the Act," upon the security of the rents & tolls of the canal; with a proviso that the sums previously raised were to constitute a first charge upon the canal. Part of the moneys raised in pursuance of this Act, were applied in completing the canal, & the surplus was applied in paying off some of the first mtges., & releasing to such extent the other property of the corpn. Upon a bill filed by the mtgees. under the Act impeaching the validity of such application of the funds:—*Held*: such application of the funds was unauthorised; as between the corpn. & the mtgees. under the Act, the estates, included in the mtges. so paid off, were applicable to the payment of those mtgees.; the moneys so applied ought to have been repaid to the second mtgees. ratably; & such mtgees. had a lien for such amount upon the corpn. estates, other than the canal property, comprised in the prior mtge.—*TREVILLIAN v. EXETER CORPN.* (1854), 5 De G. M. & G. 828; 3 Eq. Rep. 896; 24 L. J. Ch. 157; 24 L. T. O. S. 149; 18 J. P. 806; 18 Jur. 1019; 3 W. R. 45; 43 E. R. 1091, L. JJ.

**580. — By overdraft from bank — As temporary loan.]**—A borough council in their estimate for a general district rate for the borough included items which consisted of debts contracted in former years & which had from year to year been carried to a "suspense account" opened for that purpose, & a balance due for works executed in previous years. The council from time to time paid these old debts by money borrowed from their bank by overdrafts, but, so far as the ratepayers were concerned, the items remained unpaid so long as they appeared in the suspense account. Applt. appealed against the rate on the ground that it contained charges incurred more than six months before the making of the rate:—*Held*: the estimate could be looked at for the purpose of seeing what items were included in the rate; & there was sufficient ground for holding that the rate contained items which were more than six months old, & the council could not by borrowing money from the bank & paying these old debts, treat the debts as the debts of the bank, & so prevent the charges from being retrospective charges more than six months old within P. H. Act, 1875, s. 210; & the rate was bad in consequence.

It was said by the corpn. that they had borrowed from their bank, & that it was true their accounts were going from bad to worse & that they were owing their bank more & more, but they contended

paid their tradesmen, & had paid their principal debts, & that the whole had become a debt due to the bank, & that therefore it must only be assumed at the end of the given financial year that they owed the bank so much money, & that it was to meet that debt that they made this rate. It seems to me that if that argument were allowed to prevail, a public body would only have to arrange with their bankers to borrow money to pay their debts & so defeat the provisions of sect. 210 altogether. I cannot think that argument is right (*LORD ALVERSTONE, C.J.*).

Nothing that I am saying, & nothing that my Lord has said, would in any way suggest that there would have been anything wrong in that which must as a matter of practice always be done, namely, in having temporary loans within the limits of their borrowing powers, in respect of matters which they have to pay quickly when they want to raise a loan & to raise their whole loan in one sum, as, for instance, by issuing stock, in which case they must incur some small expenditure before they raise their loan. In such a case obviously a temporary loan from the bankers within the limits of their borrowing powers would, of course, stand upon a totally different footing from such things as have been done here (*CHANNELL, J.*). —*SMITH v. SOUTHAMPTON CORPN.*, [1902] 2 K. B. 244; 71 L. J. K. B. 639; 87 L. T. 171; 67 J. P. 5; 50 W. R. 651, D. C.

*Annotations*:—*Appld. A.-G. v. De Winton*, [1906] 2 Ch. 106. *Consd. Croydon Corpn. v. Croydon R. C.*, [1908] 2 Ch. 321; *R. v. Locke* [1911] 1 K. B. 680.

**581. — What amounts to.]**—A corpn. with statutory borrowing powers to be exercised with the consent of the Local Govt. Board were in the habit of borrowing money from their bank by way of overdraft before such consent had been obtained. These overdrafts extended over a number of years, & at one time amounted to £200,000. A considerable portion of this money, which they were entitled to borrow for specific purposes only, they used for general purposes. In reduction of these overdrafts the bank, with the approval of the corpn., had applied certain moneys in their hands belonging to the consolidated loans fund contrary to the provisions of the Act of Parliament creating the fund:—*Held*: (1) the obtaining of the overdraft was *ultra vires* the corpn.; *qu.*: whether an overdraft extending over several years for substantially the whole amount of the authorised loan could be justified as a temporary loan; (2) the overdraft obtained from the bank for general purposes in respect of powers granted for specific purposes was illegal; (3) the application of money due to the consolidated loans fund in repayment of the overdrafts in question was illegal.—*A.-G. v. WEST HAM CORPN.*, [1910] 2 Ch. 560; 80 L. J. Ch. 105; 103 L. T. 394; 74 J. P. 406; 26 T. L. R.

*WEST GARAFRAXA TOWNSHIP* (1879), 44 U. C. R. 515.—*CAN.*

**g. — Amount limited by previous years' rate collector—Effect if amount exceeded.]**—*HOLMES v. GODE-RICH* (1902), 23 C. L. T. 12; 5 O. L. R. 33; 1 O. W. R. 367, 814.—*CAN.*

**h. — Necessity for authority for loans outside.]**—*R. (MOORE) v. HAMILL* (1904), 24 C. L. T. 271; 7 O. L. R. 600; 3 O. W. R. 642.—*CAN.*

**k. — Rate of interest.]**—Municipal corpns. cannot by bye-law raise money at a rate of interest exceeding six per cent.—*Re WILSON & COUNTY OF ELGIN* (1856), 13 U. C. R. 218.—*CAN.*

**l. — Recital in bye-law of**

*statutory authority.]*—*Re GRANT & CITY OF TORONTO* (1862), 12 C. P. 357.—*CAN.*

**m. — For encouragement of manufactures.]**—*SCOTTISH AMERICAN INVESTMENT CO. v. VILLAGE OF ELORA* (1881), 6 A. R. 628.—*CAN.*

**n. — Statutory restriction — Authorisation by bye-law necessary.]**—*MACARTHUR v. PORTAGE LA PRAIRIE TOWN* (1893), 9 Man. L. R. 588.—*CAN.*

**o. — ]**—*HART v. HALIFAX CITY* (1902), 35 N. S. R. 1.—*CAN.*

**p. — For beneficial expenditure.]**—*COLONIAL GOVERNMENT v. JOUBERT* (1886), 4 S. C. 211.—*S. AF.*

**q. — ]**—*THORNTON v. HUGO & GRAAFF-REINET CORPN.*

(1886), 5 E. D. C. 280.—*S. AF.*

**r. Repayment of loans — Money unlawfully borrowed—For ordinary purposes.]**—A municipal council may, with the consent of the ratepayers, raise money by debentures to repay money unlawfully borrowed under Municipal Act, 1892, when the expenditure, although not included in the estimates, was for purposes within the general powers of the corpn.—*FITZGERALD v. MOISONS BANK* (1898), 29 O. R. 105.—*CAN.*

**t. — Appropriation of interest to sinking fund.]**—*Re BARBER & CITY OF OTTAWA* (1876), 39 U. C. R. 406.—*CAN.*

**u. By debentures—Secured on taxes of following year.]**—*CLAPP v. TOWNSHIP*

683; 9 L. G. R. 433; *previous proceedings*, 74 J. P. 196.

582. ——— Statutory borrowing powers exhausted.]—A.-G. v. DE WINTON, No. 497, *ante*.

583. ——— Statutory sanction not obtained—Loan illegal.]—A.-G. v. WEST HAM CORPN., No. 581, *ante*.

584. ——— For specific authorised purposes—Application to other unauthorised purposes illegal.]—A.-G. v. WEST HAM CORPN., No. 581, *ante*.

585. ——— Overdraft over period of years—Whether temporary loan.]—A.-G. v. WEST HAM CORPN., No. 581, *ante*.

—[See, now, Local Authorities (Financial Provisions) Act, 1921 (c. 67), s. 3.

—By mortgage.]—See Sect. 1, sub-sect. 8, B. (b) iv., *ante*.

—As urban authority.]—See Part V., Sect. 4, sub-sect. 1, *ante*.

—Under P. H. Act, 1875.]—See Part II., Sect. 9, sub-sect. 1, *ante*.

Repayment of loan.]—See 1882 Act, ss. 112, 113.

586. ——— Out of consolidated loans fund—Sums borrowed for unauthorised purpose.]—A.-G. v. WEST HAM CORPN., No. 581, *ante*.

587. ——— “Redeemable” stock—Whether corporation bound to redeem at particular date.]—By Edinburgh Corporation Stock Act, 1894 (c. lvi), the Corpn. of Edinburgh, where they had any unexhausted statutory borrowing power, were authorised to exercise such power by the creation of redeemable stock, & by the Edinburgh Improvement & Tramways Act, 1896 (c. cxxiv), the corpn., in addition to the powers contained in the Act of 1894, were authorised to create & issue a new class of stock to be “redeemable at the option of the corpn. at one & the same period to be fixed by the corpn. but not exceeding sixty years from the first issue of such stock.” In pursuance of this power the corpn. issued stock to be redeemable at par after the expiration of a period of thirty years from May 15, 1897:—*Held*: the corpn. were not bound, on the application of the holders, to redeem the stock immediately on the expiration of that period, but had merely an option to do so.—EDINBURGH CORPN. v. BRITISH LINEN BANK, [1913] A. C. 133; 82 L. J. P. C. 25; 107 L. T. 567; 29 T. L. R. 25, H. L.

588. Compliance with formalities—Whether presumed.]—On Feb. 16, 1836, thirty mtges. of the rates of the borough for £100 each, & on Apr. 29, 1836, eight other mtges. of the rates for £100 each were made by the then mayor & two other justices of the town & port, in pursuance of the powers of 24 Geo. 3, c. 54, to J. The mtges. were to be dis-

charged pursuant to the directions of the Act; & interest was to be paid at the rate of 5 per cent. *per annum*. The moneys in consideration of which the mtges. had been made had been advanced by the mtgee., & applied in defraying the expenses of purchasing, pursuant to a presentment & resolution of sessions before 1835 Act, & converting into a new gaol & sessions house for the borough & port certain buildings called the *Maison Dieu*, & the land adjoining. It was not known whether 24 Geo. 3, c. 54, s. 9, was complied with in respect of an estimate of the cost of the conversion of the *Maison Dieu* into a gaol & sessions house having been made, or in respect of its having been ascertained by means of an estimate, whether such cost would exceed one half the amount of the ordinary annual assessment for the rate in nature of a county rate upon the borough, & the limits & precincts of same; but in fact the actual expenditure did exceed one half the amount of such assessment. The first election of councillor under 1835 Act, took place on Dec. 26, 1835; of aldermen on Dec. 31, 1835; & of mayor on Jan. 1, 1836. The principal money had not been paid; & no interest had been paid on the thirty mtges. since Aug. 16, 1847, or on the eight mtges. since Oct. 29, 1847:—*Held*: after the lapse of, & regular payment of interest for, so many years, the ct. could not presume that an estimate had not been made, or that the justices had acted without jurisdiction.—R. v. DOVER TOWN COUNCIL & RECORDER (1850), 15 J. P. 129.

589. Priority between debenture - holders—Mortgage by way of collateral security—Whether valid.]—DE WINTON v. BRECON CORPN., No. 325, *ante*.

Securities over municipal funds & property—Whether within Mortmain Acts.]—See CHARITIES, Vol. VIII., p. 269, Nos. 327–332.

#### SUB-SECT. 4.—ACCOUNTS AND AUDIT.

##### A. Accounts.

Officers' accounts.]—See 1882 Act, s. 21 (1).

Town clerk's accounts.]—See 1882 Act, s. 28.

Treasurer's accounts.]—See 1882 Act, ss. 26, 27.

590. Separate accounts—Right of set-off between—Income & expenditure under different Acts.]—The corpn. of P., who besides their municipal character filled those of managers of the public baths & washhouses under Baths & Washhouses Act, 1846 (c. 74), & of the local board of health under 11 & 12 Vict. c. 63, kept three separate accounts at their banker's, viz. “The

OF THURLOW (1860), 10 C. P. 533.—CAN.

b. ——— Alteration of boundaries—Effect of.]—GILLESPIE v. WESTBOURNE MUNICIPALITY (1888), 10 Man. L. R. 656.—CAN.

c. ——— In aid of railway company—Trustee of debentures till completion of railway—Lien & compensation of trustee.]—Re TILSONBURG, LAKE ERIE & PACIFIC RY. CO. (1897), 24 A. R. 378.—CAN.

d. ——— Inquiry by lender.]—The lender of money to a municipality on its debentures, is bound at his own risk to see that the proceedings leading up to their creation & issue are legal & regular.—WILTSHIRE v. TOWNSHIP OF SURREY (1891), 2 B. C. R. 79.—CAN.

e. ——— Authorised but unissued—Special rate not leviable.]—Debentures

authorised by a bye-law under Municipal Act, 1897, were duly executed, but remained unissued in the possession & under the control of the municipality:—*Held*: until the sale or negotiation of the debentures there was no debt on the part of the township, & the special rate provided in the bye-law was not leviable, though the time fixed for payment of some of the debentures had passed.—BOGART v. TOWNSHIP OF KING (1901), 21 C. L. T. 229; 1 O. L. R. 496.—CAN.

f. ——— Payable by instalments—Sinking fund unnecessary.]—R. (SEYMOUR) v. PLANT (1904), 24 C. L. T. 235; 7 O. L. R. 467; 3 O. W. R. 550.—CAN.

#### PART VII. SECT. 5, SUB-SECT. 4.—A.

g. Separate accounts—Duty of municipal officers.]—It is culpable

neglect of duty on the part of municipal officers not to see that separate accounts for special rate, sinking fund, & assessments for general purposes, are kept as directed by the statute.—WILKIE v. VILLAGE OF CLINTON (1871), 18 Gr. 557.—CAN.

h. Time for payment.]—A sheriff's account against a county is payable as soon as audited by the county board of audit, & the county treasurer is not justified in withholding payment until the account has been allowed & paid by the govt.—Re LINCOLN SHERIFF & LINCOLN COUNTY TREASURER & CORPN. (1873), 34 U. C. R. 1.—CAN.

k. Inspection of accounts—Right of ratepayers.]—BRUCE v. EDINBURGH CITY TRUSTEES (1835), 13 Sh. (Ct. of Sess.) 437; 10 Fac. Coll. 250.—SCOT.

l. ———.]—MABERLEY v.



**Sect. 5.—Finance: Sub-sect. 4, A., B. & C.; sub-sect. 5. Sect. 6: Sub-sect. 1.]**

Corpn. of P. Account," "The Corpn. Baths & Wash-houses Revenue Account," "The P. Local Board of Health Account." Upon the first account they were indebted to the bank, & upon the other two the bank was indebted to them in an equal amount. In an action brought by the banker to recover the balance due to him on account No. 1:—*Held*: the corpn. were entitled to set off the debts due to them on the other two accounts.—*PEDDER v. PRESTON CORPN.* (1862), 12 C. B. N. S. 535; 31 L. J. C. P. 291; 6 L. T. 540; 9 Jur. N. S. 496; 10 W. R. 773; 142 E. R. 1251.

*Annotation*:—*Reid. Anthony v. Brecon Markets Co.* (1872), 26 L. T. 979.

### B. The Auditors.

See 1882 Act, ss. 25, 62; P. H. Act, 1875, ss. 245, 246.

**Election.]—See, generally, ELECTIONS, Vol. XX., p. 138.**

**591. — Enforcement by mandamus.]—Re CAERMARTHEN BOROUGH** (1845), 9 J. P. Jo. 264.

**592. — Election not completed on appointed day.]—R. v. HASTINGS CORPN.** (1845), 9 J. P. Jo. 264.

**593. — Omission to elect on appointed day.]—R. v. BRIDPORT CORPN.** (1851), 17 L. T. O. S. 85; 15 J. P. Jo. 352.

**594. — ]—R. v. BANBURY CORPN.** (1852), 16 J. P. Jo. 294.

**595. — ]—R. v. HARTLEPOOL CORPN.** (1852), 19 L. T. O. S. 65; 16 J. P. Jo. 294.

**596. — Mandamus to a municipal corpn. to proceed to the election of auditors, no election having taken place on the day appointed by 1835 Act.]—R. v. SOUTHWOLD CORPN.** (1853), 21 L. T. O. S. 79; 1 W. R. 308; 17 J. P. Jo. 296.

**597. Remuneration—In respect of municipal accounts.]—(1) An elective auditor of a borough under 1882 Act, is not entitled to any remuneration for his services in auditing the accounts of the borough.**

(2) Where the mayor, aldermen, & burgesses of a borough, acting by the council, are an urban sanitary authority under P. H. Act, 1875, s. 6, the elective auditors of the borough, being by sect. 246 of that Act auditors to the urban sanitary authority, are entitled to remuneration under that sect. for auditing the accounts of the urban sanitary authority. They are not necessarily entitled to be remunerated in respect of each day on which they may have been actually engaged, but only for such a time as a business man would reasonably take to audit such accounts.

(3) Their duties in this respect are not confined to seeing that there are vouchers in respect of items for which the urban sanitary authority claims credit; but they must make a reasonable examina-

tion to see that the payments made are made within the duties of such authority.—*THOMAS v. DEVONPORT CORPN.*, [1900] 1 Q. B. 16; 69 L. J. Q. B. 51; 81 L. T. 427; 63 J. P. 740; 48 W. R. 89; 16 T. L. R. 9, C. A.

*Annotations*:—*As to* (3) *Consd. R. v. Roberts*, [1908] 1 K. B. 407. *Apld. Re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139. *Reid. A.-G. v. De Winton*, [1906] 2 Ch. 106; *R. v. Roberts, Ex p. Scurr*, [1924] 2 K. B. 695; *Roberts v. Hopwood*, [1925] A. C. 578.

**598. — In respect of accounts of borough as urban sanitary authority.]—THOMAS v. DEVONPORT CORPN.**, No. 597, *ante*.

**599. — How calculated.]—THOMAS v. DEVONPORT CORPN.**, No. 597, *ante*.

**600. Duties—To verify receipts & payments.]—THOMAS v. DEVONPORT CORPN.**, No. 597, *ante*.

**601. — To question legality of payments.]—THOMAS v. DEVONPORT CORPN.**, No. 597, *ante*.

**602. Power—To surcharge.]—A.-G. v. DE WINTON**, No. 497, *ante*.

### C. The Audit.

**What payments allowed.]—See Sub-sect. 1, B., *ante*.**

**603. Whether conclusive—As to validity of payments.]—A.-G. v. DE WINTON**, No. 497, *ante*.

### SUB-SECT. 5.—DEBTS INCURRED BEFORE MUNICIPAL CORPORATIONS ACT, 1882.

**Power to liquidate or give security.]—See 1882 Act, ss. 131, 132.**

**604. "Lawful debt"—Costs of defending quo warranto against members.]—HOLDSWORTH v. DARTMOUTH CORPN.**, No. 541, *ante*.

**605. Security for payment—Whether valid—Sum borrowed after 1835 Act to repay prior debt—Difficulty of enforcing payment.]—A bond given by a corpn., after the passing of above Act, but before the passing of 6 & 7 Will. 4, c. 104, to secure a sum of money borrowed for the purpose of paying debts contracted by the corpn. before the passing of above Act, is valid, notwithstanding sect. 92 might interpose a difficulty in the way of the obligee's obtaining satisfaction of a judgment thereon.—*PALLISTER v. GRAVESEND CORPN.* (1850), 9 C. B. 774; 19 L. J. C. P. 358; 15 L. T. O. S. 253; 137 E. R. 1096.**

*Annotations*:—*Consd. Payne v. Brecon Corpn.* (1858), 3 H. & N. 572. *Reid. Lewis v. Rochester Corpn.* (1860), 9 C. B. N. S. 401; *Bush v. Martin* (1863), 2 H. & C. 311; *Saunders v. Slack* (1864), 11 L. T. 484; *A.-G. v. Newcastle-upon-Tyne Corpn. & N. E. Ry.* (1889), 23 Q. B. D. 492. *Mentd. Itchin Bridge Co. v. Southampton L. B. of Health* (1858), 6 W. R. 223; *Coe v. Wise* (1864), 5 B. & S. 440.

*See, now*, 1882 Act, s. 131 (3).

**606. — Purpose of loan ultra vires—Statutory consent not obtained.]—A covenant by a municipal corpn. to repay money borrowed by them after the passing of 1835 Act, is valid, although the money was not borrowed for any of the purposes to which the borough fund is applic-**

WOODSTOCK MUNICIPALITY (1901), 18 S. C. 257.—S. AF.

m. — Challenge of accounts.)

### PART VII. SECT. 5, SUB-SECT. 4.—B.

**n. Remuneration—In respect of municipal accounts—Unauthorised but accepted services.]—ROBINS v. BROCKTON** (1885), 7 O. R. 481.—CAN.

**o. — Conditions precedent to right of action.]—A person appointed by the provincial auditor, pursuant to the Act respecting the audit of muni-**

cipal accounts, R. S. O. 1897, c. 228, to audit the accounts of a municipality, has no right of action against the municipality for his fees & expenses until three months after the amount thereof has been specifically determined by the provincial auditor with the approval of the A.-G. or other minister.—*WILLIAMSON v. TOWNSHIP OF ELIZABETHTOWN* (1904), 24 C. L. T. L. R. 181; 3 O. W. R.

**p. Surcharge—Appeal—Auditor's costs.]—ROBERTS v. BATTERSEA BOROUGH COUNCIL** (1914), 48 L. T. Jo. 243.—IR.

### PART VII. SECT. 5, SUB-SECT. 4.—C.

**603 i. Whether conclusive—As to validity of payments.]—The audit of accounts under Temperance Act, 1864, against the municipalities is not final & binding on the municipalities, it being open to them to show that charges have been allowed in such accounts for which they are not liable, although it would not be necessary or proper to require evidence of matters in detail where an audit had been had.—*PRINCE EDWARD LICENSE COMRS. v. COUNTY OF PRINCE EDWARD* (1879), 26 Gr. 452.—CAN.**

able by sect. 92, & although the covenant is contained in a mtge. deed made without the approbation of the Lords of the Treasury, as required by sect. 94.—*PAYNE v. BRECON CORPN.* (1858), 3 H. & N. 572; 27 L. J. Ex. 495; 31 L. T. O. S. 328; 22 J. P. 690; 6 W. R. 801; 157 E. R. 597.

*Annotations*:—*Reid*. *Bush v. Carter* (1863), 2 H. & C. 311; *A.-G. v. Newcastle-upon-Tyne Corpn. & N. E. Ry.* (1889), 23 Q. B. D. 492. *Mentd.* *Chambers v. Manchester & Milford Ry.* (1864), 5 B. & S. 588; *Pickering v. Ilfracombe Ry.* (1868), L. R. 3 C. P. 235.

**607.** ——— **Security for sums paid by treasurer—For debts due before 1835 Act.**—The corpn. of L., constituted under above Act, borrowed £200 of M. to enable them to pay K., their then treasurer, sums which he had paid to creditors of the old corpn., & gave M. their promissory note for the £200. They did not, however, pay over that sum to K., but suffered him to receive their then accruing income in reduction of what was due to him, & applied the £200 to purposes to which the income would otherwise have been applicable:—*Held*: the corpn. had no authority to give the promissory note, as it was not given to secure a debt due prior to the passing of above Act.—*A.-G. v. LICHFIELD CORPN.* (1843), 13 Sim. 547; 1 L. T. O. S. 430; 60 E. R. 212.

**608.** ——— **Given before 1835 Act—Whether enforceable against after-acquired lands—Under Judgments Act, 1838 (c. 110), s. 13.**—Judgment upon a bond given by a municipal corpn. before the passing of 1835 Act:—*Held*: under Judgments Act, 1838 (c. 110), s. 13, to operate as a charge upon all lands & hereditaments of the corpn., whether acquired before or after the passing of 1835 Act, the ct. being of opinion that, even if the latter statute standing alone would have prevented the judgment creditor from charging after-acquired lands, which, *semble*, it would not, that objection was removed by 6 & 7 Will. 4, c. 104, s. 1; & the power by that sect. given to municipal corpn. of charging their lands & hereditaments for securing repayment & satisfaction of any debt contracted by them before the passing of 1835 Act, is a power which they might exercise “for their own benefit,” within Judgments Act, 1838 (c. 110), s. 13, the words “for his own benefit” meaning no more than “for his own use,” “not as a trustee.”—*ARNOLD v. GRAVESEND CORPN.* (1856), 2 K. & J. 574; 25 L. J. Ch. 530; 27 L. T. O. S. 97; 20 J. P. 358, 499; 2 Jur. N. S. 703; 4 W. R. 478; 69 E. R. 911; *subsequent proceedings*, *sub nom.* *ARNOLD v. GRAVESEND CORPN.*, *PALLISTER v. GRAVESEND CORPN.*, 25 L. J. Ch. 776.

*Annotations*:—*Reid*. *A.-G. v. Newcastle-upon-Tyne Corpn. & N. E. Ry.* (1889), 23 Q. B. D. 492; *Re Thompson, Bedford v. Teal* (1890), 45 Ch. D. 161.

*See, now*, Law of Property Act, 1925 (c. 20), s. 195, & generally, JUDGMENTS, Vol. XXX., pp. 157 *et seq.*

**Power to consolidate.**—*See* 1882 Act, s. 127.

## SECT. 6.—FREEMEN.

### SUB-SECT. 1.—STATUS AND QUALIFICATIONS.

**609. Status—Not an office.**—The freedom of a corpn. is not so properly a place or office, as a privilege. It is not a place in the Govt. within 7 & 8 Will. 3, c. 34, s. 6, though it entitles the party to vote for members of Parliament, & gives him a right of common.—*R. v. MORRIS* (1698), 1

Ld. Raym. 337; 91 E. R. 1121; *sub nom.* *R. v. MAURICE* (MAYOR OF LINCOLN), Carth. 448; *sub nom.* *R. v. LINCOLN CORPN.*, 5 Mod. Rep. 399; 12 Mod. Rep. 190; 3 Ld. Raym. 203.

*Annotation*:—*Mentd.* *R. v. March* (1760), 2 Burr. 990.

**610.** ——— **Not part of corporation.**—*LINCOLN CORPN. v. HOLMES COMMON OVERSEERS*, No. 302, *ante*.

**Qualifications—By statute.**—*See* 1882 Act, ss. 203, 204.

**611.** ——— **Apprenticeship.**—Binding & service necessary to gain the freedom of Colchester.—*R. v. ROWE* (1769), 4 Burr. 2288; 98 E. R. 193.

**612.** ——— **Sufficiency of service—Service outside borough.**—By the constitution of the corpn. of H., a person having served a seven years' apprenticeship to a freeman residing in the town is entitled to his freedom; & by a bye-law the indentures must be enrolled by the town clerk within four months from the date. An apprentice who is bound to a freeman, resident only occasionally, & whose service is to be performed at another place, is not entitled to have his indentures enrolled, nor will the ct. grant a *mandamus* to the town clerk for that purpose.—*R. v. MARSHAL* (1787), 2 Term Rep. 2; 100 E. R. 1.

*Annotation*:—*Mentd.* *R. v. Saddlers' Co.* (1863), 10 H. L. Cas. 404.

**613.** ——— ——— ——— ———.]—(1) Though bye-law of corpn. requires indenture of apprenticeship to be enrolled, if it has been exhibited to town clerk, who marked it enrolled, it is sufficient, notwithstanding it is not enrolled in the corpn. books.

(2) Under bye-law, service at another place is not sufficient, unless the trade there was subservient to the trade at C.—*R. v. CAMBRIDGE CORPN.* (1818), 2 Chit. 144.

**614.** ——— ——— **Work done for others than master.**—An apprentice, bound for seven years to A., served him in his house between five & six years, & afterwards, for the remainder of the term, resided in his mother's house having agreed with his master that he should be at liberty to work for whom he pleased, he paying 2s. per week to his master. The master also, during this time, occasionally gave him work, for which he was not paid:—*Held*: this was not a continuance of the service to A. for seven years under the indenture.—*R. v. INMAN* (1820), 4 B. & Ald. 55; 106 E. R. 858.

**615.** ——— ——— **To freeman carrying on trade—Service under articles to solicitor.**—An attorney is not a trade, nor is his articulated clerk an apprentice, so as to entitle the latter to the freedom of a corpn. as by apprenticeship to a freeman, being a trader.—*R. v. DONCASTER CORPN.* (1828), 7 B. & C. 630; 1 Man. & Ry. K. B. 545; 1 Man. & Ry. M. C. 213; 6 L. J. O. S. M. C. 57; 108 E. R. 858.

**616.** ——— ——— **Enrolment—Sufficiency.**—*R. v. CAMBRIDGE CORPN.*, No. 613, *ante*.

**617.** ——— **Under charter—By property—Estate for life of wife—Whether sufficient.**—A charter ordained that no person should be admitted a burgess, except he had for three years before been seised & possessed of an estate of freehold for the term of his life, or some greater estate in land of a certain value, with an exception of such as should be seised of such estate of such yearly value which had come to him by descent or marriage:—*Held*: one who by virtue of his marriage became seised of an estate in right of his wife for her life, was not

**PART VII. SECT. 6, SUB-SECT. 1.**  
*q. Status inter pares.*—In an application to file an information in the nature of a *quo warranto*, if the relator

comes before the ct. as a freeman, & it appears that his freedom was conferred by the same select body who have elected doct. to an office, the title to

which the relator seeks to impeach by the information, he cannot be heard, inasmuch as his own title to his freedom stands upon the same foundation as



**Sect. 6.—Freemen: Sub-sects. 1, 2, 3 & 4. Sect. 7.]** within the exception, & therefore not qualified.—*R. v. POWELL* (1800), 8 Term Rep. 639; 101 E. R. 1591.

**618. — By custom — Who may be witness.]—**A father is an admissible witness to prove a custom, under which his son claims the freedom of a corp'n.—*COMMINS v. OAKHAMPTON CORPN.* (1752), Say. 45; 96 E. R. 797.

**Annotation:—***Mentd.* Doe d. Teynham v. Tyler (1830), 6 Bing. 390.

**619. — Admission by patrimony—Whether all sons qualified.]—**Where the custom of a corp'n. was, that "every freeman's son born in the town after his father was a freeman, should be admitted a freeman on attaining his age of twenty-one years": & no instance appeared, since the time of Queen Elizabeth, of more than one son of a freeman having been admitted in right of his father:—*Held*: the expression "every freeman's son" when construed by the usage did not mean "every son of a freeman"; & the custom was satisfied by one son of a freeman being admitted.—*R. v. RYE CORPN.* (1828), 7 L. J. O. S. K. B. 107.

**Honorary freemen.]—**See Honorary Freedom of Boroughs Act, 1885 (c. 29).

#### SUB-SECT. 2.—ADMISSION AND REMOVAL AND WRONGFUL EXERCISE OF OFFICE.

**620. Admission — Before 1882 Act—Election—Candidates not considered individually—Whether valid.]—**Where at a corp'n. meeting, for the purpose of electing honorary freemen, a list of names was proposed, upon the whole of whom the vote was taken collectively, instead of individually:—*Held*: such election was void, even where the corp'n. consisted of an indefinite number.—*R. v. LAYER* (1819), 2 B. & Ald. 707; 106 E. R. 523.

**Annotations:—***Refd.* Campbell v. Maund (1836), 5 Ad. & El. 865; *R. v. Brightwell* (1839), 10 Ad. & El. 171.

**621. — By right of birth — Whether all sons of freeman entitled—Proof of custom.]—***R. v. RYE CORPN.*, No. 619, *ante*.

— **Since 1882 Act.]—**See 1882 Act, ss. 203–05.

**622. — Enforcement — By mandamus.]—**A mandamus to make an apprentice free of a town.—*TOWNSENDS CASE* (1662), 1 Keb. 458; 1 Lev. 91; 1 Raym. 69, 92; 83 E. R. 458; *sub nom.* TOWNSENDS CASE, 1 Keb. 470; *sub nom.* *R. v. TOWNSEND*, 1 Keb. 659; *sub nom.* *TOWNSEND v. XFORD CORPN.*, 1 Sid. 107.

**Annotations:—***Refd.* Merchants Adventurers v. Rebow (1686), Comb. 53; *R. v. Gray's Inn* (1780), 1 Doug. K. B. 353.

**623. — Rule for a mandamus to admit the prosecutor to the freedom of a corp'n. absolute in the first instance.]—***R. v. COVENTRY CORPN.* (1783), 3 Doug. K. B. 236; 99 E. R. 631.

— **See, generally, CROWN PRACTICE, Vol. XVI., pp. 314, 315.**

— **Practice.]—**See CROWN PRACTICE, Vol. XVI., pp. 323 *et seq.*

**624. Removal — Power to remove—Limited by charter or prescription.]—**(1) The cause of disfranchising a citizen, freeman, or burgess, ought to be grounded upon an act which is against the duty of a citizen or burgess, & against the public good of the city or borough whereof, etc., & against his

oath, which he took when he was sworn a freeman of the city or borough: but words of contempt, or *contra bonos mores*, although against the chief officer or his brethren, are not good causes of disfranchisement, nor are endeavours, etc., to do a thing against the duty or trust of his freedom.

(2) No freeman of any corp'n. can be disfranchised by the corp'n., unless they have authority to do it, either by the express words of the charter, or by prescription: if they have no such authority, the party ought to be convicted by course of law before he can be removed. A removal, without hearing the party removed, is bad.

(3) If a party is disfranchised, & a writ to restore the party, or signify the cause, etc., is awarded in K. B., if a sufficient cause of removal is certified, but which is false, the ct. cannot award a writ to restore the party; but the party grieved may have a special action on the case, & upon obtaining judgment, a writ of restitution shall be awarded.—*BAGG'S CASE* (1615), 11 Co. Rep. 93 b; 1 Roll. Rep. 224; 77 E. R. 1271.

**Annotations:—***As to* (1) *Refd.* *R. v. Gloucester Corp'n.* (1616), 3 Bulst. 189; *R. v. Campion* (1660), 1 Sid. 14; *R. v. Derby Corp'n.* (1735), Lee temp. Hard. 153; *R. v. Richardson* (1758), 1 Burr. 517; *R. v. Saddlers' Co.* (1861), 4 L. T. 54. *As to* (2) *Expld.* *R. v. Wilton Corp'n.* (1695), 5 Mod. Rep. 257. *Consd.* *R. v. Richardson* (1758), 1 Burr. 517. *Refd.* *Exeter City v. Glide* (1690), 4 Mod. Rep. 33; *R. v. Lane* (1709), Fortes. Rep. 275; *R. v. Carlisle Corp'n.* (1720), 1 Stra. 385; *Bruce's Case* (1728), 2 Stra. 819; *R. v. Doncaster Corp'n.* (1729), 2 Ld. Raym. 1564; *R. v. Derby Corp'n.* (1735), Lee temp. Hard. 153; *R. v. Liverpool Corp'n.* (1758), 2 Keny. 424; *R. v. Cheshire Lines Committee, Same v. Same* (1873), 42 L. J. M. C. 100. *As to* (3) *Refd.* *Audly's Case* (1625), Lat. 123; *Barnardiston v. Soam* (1674), 3 Keb. 428. *Generally, Refd.* *Protector v. Kingston-on-Thames Town, Yates' Case* (1655), Sty. 477; *R. v. Heathcot* (1712), Fortes. Rep. 283; *R. v. Ponsonby* (1753), 1 Keny. 1; *R. v. Barker* (1761), 1 Wm. Bl. 352. *Mentd.* *Phillips v. Bury* (1694), Holt, K. B. 715; *R. v. Dublin (Dean & Chapter)* (1722), 1 Stra. 536; *R. v. Gaskin* (1799), 8 Term Rep. 209; *R. v. Hewes* (1835), 3 Ad. & El. 725; *Rutter v. Chapman* (1841), 8 M. & W. 1; *R. v. Darlington Free Grammar School* (1844), 6 Q. B. 682; *Ex p. Kinning* (1847), 2 New Pract. Cas. 240; *Re Hammersmith Rent-Charge* (1849), 4 Exch. 87; *Bonaker v. Evans* (1850), 16 Q. B. 162; *Haylock v. Sparke* (1853), 1 E. & B. 471.

for.] — *BAGG'S CASE*,

624, *ante*.

**626. — Wrongful removal — Remedies.]—***BAGG'S CASE*, No. 624, *ante*.

**627. — ]—**A corp'n., possessed of a common, made a bye-law, that every freeman might stock thereon with ten sheep. A freeman, who had stocked his full number, stocked ten more in the name of another freeman. For this he was disfranchised by the corp'n.:—*Held*: to be no cause of disfranchisement; & a peremptory mandamus was ordered to restore him.—*R. v. GREAT GRIMSBY CORPN.* (1832), 1 L. J. M. C. 23.

— **See, generally, CROWN PRACTICE, Vol. XVI., p. 315, Nos. 1270–1274.**

**628. Wrongful exercise of office — Whether quo warranto lies.]—***R. v. HARRISON* (1839), 11 Ad. & El. 506, n.; 113 E. R. 507, n.

**Annotation:—***Refd.* *R. v. Slatter* (1840), 9 L. J. Q. B. 115.

— **See, generally, CROWN PRACTICE, Vol. XVI., pp. 355 *et seq.***

#### SUB-SECT. 3.—RIGHTS IN CORPORATE PROPERTY.

*See, generally, 1882 Act, ss. 205–208.*

**629. Proceeds of sale of Freemen's Common.]—***NASH v. COOMBS*, No. 320, *ante*.

t.'s title to that office.—*R. v. ACKEN* (1832), Alc. & N. 113.—*IR.*

**ART VII. SECT. 6, SUB-SECT. 2.**  
Admission — Custom.] — *R. v.*

Welsh, Reg. Cas. 81.—*IR.*  
t. — — — — —  
*GRIFFITH CASE* (1860), 12 Ir. Jur. 313.

Batt. 628;

of birth.]—

a. — — — — —*R. v. COWEN* (1838), Alc. Reg. Cas. 148; 6 Ir. L. Rec. N. S. 334; 1 Jebb & S. 223; Welsh, Reg. Cas. 38.—*IR.*

**630. Effect of 1835 Act, s. 2.]—**(1) In an action by some, on behalf of all, of the freemen of a borough to establish the right of all individual freemen to share for their private benefit the net proceeds of certain properties vested in the corpn. :—*Held* : the effect of the saving of rights in above sect. was to legalise the beneficial interests therein mentioned without reference to the legality of their origin & in particular to obviate any objection which might otherwise arise in respect of the tendency towards a perpetuity of any such beneficial interest.

(2) An action to establish such rights as aforesaid may be brought by parties claiming to be entitled without an information by the A.-G.

(3) In such an action it was held on demurrer that in order to enable pl'ts. to avail themselves of such saving of rights as aforesaid it was sufficient for them after stating the title of the corpn. by charter or otherwise to the property in question to aver that at the time of the passing of the Act the rents, tolls & profits claimed by them were not, nor ever had been nor ought to have been held & applied to public purposes, but then were & always had been held & applied for the particular benefit of the freemen & without pleading that such rents, tolls & profits had been enjoyed or acquired by virtue of any specific statute, charter, bye-law or custom, or expressly to aver that any custom to such effect as aforesaid existed.—*PRESTNEY v. COLCHESTER CORPN. & A.-G.* (1882), 21 Ch. D. 111 ; 51 L. J. Ch. 805.

*Annotation* :—*As to* (1) *Ap'd.* *Stanley v. Norwich Corpn.* (1887), 3 T. L. R. 506.

**631. —.**—*STANLEY v. NORWICH CORPN.* (1887), 3 T. L. R. 506.

*Annotation* :—*Re'd.* *Re Norwich Town Close Estate* (1889), 5 T. L. R. 197.

**632. Effect of extension of borough.]—**By a local Act provision was made for allotments to be held by the deputies of the freemen in trust for freemen, or their widows, resident within the borough. Application had to be made to the deputies for any such allotment, & any person aggrieved with their decision could appeal to the justices, of the borough in petty or special sessions, whose determination was "to be final & conclusive, & not removable by *certiorari*, or any other writ or process whatsoever, into any of Her Majesty's Cts. of Record." By another local Act, the borough had been enlarged to include certain areas called "the added areas." The applicant, a freeman of the borough, & resident in one of the added areas, applied to the deputies for an allotment, but his application was refused on the ground that he was not resident within the borough as constituted at the time of the enactment of the first local Act. He appealed to the justices, who granted his application, but at the request of the deputies they stated a case under Summary Jurisdiction Act, 1879 (c. 49), s. 33 :—*Held* : on the merits, the extension of the limits of the borough carried with it the extension of the area of the residential privilege.—*LEICESTER BOROUGH*

(*DEPUTIES OF FREEMEN*) *v. HEWITT* (1893), 62 L. J. M. C. 51 ; 68 L. T. 201 ; 57 J. P. 344 ; 5 R. 211, D. C.

**633. Action to establish right—Parties.]—***PRESTNEY v. COLCHESTER CORPN. & A.-G.*, No. 630, *ante*.

**634. — Pleading.]—***PRESTNEY v. COLCHESTER CORPN. & A.-G.*, No. 630, *ante*.

**Right of common.]—***See* Nos. 302, 320, *ante*.

#### SUB-SECT. 4.—THE FREEMAN'S ROLL.

**Duty of town clerk to keep.]—***See* 1882 Act, s. 203.

**Right of inspection.]—***See* 1882 Act, s. 233 (5).

**635. — Extent of right.]—**Persons empowered by 3 Geo. 3, c. 15, to inspect the entries of freemen, have a right to inspect all books, papers, etc., in which the admissions of freemen are entered, & where there are two or more bailiffs, etc., of a borough or corpn., a joint action will lie, if they refuse inspection, though the words of the statute, are in the singular number, mayor, bailiff, etc.—*SCHULDAM v. BUNNISS* (1774), 1 Cowp. 192 ; 98 E. R. 1038.

#### SECT. 7.—BOUNDARIES.

*See* 1888 Act, ss. 52–60.

**636. County of a city—Whether co-extensive with city.]—**By charter of 1344 the men of the villa of Coventry, tenants of the Queen Mother of the manor of Chilesmore, in Coventry, were incorporated. The corpn. consisted of the mayor, bailiffs & men or commonalty of the villa of Coventry. By that & subsequent charters, various franchises within the villa of Coventry, & throughout the view of frankpledge of the manor of Chilesmore, & elsewhere, were granted to the mayor & bailiffs of Coventry. By another charter of 1451 the villa of Coventry with Radford, Keresley, & other specified places, were made into a distinct county called the "County of the city of Coventry." By another charter of 1621 regulating the government of the corpn., the aldermen of Coventry were made justices of the peace of the county of the city. There were ten aldermen of Coventry, being one alderman for each of ten wards ; & the limits of the wards did not appear far to exceed the continuous lines of the streets & houses popularly known as the city of Coventry :—*Held* : under 6 & 7 Will. 4, c. 103, s. 1, places being within the county of the city of Coventry & through which the mayor & bailiffs of Coventry had a coroner, & other franchises, under the above charters, but being beyond the lines of such streets & houses, & not within any of the wards of Coventry, were not part of the city of Coventry.—*COVENTRY CORPN. v. LYTHALL* (1842), 10 M. & W. 773 ; 12 L. J. Ex. 409 ; 152 E. R. 684.

#### PART VII. SECT. 7.

**b. Road between townships — Deviation.]—***LAFFERTY v. STOCK* (1852), 3 C. P. 9.—*CAN.*

**c. Township front—River.]—***JOHNSON v. HUNTER* (1866), 25 U. C. R. 348.—*CAN.*

**d. River or highway boundary.]—**Where two properties or municipalities are divided by a river or highway, the limit of each is *primâ facie* the centre of the river or road.—*Re McDONOUGH* (1870), 30 U. C. R. 288.—*CAN.*

**e. Declaration of boundaries—Under**

*dispute.]—*A municipal corpn. have no power to declare certain posts planted by a surveyor to be the true boundaries of an original road allowance which they direct to be opened, such boundaries being then a matter in dispute.—*McMULLEN v. CARADOC CORPN.* (1872), 22 C. P. 356.—*CAN.*

**f. Extension of works beyond boundaries — Sewer.]—**One municipality cannot extend a sewer through lands within the bounds of a contiguous municipality, without the consent of the latter, or without taking the

statutory steps, even although the lands have been purchased by the former municipality from the private owners.—*CITY OF HAMILTON v. TOWNSHIP OF BARTON CORPN.* (1891), 20 S. C. R. 173.—*CAN.*

**g. — Electric service to other corporations.]—***Re WINNIPEG LIGHT & POWER DEPARTMENT & ST. BONIFACE* (1913), 25 W. L. R. 618 ; 5 W. W. R. 293 ; 14 D. L. R. 186.—*CAN.*

**h. — Cemetery — Part of municipality acquiring—Not a true boundary.]—***HARWICH & KENT v. CHATHAM*



**Sect. 7.—Boundaries.** **Sect. 8: Sub-sects. 1, 2 & 3, *ante*.**

**637. Extension of boundaries—Whether privileges extended.]—**LEICESTER BOROUGH (DEPUTIES OF FREEMEN) *v.* HEWITT, No. 632, *ante*.

**638. — By incorporation of adjoining urban district—Transfer of liabilities.]—**BROOKS, JENKINS & CO. *v.* TORQUAY CORPN., No. 110, *ante*.

## SECT. 8.—LEGAL PROCEEDINGS.

### SUB-SECT. 1.—IN GENERAL.

*See, generally, CORPORATIONS, Vol. XIII., pp.*

**Liabilities & remedies in tort.]—***See, generally, CORPORATIONS, Vol. XIII., pp. 398 et seq.*

**Criminal & quasi-criminal proceedings.]—***See CORPORATIONS, Vol. XIII., pp. 408 et seq.*

**Description of corporation.]—***See, generally, CORPORATIONS, Vol. XIII., pp. 280, 283, 284.*

**639. Parties—Whether Attorney-General necessary—Action by members of council—For declaration that resolution ultra vires.]—**In an action by three members of a borough council for a declaration that a resolution of the council reducing the wages of the council's employees was *ultra vires* & invalid, on the ground that the resolution was not passed by a two-thirds majority in accordance with the council's bye-laws:—*Held*: the A.-G. must be a party to the action.—HURLEY *v.* STEPNEY BOROUGH COUNCIL (1923), 67 Sol. Jo. 767; 87 J. P. Jo. 566.

—*See, generally, CROWN PRACTICE, Vol. XVI., pp. 488 et seq.; INJUNCTION, Vol. XXVIII., pp. 494 et seq.*

### SUB-SECT. 2.—PROCEEDINGS BY BOROUGHES.

*See, generally, 1882 Act, ss. 219–222, 224, 225, 226 (3), 227 (1)–(4), (7), (8); Part II., Sect. 11, sub-sect. 2, ante.*

**In what name action brought.]—***See, generally, CORPORATIONS, Vol. XIII., p. 415.*

**640. — Whether mayor & corporation—Action on behalf of ratepayers.]—**In pursuance of a resolution passed by the watch committee of a borough incorporated under 1835 Act, the justices of the county provided police for the borough from 1869 to 1887. The expenses of such police for each half-year were provided for in advance by a

rate levied on the borough, & the sum so raised was, together with the sums collected from the other townships of the union in which the borough was situate, paid to the county treasurer by the guardians of the union in obedience to precept addressed to them by the county justices. By 1835 Act, the watch committee were required to appoint police for the borough, & on June 30, 1887, they withdrew the county police & appointed borough constables. At this date the county justices had in their hands a sum arising from a rate levied on the borough applicable for the future expenses of the police in the division in which the borough was situate, but there was no ascertained sum applicable exclusively to the police provided for the borough. In an action by the mayor & corpn., suing on behalf of all the ratepayers of the borough, & the guardians of the union against the council of the county as successors of the county justices, to recover the amount overpaid by the borough:—*Held*: (1) pltf. were not entitled to represent the ratepayers of the borough; (2) the remedy against defts., if any, was by *mandamus*; (3) on the merits the money was not recoverable on the ground of extortion *colore officii*, as it was paid under a voluntary arrangement; nor on the ground of a partial failure of consideration as the proportion overpaid was not properly ascertainable.—BOOTLE-CUM-LINACRE CORPN. *v.* LANCASHIRE COUNTY COUNCIL (1890), 60 L. J. Q. B. 323; 7 T. L. R. 179, C. A.

**641. — Whether by officer in individual capacity—Contract signed on behalf of corporation.]**

—The highest bidder for certain lands sold by auction, & the mayor of a corpn., on behalf of himself & the rest of the burgesses & commonalty of the borough, the vendors of the lands, signed a contract, in which they mutually promised to fulfil the conditions of sale on their respective parts. The conditions stated the title of the corpn. to the premises, & stipulated that they should convey, & might re-sell on default. The only act therein mentioned to be done by pltf. was the receiving the deposit:—*Held*: pltf. could not maintain an action in his individual capacity against the purchaser for breach of this contract.—BOWEN *v.* MORRIS (1810), 2 Taunt. 374; 127 E. R. 1122, Ex. Ch.

*Annotations:—Reid. Fishmongers' Co. v. Robertson* (1843), 5 Man. & G. 131. *Mentd. Spittle v. Lavender* (1821), 2 Brod. & Bing. 452; *Laythorp v. Bryant* (1836), 2 Bing. N. C. 735.

**642. — Criminal or quasi-criminal proceedings—Proof of authority.]—**On Jan. 8, 1912,

(1914), 3 O. L. R. 654; 6 O. W. N. 681.—CAN.

### PART VII. SECT. 8, SUB-SECT. 1.

**k. Parties—Whether Attorney-General necessary.]—**The A.-G. is not a necessary party to a bill filed by the municipal council of an incorporated town to prevent an injury to the property of the municipality.—GUELPH TOWN *v.* CANADA CO. (1854), 4 Gr. 632.—CAN.

**l. — Where a town council has a special interest in the subject-matter of an action, the action can be brought in the name of the town, without joining the A.-G.—**LIVERPOOL & MILTON RY. CO. *v.* LIVERPOOL TOWN (1903), 33 S. C. R. 180.—CAN.

**m. — A municipal corpn. having a proprietary right to maintain may bring an action in its own name, & in such case the A.-G. is neither a necessary nor proper party. Where the corpn. refuses to allow the corporate name to be used, a ratepayer having a direct pecuniary**

interest may sue in the interest of the corpn. without joining the A.-G.—MACILREITH *v.* HART (1908), 39 S. C. R. 657.—CAN.

**n. — Neither the ratepayers nor the inhabitants of a city are the "public" of whose interests the A.-G. is the custodian so as to make him a necessary party to an action.—**LIVINGSTONE *v.* CITY OF EDMONTON & EDMONTON INDUSTRIAL, ETC. CO., LTD. (1915), 31 W. L. R. 609; 8 W. W. R. 976.—CAN.

**o. — Whether warden necessary.]—**Where a bill was filed to restrain the issue of debentures by a municipal council, but did not allege that the warden was individually acting in the matter, or taking any step otherwise than as the officer of the council, & under the bye-law:—*Held*: he was not a necessary or proper party to the suit.—WEST GWILLIMBURY *v.* SIMCOE (1874), 21 Gr. 68.—CAN.

**p. — Meaning of "interested."]—***Re TOWNSHIPS OF HARWICH & RALEIGH* (1890), 20 O. R. 154.—CAN.

**q. — Joinder of corporation with**

**out authority.]—**TOWN OF BARRIE *v.* WEAYMOUTH (1892), 15 P. R. 95.—CAN.

**r. Award of compensation to landowner.]—**An award of compensation to a landowner for lands injuriously affected by reason of work done by a municipal corpn. is an award which does not require adoption by the council.—*Re MCLELLAN & TOWNSHIP OF CHINGUACOUSY* (1898), 18 P. R. 246.—CAN.

### PART VII. SECT. 8, SUB-SECT. 2.

**t. In what name action brought—Whether by officer in individual capacity.]—**In an action by a treasurer of a district, under the Division Courts Act, against the clerk of a division ct., for not paying over moneys received, it is sufficient to declare in the treasurer's own name for money had & received by deft. to the use of pltf. for the purposes of the Act.—HOWARD *v.* WALTON (1845), 2 U. C. R. 266.—CAN.

**u. — Action for debts—Corporate name.]—**Under the Municipal



applt. on behalf of the mayor & corpn. of L. preferred an information against resps. for damaging a holly tree at B., the property of the corpn., to the amount of £5. Applt. was chief ranger of B.; & stated on oath that he had a general power to prosecute for offences under the B. bye-laws on behalf of the corpn. The present proceedings were initiated, not under the bye-laws but under Malicious Damage Act, 1861 (c. 97), s. 22. The solr. representing resps. asked for the production of a copy of the minute or resolution authorising applt. to prefer the information. No such authority, being produced, he raised the objection that as the information was laid on behalf of the corpn. of L. it was laid by a corporate body, & should therefore have been laid by an attorney duly appointed under the common seal or warrant of the corpn. It was contended that the justices could not proceed to hear the information. The justices acceded to this view & dismissed the information:—*Held*: the information was properly laid.—*DUCHESNE v. FINCH* (1912), 107 L. T. 412; 76 J. P. 377; 28 T. L. R. 440; 10 L. G. R. 559; 23 Cox, C. C. 170, D. C.

643. ——— ——— ——— ———.] — In prosecution by officers of city or borough councils for penalties in respect of the local licences transferred to the councils by the Finance Act, 1908 (c. 16), & the Order in Council of Oct. 19, 1908, specific authorisation of the proceedings by the councils must be proved. County & borough councils are the successors to the powers & duties of the Comrs. of Inland Revenue in regard to the local taxation licences transferred to them; & their powers are not more extensive than those of the comrs. Under Excise Management Act, 1827 (c. 53), & Inland Revenue Regulations Act, 1890 (c. 21), specific authorisation of the prosecution by the comrs. in each case must be proved, & this is now the case in prosecutions instituted by officers of county & borough councils.—JONES *v.* WILSON, [1918] 2 K. B. 36; 87 L. J. K. B. 1040; 119 L. T. 45; 82 J. P. 277; 62 Sol. Jo. 653; 16 L. G. R. 614; 26 Cox, C. C. 265, D. C.

**Consent of Attorney-General—Whether necessary.]—***See, generally,* CROWN PRACTICE; Vol. XVI., pp. 490, 491.

**Proceedings against tenants in occupation—Under informal instrument.]—See CORPORATIONS, Vol. XIII., p. 376, Nos. 1069-1072.**

Councils Act, 1841, a municipal council can in their corporate name enforce payment of debts due to the district where neither the magistrates nor their treasurer could have sued formerly, but they cannot vary the rights of the parties, nor alter any contract.—OTTAWA DISTRICT COUNCIL v. Low (1842), 6 O. S. 546.—CAN.

b. *Recovery of improvement expenses.*—A council has no power to lay down a side-walk & sue for cost of same. The remedy is by indictment for non-repair, or action for the penalty. — MUNICIPAL COUNCIL v. STABB (1891), 7 Nfld. L. R. 486.—**NFLD.**

**PART VII. SECT. 8, SUB-SECT. 8.—A.**

c. Alderman — Failure to attend revision court—Action not maintainable by ratepayer.]—An action cannot be maintained against an individual alderman for his neglect or refusal to attend & constitute a revision ct., as the duty of attendance is one of public concernment only, & involves no question of private right. Municipalities Act, 1867, imposes such duty on the council alone.—HOWE v. HARRISKY (1884), 5 N. S. W. L. R. 223.—AUS.

**644. Action for libel—Imputation of corrupt practices by corporation.]**—In an action for libel brought by a corpn., the statement of claim complained that deflt. had charged pltfs. with corrupt practices. It contained no allegation that pltfs. had suffered any special pecuniary damage in consequence of such imputation:—*Held*: inasmuch as a corpn., as distinguished from the individuals composing it, cannot be guilty of corrupt practices, the statement of claim disclosed no cause of action.—**MANCHESTER CORPN. v. WILLIAMS**, [1891] 1 Q. B. 94; 60 L. J. Q. B. 23; 63 L. T. 805; 54 J. P. 712; 39 W. R. 302; 7 T. L. R. 9, D. C.

**Annotations:**—**Refd.** *South Hetton Coal Co. v. North-Eastern News Assocn.*, [1894] 1 Q. B. 133; *Homing Pigeon Publishing Co. v. Racing Pigeon Publishing Co.* (1913), 29 T. L. R. 389; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

**Recovery of improvement expenses—Under Public Health Acts.]—See HIGHWAYS, Vol. XXVI., pp. 532 *et seq.***

**Private improvement expenses.]**

*See* HIGHWAYS, Vol. XXVI., pp. 535, 536.

— **Under Private Street Works Act, 1892 (c. 57).**—See HIGHWAYS, Vol. XXVI., pp. 545, 546.

**Under local Acts.]—***See* HIGHWAYS, Vol. XXVI., pp. 551, 552.

**Recovery of local licence duties.**—*See, generally,* Finance Act, 1908 (c. 16), s. 6; REVENUE.

### SUB-SECT. 3.—PROCEEDINGS AGAINST BOROUGHES AND THEIR OFFICERS.

### A. In General.

*See, generally, Part II., Sect. 11, sub-sect. 1, ante; CORPORATIONS, Vol. XIII., pp. 415 et seq.*

**Liability for acts of officers & servants.]—See, generally, MASTER & SERVANT; NEGLIGENCE; NUISANCE; TORT.**

**645. Action by officers for fees — Fees withheld by corporation on alleged abolition of office—Whether action in contract or tort.]—HALL v. SWANSEA CORPN., No. 508, *ante*.**

**646. Representative action by freeman—To establish rights in corporate property—Whether Attorney-General necessary party.]—*PRESTNEY v. COLCHESTER CORPN. & A.-G.*, No. 630, *ante*.**

**d. Parties — Building committee —**  
*Description as committee or individually.*  
**—KEATING v. SIMCOE DISTRICT (1843),**  
**1 U. C. R. 28.—CAN.**

6. — *Whether treasurer proper party.*—To a bill by a rural school section corpn. to compel the municipality to make good money paid by the municipality to a person alleged not to be the duly appointed officer of the corpn., the treasurer of the municipality is not a proper party.—**HAMILTON SCHOOL TRUSTEES v. NEIL** (1881), 28 Gr. 408.—**CAN.**

1. — *Whether Attorney-General necessary party.*—HART v. CITY OF HALIFAX (1906), 2 E. L. R. 118.—CAN.

**g. Action liable to lead to dissolution of council.]**—A private relator, under 12 Vict. c. 81, cannot either attack by writ of summons the township council by name, upon grounds which, if sustained, must necessarily lead to a dissolution of the body, or attack the whole council in one proceeding, through the individual names of every member of it.—**R. (LAWRENCE) v. WOODRUFF** (1851). 1 C. L. Ch. 119; 8 U. C. R. 336.—**CAN.**

#### **h. Mayor—Failure to execute instructions of council—Action by party**

*aggravated*.]—Where a council while in session, instructed the mayor & ordered him as such mayor, on behalf & in the name of the council, to make & execute a lease, of which he had notice, but which he maliciously refused to do:—*Held*: action not maintainable by intended lessee.—**FAIR v. MOORE** (1852), 3 C. P. 484.—**CAN.**

**k.** — *Notice of action.*]—Deft. was sued as mayor of a town for refusing to sign an order to enable pltf. to obtain a saloon license:—*Held*: as it must be presumed that deft., in refusing to sign the order, intended to act in the discharge of his official duty, he was entitled to notice.—**MORAN v PALMER** (1863), 13 C. P. 528.—**CAN.**

1. — *Defending on behalf of rate-payers — Action by town solicitor.*] — Where an action for professional services was instituted against a town by a firm of solrs. of which the town solr. was a member, & deftd. town was, therefore, *inops concilii*, the mayor as a ratepayer was allowed to intervene, at the peril of costs & defend the action on behalf of himself & all other rate-payers of the town.—*CORNING v. YARMOUTH TOWN* (No. 2) (1913), 12 E. L. R. 208 ; 9 D. L. R. 277 ; *affd.*,



*Sect. 8.—Legal proceedings: Sub-sect. 3, A., B. & C. (a) i., ii. & iii., & (b).]*

**647. Right of set-off—Between general & special accounts.]—**PEDDER *v.* PRESTON CORPN., No. 590, *ante*.

*See, generally, SET-OFF.*

**648. Recovery of penalty under 1882 Act, s. 224—For acting in corporate office when disqualified—Application of statutory requirements—Whether to Municipal Elections (Corrupt & Illegal Practices Act), 1884 (c. 70).]**—In Nov. 1920, defts. were candidates at a municipal election. They were duly elected. They failed within the time limited to make the return & declaration required by Municipal Elections (Corrupt & Illegal Practices) Act, 1884 (c. 70), s. 21 (3), & after the expiration of the twenty-eight days allowed for that purpose by sub-sect. 4 of that sect., they sat & voted at meetings of the council, meetings of committees, & at meetings of the council sitting to exercise the functions of an urban council under the Public Health Acts. Pltf. brought two actions against them, claiming, as a common informer, to recover the penalties under Municipal Elections (Corrupt & Illegal Practices) Act, 1884 (c. 70), s. 21. Defts. relied on 1882 Act, sect. 224. It was admitted that the requirements of this sect. had not been complied with in this case:—*Held*: (1) the subject-matter 1882 Act, sect. 224, is quite distinct from the subject-matter of the Act of 1884, & therefore, 1882 Act, s. 224, does not apply to Municipal Elections (Corrupt & Illegal Practices) Act, 1884 (c. 70), s. 21 (4); (2) pltf., as a common informer, was entitled, subject to any question of relief by the ct. under Municipal Elections (Corrupt & Illegal Practices) Act, 1884 (c. 70), s. 21 (7), to recover penalties against defts. under sub-sect. 4 of that sect.; (3) Municipal Elections (Corrupt & Illegal Practices) Act, 1884 (c. 70), s. 21 (4), being a penal section, must be construed strictly in favour of defts.; (4) having regard to the facts as found by the judge that defts. were ignorant of the technical requirements of the sect. & that the actions were instigated from improper motives, an opportunity must be given to defts. to apply to the ct. for relief under the sect. before judgment should be entered in the actions.—NICHOL *v.* FEARBY, NICHOL *v.* ROBINSON (1922), 127 L. T.

522; 86 J. P. 204; 38 T. L. R. 735; 20 L. G. R. 705; *subsequent proceedings*, [1923] 1 K. B. 480. —.]—*See, generally*, Sect. 1, sub-sect. 7, C., *ante*.

**649. Proceedings by common informer.]—**NICHOL *v.* FEARBY, SAME *v.* ROBINSON, No. 648, *ante*.

### B. Statutory Protection.

*See* PUBLIC AUTHORITIES.

### C. Particular Proceedings.

#### (a) Mandamus.

##### i. In General.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 276 *et seq.*

**650. Whether mandamus or quo warranto proper remedy—To enforce service in corporate office.]—**R. *v.* HUNGERFORD (1707), 11 Mod. Rep. 142; 88 E. R. 952.

*See, also*, No. 657, *post*.

**651. — To test validity of election.]—**If a councillor of a corpn. be ousted, & another elected in his stead, & such election be merely colourable, a *mandamus* will go to permit the ousted party to exercise his office, but not to restore him to his office.

If such ouster & election be *bonâ fide*, the ct. will not grant a *mandamus* in favour of the party displaced; the proper proceeding is by *quo warranto* against the party holding the office *de facto*.

*Qu.*: whether, if a party be elected a councillor, & duly qualified at the time of his election, & his name be afterwards improperly omitted in the burgess list before his time of service as a councillor is expired, such omission vacate the office of councillor.

If so, *qu.*: whether the office be absolutely vacant before notice to that effect be given under 1835 Act, s. 52.—R. *v.* OXFORD CORPN. (1837), 6 Ad. & El. 349; 1 Nev. & P. K. B. 474; Will. Woll. & Dav. 125; 6 L. J. K. B. 103; 1 J. P. 214; 112 E. R. 133.

*Annotations*:—*Consd.* R. *v.* Welchpool Corpn. (1876), 35 L. T. 594. *Refd.* R. *v.* Birmingham (Rector & Churchwardens) (1837), 1 J. P. 211; R. *v.* Leeds Corpn. (1841), 11 Ad. & El. 512.

**652. — — —.]—**At the election of a town councillor, the ward alderman having examined the

13 E. L. R. 208; 12 D. L. R. 683.—CAN.

**m. Action by inhabitants — Illegal application of funds by mayor—Whether Attorney-General necessary party.]—**A bill will lie by some of the inhabitants of a municipality alleging an illegal application of the funds by the mayor, which the council refused to interfere with. The A.-G. is not a necessary party, to such a suit.—PATERSON *v.* BOWES (1853), 4 Gr. 170.—CAN.

**n. Notice of action.]—**A municipal council is not entitled like a public officer to a month's notice before action brought against the municipality in respect of any act of the corpn.—HODGINS *v.* COUNTIES OF HURON & BRUCE CORPN. (1866), 3 E. & A. 169.—CAN.

**o. Diversion of debentures from specified purpose — Action for restoration by ratepayer.]—**BROGDIN *v.* BANK OF UPPER CANADA (1867), 13 Gr. 544.—CAN.

**p. Action by officer for salary.]—**Re WHITAKER & MASON (1889), 18 O. R. 63.—CAN.

**q. Obstruction on highway—Remedy over against negligent third party.]—**The person who placed on a high-

way a boulder which caused injury to the pltf. was added as a deft. under Municipal Act, 1887:—*Held*: he was liable over to the corpn.—MCKELVIN *v.* LONDON CITY (1892), 22 O. R. 70.—CAN.

**r. Action against town clerk for moneys detained — Counterclaim for salary.]—**In an action by the town for money retained by the town clerk he is not entitled to counterclaim for salary.—TOWN OF SYDNEY *v.* HILL (1893), 25 N. S. R. 433.—CAN.

**t. Right of action by ratepayer—To compel refund of moneys illegally paid.]—**PEASE *v.* TOWN OF MOOSOMIN & SARVIS (1901), 5 Terr. L. R. 207.—CAN.

**a. — To compel collection of debt by corporation.]—**A ratepayer is not entitled to bring into ct. a municipal corpn. & a person who is alleged to be indebted to the corpn., for the purpose of having it declared that the corpn. has wrongfully refrained from collecting the alleged debt, & that it is owing by the alleged debtor.—NORFOLK *v.* ROBERTS (1913), 28 O. L. R. 593; 4 O. W. N. 1231; *affd.* 50 S. C. R. 283.—CAN.

**b. — For misappropriation of funds.]—**If the property or funds of a municipal corpn. be illegally or wrong-

fully interfered with or its powers be misused, & the officers of the corpn. are parties to the wrong or will not discharge their duty, any inhabitant, & particularly a taxable inhabitant has a right to take proceedings on behalf of himself & others similarly situated to prevent or avoid the illegal or wrongful acts.—STEPHENSON *v.* COWAN (1914), 30 W. L. R. 297; 25 Man. L. R. 67; 7 W. W. R. 772; 20 D. L. R. 605.—CAN.

**c. Statutory liability for damage to sheep by dog — Valuation a condition precedent.]—**There is not an immediate right of action against the municipality by a person whose sheep have been injured. But where the valuer has found the amount of the damage, & a proper claim had been made, an action will lie against the municipality if the sum found is not paid.—HOGLE *v.* TOWNSHIP OF ERNESTTOWN (1917), 41 O. L. R. 394; 13 O. W. N. 347; 41 D. L. R. 123.—CAN.

**d. Liability of councillors — Right of appeal.]—**Where an interlocutor appears to affect the interests of each individual member of the corpn., any one member is by law entitled to appeal against it.—GRAY *v.* FORBES (1838), 6 Cl. & Fin. 356; 7 E. R. 439.—SCOT.

voting papers, declared P. duly elected, before two o'clock on the day next but one after the day of election, pursuant to 1835 Act, s. 35; upon a re-examination of the papers he declared R. was elected, but such declaration was not made till after two o'clock:—*Held*: the latter declaration was a nullity, & the proper way of enforcing the election of P. was by *mandamus* to the corpn. to count his votes, & not by *quo warranto* against R.—*R. v. LEEDS CORPN.* (1841), 11 Ad. & El. 512; Arn. & H. 317; 4 Per. & Dav. 632; 10 L. J. Q. B. 112; 5 J. P. 435; 5 Jur. 548; 113 E. R. 510.

*Annotations*:—*Distd. R. v. Chester Corpn.* (1855), 25 L. J. Q. B. 61; *R. v. Welchpool Corpn.* (1876), 35 L. T. 594. *Refd. R. v. St. Faith* (1856), 4 W. R. 267; *R. v. Bangor Corpn.* (1886), 18 Q. B. D. 349.

653. ———.]—*R. v. DUNN* (1858), 22 J. P. Jo. 68.

———.]—*See, further*, CROWN PRACTICE, Vol. XVI., pp. 300, 314, 315, 356, 357, Nos. 1132, 1133, 1257–1262, 1267–1269, 1871–1878.

*Discretion of court to grant.*]—*See* CROWN PRACTICE, Vol. XVI., pp. 276 *et seq.*

*Conditions precedent to issue.*]—*See* CROWN PRACTICE, Vol. XVI., pp. 279 *et seq.*

*To whom directed.*]—*See* CROWN PRACTICE, Vol. XVI., pp. 303 *et seq.*, 333, 334.

*Notice of application.*]—*See* 1882 Act, s. 225 (2).

## ii. Purposes for which granted.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 308 *et seq.*

*Admission to office.*]—*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 314, 315.

——— *Freemen.*]—*See* Sect. 6, sub-sect. 2, *ante*.

*Election of officers.*]—*See, generally*, CORPORATIONS, Vol. XIII., p. 322, Nos. 578, 579; CROWN PRACTICE, Vol. XVI., pp. 314, 315; ELECTIONS, Vol. XX., pp. 120, 121.

——— *Aldermen.*]—*See* Sect. 2, sub-sect. 3, *ante*.

— *Auditors.*]—*See* Sect. 5, sub-sect. 4, B., *ante*.

— *Councillors.*]—*See* Sect. 2, sub-sect. 2, A., *ante*.

— *Mayor.*]—*See* Sect. 2, sub-sect. 4, A., *ante*.

*Performance of rights & duties.*]—*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 316 *et seq.*, 318, 319.

——— *As sanitary authority.*]—*See* PUBLIC HEALTH; SEWERS & DRAINS.

——— *Holding meeting.*]—*See* CORPORATIONS, Vol. XIII., p. 341.

654. ——— *Payment out of borough fund.*]—*R. v. GLOUCESTER CORPN.*, No. 516, *ante*.

655. *Publication of result of election.*]—*R. v. HANCOCK*, No. 379, *ante*.

*Restoration to office.*]—*See, generally*, CROWN PRACTICE, Vol. XIII., p. 319.

——— *Alderman.*]—*See* Sect. 2, sub-sect. 3, *ante*.

656. *Service in corporate office.*]—*R. v. HUNGERFORD* (1707), 11 Mod. Rep. 142; 88 E. R. 952.

657. ——— *Mayor.*]—The ct. will grant a rule for a *mandamus* to serve the office of mayor, upon an affidavit merely stating the election & refusal.—*R. v. SIMMONS* (1783), 3 Doug. K. B. 237; 99 E. R. 632.

*See, now*, 1882 Act, ss. 34, 36.

## iii. Procedure.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 323 *et seq.*

## (b) Certiorari.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 398 *et seq.*

*For what purposes granted—Statutory restriction.*]—*See* 1882 Act, s. 220, & *generally*, CROWN PRACTICE, Vol. XVI., pp. 436 *et seq.*

## PART VII. SECT. 8, SUB-SECT. 3.—C. (a) ii.

654 i. *Performance of rights & duties—Payment out of borough fund.*]—One who has a valid legal claim against a municipal corpn. has no right to a *mandamus* to compel the mayor to sign a cheque for the amount although the council has passed a resolution approving payment over the mayor's veto, because claimant has another adequate remedy, viz., to proceed by action against the municipality.—*HOLMES v. BROWN* (1908), 18 Man. L. R. 48.—CAN.

e. *Interference with discretion of corporation.*]—*Ex p. COULTON* (1913), 13 S. R. N. S. W. 106; 30 N. S. W. W. N. 36.—AUS.

.. The ct. will not grant a writ of *mandamus* to compel a municipal authority to approve a plan of sub-division where the authority has refused its sanction on the ground that the sub-division did not comply with the law, & has not exercised unreasonably the discretion allowed by the statute.—*MOFFET v. RUTAN* (1911), 16 B. C. R. 342.—CAN.

g. *Production of books for audit.*]—*R. v. LAUNCESTON CORPN.*, *Ex p. AUDITOR-GENERAL* (1923), 19 Tas. L. R. 7.—AUS.

h. *To raise money—For educational purposes.*]—*Re GALT SCHOOL TRUSTEES & VILLAGE OF GALT* (1856), 13 U. C. R. 511.—CAN.

k. ——— *Teachers' salaries.*]—The board of school trustees of a town may be compelled by *mandamus* to raise the money for teachers' salaries.—*MUNSON v. TOWN OF COLLINGWOOD* (1859), 9 C. P. 497.—CAN.

l. ——— *For general purposes.*]—On J.—VOL. XXXIII.

an application for a *mandamus* to compel a public body to raise & expend a large sum of money for general purposes, in this instance to build the gaol & ct. house:—*Qu.*: whether the appet. as a ratepayer could claim a remedy by *mandamus* in such a case.—*R. v. MUNICIPAL COUNCIL OF BRUCE* (1861), 11 C. P. 575.—CAN.

m. *To raise sinking fund for debentures—Sinking fund required by bye-law.*]—*CLARKE v. PALMERSTON TOWN* (1883), 6 O. R. 616.—CAN.

n. *School estimates—To provide sum estimated.*]—A *mandamus nisi* will be granted to compel a city council to provide the sum required for school purposes for the year, according to the estimate furnished to them by the school trustees, although it appears that steps had been taken to provide the said sum.—*CITY OF TORONTO SCHOOL TRUSTEES v. CITY OF TORONTO CORPN.* (1863), 20 U. C. R. 302.—CAN.

o. ——— *Insufficiency of estimate.*]—Where a school estimate is insufficient a *mandamus* cannot be granted to provide the sum mentioned in it.—*Re SANDWICH BOARD OF SCHOOL TRUSTEES & SANDWICH CORPN.* (1864), 23 U. C. R. 639.—CAN.

p. *Railway bonus—To compel corporation to hand over debentures for bonus to trustees—Impossibility of compliance.*]—*Re HAMILTON & NORTH-WESTERN RY. CO. & COUNTY OF HALTON* (1876), 39 U. C. R. 93.—CAN.

q. *To fix remuneration of officer.*]—Where a lock-up housekeeper cannot maintain an action for his services, no remuneration having been fixed by the council:—*Qu.*: whether the city council could be compelled by *mandamus* to fix the salary.—*WOODWARD*

*v. FREDERICTON CITY* (1888), 27 N. B. R. 211.—CAN.

r. *To compel mayor to execute bye-law.*]—Where a bye-law is a breach of faith towards the electorate, an application for a *mandamus* to compel execution by the mayor will be refused.—*Re TOWN OF GALT, SCOTT v. PATTERSON* (1908), 12 O. W. R. 637; 17 O. L. R. 270.—CAN.

t. *To compel nomination of arbitrator.*]—In the case of default by a municipality to name an arbitrator under Municipal Act, 1911, c. 170, the proper procedure is by way of *mandamus* against the municipality.—*Re WALKER & MUNICIPALITY OF SOUTH VANCOUVER* (1913), 18 B. C. R. 480.—CAN.

a. *To compel submission to electors of liquor bye-law.*]—*Re STRATFORD LOCAL OPTION BY-LAW* (1915), 9 O. W. N. 225; 35 O. L. R. 26.—CAN.

b. ———.]—*Re OWEN SOUND LOCAL OPTION BY-LAW* (1915), 9 O. W. N. 268; 35 O. L. R. 48.—CAN.

c. *Amendment of burgess list.*]—Where a borough council, in the exercise of the authority, conferred Municipal Corporations Act, 1886, refuses to amend the burgess list, the ct. will not grant a *mandamus* to compel it to add to the list the name of any person who cannot clearly show that he has a complete qualification.—*HANLON v. WEST HARBOUR BOROUGH (MAYOR, COUNCILLORS & BURGESSES)* (1888), 7 N. Z. L. R. 106.—N.Z.

## PART VII. SECT. 8, SUB-SECT. 3.—C. (b).

d. *For what purposes granted—To test validity of resolution.*]—*R. v.*



*Sect. 8.—Legal proceedings: Sub-sect. 3, C. (b), (c), (d) & (e), D. (a) & (b), & E. Sects. 9 & 10. Parts VIII. & IX.]*

**658. — To test validity of charter.] — R. v. BOUCHER, No. 257, ante.**

*See, generally, CORPORATIONS, Vol. XIII., pp. 297, 298.*

**To remove order for payment out of borough fund.]—See Sect. 5, sub-sect. 1, B. (c), ante.**

**659. — Whether sole remedy.] — A.-G. v. DE WINTON, No. 497, ante.**

**— To remove order to raise borough rate.]—See RATES & RATING.**

**Procedure.]—See CROWN PRACTICE, Vol. XVI., pp. 458 et seq.**

**Costs.]—See, generally, CROWN PRACTICE, Vol. XVI., pp. 477 et seq.**

**— Liability of individual councillors.]—See Nos. 355, 356, ante.**

#### (c) Quo Warranto.

*See 1882 Act, s. 225, & generally, CROWN PRACTICE, Vol. XVI., pp. 353 et seq.*

**Whether quo warranto or mandamus proper remedy.]—See Nos. 650–653, ante.**

**660. For what purposes granted — To test corporate right.]—The ct. will grant an information against a mayor, for the purpose of trying a corporate right.—R. v. TENTERDEN (MAYOR) (1723), 8 Mod. Rep. 114; 88 E. R. 89.**

**661. — To test validity of election or appointment—Not limited to corporate office.]—R. v. HIGHMORE, No. 505, ante.**

**— Councillor.]—See Sect. 2, sub-sect. 2, A., ante.**

*See, generally, CROWN PRACTICE, Vol. XVI., pp. 335 et seq.*

**To test validity of incorporation.]—See CORPORATIONS, Vol. XIII., pp. 297, 298, Nos. 287–290.**

**662. — To test validity of dismissal.] — The local board of L. consisted of nine members. R. was elected clerk of such board in Apr. 1857, & acted as such clerk until Sept. 1877, when a board of eight members dismissed him, & appointed J. in his place:—*Held*: as R. had been dismissed by persons having authority to dismiss him, a *quo warranto* ought not to issue to displace J.—*Ex p. RICHARDS* (1878), 3 Q. B. D. 368; 47 L. J. Q. B. 498; 26 W. R. 695; *sub nom. Re JONES, Ex p. RICHARDS*, 38 L. T. 684; *sub nom. R. v. JONES*, 42 J. P. 614, D. C.**

*Annotation:—Reid. Wood v. East Ham U. D. C. (1907), 71 J. P. 129.*

**Procedure.]—See CROWN PRACTICE, Vol. XVI., pp. 362 et seq., 368 et seq.**

**663. — To whom directed—Mayor — To test corporate right.]—R. v. TENTERDEN (MAYOR), No. 660, ante.**

**664. Costs — Payable out of borough fund.]—R. v. SUNDERLAND TOWN COUNCIL (1838), 2 J. P. 502.**

*—See, generally, CROWN PRACTICE, Vol. XVI., pp. 371 et seq.*

#### (d) Scire facias.

*See, generally, CROWN PRACTICE, Vol. XVI., pp. 245 et seq.*

**665. Validity of charter—How tested—Whether by scire facias or certiorari.]—R. v. BOUCHER, No. 257, ante.**

*—See, generally, CORPORATIONS, Vol. XIII., pp. 297, 298.*

#### (e) Injunction.

**Jurisdiction of court.]—See, generally, INJUNCTION, Vol. XXVIII., pp. 363 et seq.**

**— Ouster by provision of statutory remedy.]—See INJUNCTION, Vol. XXVIII., pp. 367 et seq.**

**666. For what purposes granted — Restraint of breach of trust—Between passing of Act—& date of coming into force.]—The ct. will not grant an injunction to restrain parties from proceeding to deal with property, whose right if it exists, depends upon the construction of a doubtful statute, where the granting of the injunction would for ever deprive them of an opportunity of exercising the right, especially if no irreparable mischief is to be apprehended from allowing them to proceed.**

*The ct. has authority, under its general jurisdiction, to interfere for the protection of property vested in the corpn. of a borough named in 1835 Act, on the ground of breach of trust committed or threatened after the passing of that Act, although the time when the existing members of the governing body corporate of such borough are to go out of office may not have arrived.—A.-G. v. LIVERPOOL CORPN. (1835), 1 My. & Cr. 171; 40 E. R. 342; subsequent proceedings, sub nom. A.-G. v. ASPINALL (1836), 1 Keen, 513; (1837), 2 My. & Cr. 613, L. C.*

*Annotations:—Expld. Greenhalgh v. Manchester & Birmingham Ry. (1838), 3 My. & Cr. 784. Reid. A.-G. v. Wigan Corp. (1854), 23 L. T. O. S. 43; A.-G. v. Avon Corp. (1863), 33 Beav. 67. Mentd. Re Public Fortification Acts, Ex p. Hythe Corp. (1840), 4 Y. & C. Ex. 55; Galbreath v. Armour (1845), 4 Bell, Sc. App. 374; Mill v. Hawker (1874), L. R. 9 Exch. 309; R. v. Kensington Income Tax Comrs., Ex p. de Polignac, [1917] 1 K. B. 486.*

**667. — To restrain publication of minutes—Minutes alleged to be libellous—Injunction refused.]—PLANT v. EAST HAM CORPN. (1906), 70 J. P. Jo. 244.**

*See, further, LIBEL & SLANDER.*

**Restraint of nuisance—As sanitary authority.]—See NUISANCE; PUBLIC HEALTH.**

*—See, generally, INJUNCTION, Vol. XXVIII., pp. 439 et seq.*

**Whether Attorney-General a necessary party.]—See, generally, CROWN PRACTICE, Vol. XVI., pp. 488 et seq.; INJUNCTION, Vol. XXVIII., pp. 494**

#### D. Practice and Procedure.

##### (a) Discovery.

*See, generally, CORPORATIONS, Vol. XIII., pp. 421 et seq.*

KERRY COUNTY COUNCIL, [1905] 2 I. R. 299.—IR.

#### PART VII. SECT. 8, SUB-SECT. 3.—C. (c).

**e. For what purposes granted — To test qualification for office.]—R. v. PINKSTONE (1888), 9 N. S. W. L. R. 201.—AUS.**

**f. —.]—Re WOOD (1867), 26 U. C. R. 513.—CAN.**

**Corpn. (1841), 4 I. L. R. 147; 2 Leg. Rep. 81; Jebb & B. 39.—IR.**

**h. Jurisdiction.]—The jurisdiction of the master in chambers to grant a *quo warranto* summons under Municipal Act, 1883 (O.), is established by Administration of Justice Act, 1885, s. 13.—R. (FELTZ) v. HOWLAND (1886), 11 P. R. 264.—CAN.**

#### PART VII. SECT. 8, SUB-SECT. 3.—C. (e).

**k. For what purposes granted — To restrain borrowing when statutory requirements not complied with.]—A.-G. v. CAMBERWELL CORPN., [1907] V. L. R. 448.—AUS.**

**l. — To restrain interference with councillors in exercise of official duties.]—MEARNS v. TOWN OF PETROLIA CORPN. (1880), 28 Gr. 98.—CAN.**

**m. — To restrain use of premises for prohibited purpose — Action by corporation despite permit by public officer.]—CITY OF TORONTO v. SOLWAY (1919), 46 O. L. R. 24; 16 O. W. N. 306.—CAN.**

**n. — Prevention of irreparable injury — Action by ratepayer.]—HOOPER v. NORTH VANCOUVER (B.C.), [1922] 1 W. W. R. 1249; 65 D. L. R. 286.—CAN.**

**Interrogatories—To officers of corporate bodies—Whether allowed.]—**See DISCOVERY, Vol. XVIII., pp. 186, 187, Nos. 1372–1375.

**What interrogatories allowed.]—**See DISCOVERY, Vol. XVIII., p. 192, No. 411.

**—The answer.]—**See DISCOVERY, Vol. XVIII., pp. 235, 236.

(b) *Enforcement of Judgments and Orders.*

See, generally, CORPORATIONS, Vol. XIII., pp. 426 *et seq.*

**668. Whether enforceable against corporation lands.]—**Where an action lies against a corpn., *qu.* : whether they can exempt their lands from execution by alleging that they are held only for the purposes of the borough under 1835 Act, s. 92.—DOE d. PARR v. ROE (1841), 1 Q. B. 700 ; 1 Gal. & Dav. 220 ; 10 L. J. Q. B. 317 ; 5 J. P. 626 ; 6 Jur. 101 ; 113 E. R. 1299.

**669. —.]—**BRECON CORPN. v. SEYMOUR, No. 327, *ante.*

**Whether property of new corporation liable to debts of predecessors.]—**See EXECUTION, Vol. XXI., p. 423.

*E. Costs.*

See, generally, CORPORATIONS, Vol. XIII., p. 428 ; PRACTICE.

**Of mandamus.]—**See, generally, CROWN PRACTICE, Vol. XVI., pp. 347 *et seq.*

**Of quo warranto.]—**See, generally, CROWN PRACTICE, Vol. XVI., pp. 371 *et seq.*

**Of certiorari.]—**See, generally, CROWN PRACTICE, Vol. XVI., pp. 477, 478.

**Of injunction.]—**See, generally, INJUNCTION, Vol. XXVIII., pp. 539 *et seq.*

**670. Security for costs—Whether ordered against informer—Action supported by corporation.]—**An informer cannot be called on, when suing for penalties, to give security for costs, although the corpn. of the borough where the action arises, are themselves supporting the action.—BRADSNINK v. BOYLE (1838), 2 J. P. 375.

**Whether ordered against corporation.]—**See CORPORATIONS, Vol. XIII., p. 428, Nos. 1518, 1519.

**Liability of individual members.]—**See Nos. 355, 356, *ante.*

**Payment out of borough fund.]—**See Sect. 5, sub-sect. 1, B. (a) ii., *ante.*

**671. Recovery by solicitor—Whether retainer under seal necessary.]—**R. v. PREST, No. 542, *ante.* See, also, No. 518, *ante.* & generally, CORPORATIONS, Vol. XIII., pp. 383, 384.

**672. —Solicitor also town clerk—What costs recoverable.]—**R. v. PREST, No. 542, *ante.*

SECT. 9.—BYE-LAWS.

See, generally, 1882 Act, s. 23 ; CORPORATIONS, Vol. XIII., pp. 325 *et seq.* ; PUBLIC HEALTH.

SECT. 10.—THE BOROUGH CIVIL COURT.

See 1882 Act, ss. 175–185, & generally, COURTS, Vol. XVI., pp. 197 *et seq.*

## Part VIII.—The County Borough.

See 1888 Act, ss. 31–34, 170.

**673. Powers as urban district—Transfer of powers under adoptive acts.]—**KIRKDALE BURIAL BOARD v. LIVERPOOL CORPN., No. 337, *ante.*

**Union of county boroughs.]—**See 1888 Act, s. 55.

**Financial relations with county.]—**See Part XII., Sect. 5, sub-sect. 4, B., *post.*

## Part IX.—The Quarter Sessions Borough.

See 1882 Act, ss. 150–153, 162–168, 171, 187, & generally, MAGISTRATES.

### PART VII. SECT. 8, SUB-SECT. 3.—D. (b).

**o. Whether enforceable against public buildings.]—**The city hall in Winnipeg may be sold under execution against the city, & is subject to sale in pursuance of Mechanics' Lien Act.—MCARTHUR v. DEWAR (1885), 3 Man. L. R. 72.—CAN.

### PART VII. SECT. 8, SUB-SECT. 3.—E.

**p. Security for costs—Whether ordered against ratepayers.]—**MCALLISTER v. O'MEARA (1896), 17 P. R. 176.—CAN.

**q. Liability of aldermen—Action to restrain acts beyond authority.]—**A.-G. v. HUNTER'S HILL BOROUGH

(1891), 12 N. S. W. Eq. 78 ; 6 N. S. W. W. N. 149.—AUS.

**r. Liability of disqualified member.]—**Where deft. personally contested the election, but on its being moved against sent in a disclaimer, praying to be relieved from costs, because being duly elected he was obliged to accept the office under a penalty :—*Held* : no ground for such relief.—R. v. MCMONIES (1851), 2 C. L. Ch. 137.—CAN.

**t. Recovery by ratepayer—Action to test disqualification.]—**Parties are not to be discouraged from bringing cases of disqualification under the notice of the proper tribunals by the peril of having to lose the costs necessarily incurred.—*Re* CHARLES v. LEWIS & MCMAHON (1851), 2 C. L. Ch. 171,

177.—CAN.

**a. —Action in good faith.]—**BAXTER v. KERR (1876), 23 Gr. 367.—CAN.

**b. —.]—**Where pltf. has good reason to believe an illegal act is contemplated by the corpn., he is justified in taking action, & should not be deprived of his costs.—PRINGLE v. STRATFORD (1912), 22 O. W. R. 215 ; 3 O. W. N. 1293 ; 4 D. L. R. 173.—CAN.

**c. Liability of corporation—Bye-law complained of since repealed.]—**When a council, on being served with a rule *nisi*, repeals the bye-law complained of, they are still obliged to pay the costs of the application.—*Re* COLEMAN (1858), 9 C. P. 146.—CAN.



## Part X.—The Rural District.

### SECT. 1.—IN GENERAL.

**Former rural sanitary district.]—***See* 1894 Act, s. 21 (2).

**A county district.]—***See* 1894 Act, s. 21 (3).

**674. Vesting of property in — Well abutting on highway.]—**STOKE PARISH COUNCIL *v.* PRICE, No. 182, *ante*.

### SECT. 2.—THE RURAL DISTRICT COUNCIL.

#### SUB-SECT. 1.—IN GENERAL.

**Constitution.]—***See* 1894 Act, ss. 21 (2), 24 (1), (7).

**Chairman.]—***See* 1894 Act, ss. 22, 59.

**— Disqualification.]—***See* 1894 Act, s. 46; Part II., Sect. 3, sub-sect. 2, *ante*.

**Vice-chairman.]—***See* 1894 Act, s. 59 (2).

**Councillors—Qualification.]—***See* 1894 Act, ss. 20, 24 (4).

**— Disqualification.]—***See* 1894 Act, s. 46; Part II., Sect. 3, sub-sect. 2, *ante*.

**675. — Number — Jurisdiction of county council to “fix” — May be fixed at previous number.]—**R. *v.* WEST RIDING OF YORKSHIRE COUNTY COUNCIL, *Ex p.* HEMSWORTH POOR LAW UNION, No. 707, *post*.

**Election.]—***See* ELECTIONS, Vol. XX., p. 140.

**As guardians of the poor.]—***See* 1894 Act, s. 24 (3), & *generally*, POOR LAW.

**676. — Whether liable as surveyor of highways—Under Highway Act, 1835 (c. 50), s. 46.]—**Notwithstanding 1894 Act, s. 25, a rural district councillor is not a surveyor of highways, nor subject to penalties under Highway Act, 1835 (c. 50), s. 46, for letting to hire a team to be used in repairing highways within the district of the council of which he is a member without any licence in writing from two justices of the peace, & for receiving payment from the council in respect thereof.—BUCKLEY *v.* HANSON (1898), 77 L. T. 664; 62 J. P. 119; 42 Sol. Jo. 198; 18 Cox, C. C. 688, D. C.

#### SUB-SECT. 2.—POWERS, DUTIES AND LIABILITIES.

**Powers & duties.]—***See, generally*, 1894 Act, ss. 25–27.

**677. — Promotion of bill in Parliament — For compulsory acquisition of land & water rights.]—**CLEVERTON *v.* ST. GERMAIN'S UNION RURAL SANITARY AUTHORITY, No. 687, *post*.

**— In respect of particular matters.]—***See* the cross-references at the head of this Title.

#### PART X. SECT. 2, SUB-SECT. 1.

**d. Chairman — Right to vote until re-appointed.]—**The outgoing chairman of a rural district council who has not been re-elected a member of the council at the triennial election, although entitled to continue in office until his successor has accepted office & subscribed the required declaration, is not entitled at meetings of the new council to give an original vote in addition to a casting vote.—R. *v.* BENNETT, [1921] 2 L. R. 134.—IR.

**e. Vice-chairman — Right to preside in absence of chairman.]—**The vice-chairman of a rural district council in the absence of the chairman, took the

chair at a meeting of that body, & continued present & willing to preside. Notwithstanding that the members elected another member to the chair: *Held*: as long as the vice-chairman was present & willing to occupy the chair & act legally he was entitled to remain in the chair, & there was no power in the meeting while he was present to elect a chairman in his place.—R. *v.* BRENNAN (1916), 50 L. L. T. 68.—IR.

#### PART X. SECT. 2, SUB-SECT. 2.

**f. Powers & duties — Erection of court house.]—**The ct. refused a *mandamus*, at the instance of the justices of a district, to compel the district council to build a ct. house.—HURON

**678. Liabilities — Transfer of — Part of area turned into urban district.]—**Where a local authority was, before 1894 Act, a board of guardians which had constructed a sewerage system, it was just as responsible as any private person for allowing sewage to escape therefrom to the injury of others, whether the injury consisted in fouling the water of a river in infringement of the rights of riparian owners or in depositing offensive matter on their land, & the liability of the guardians in this respect was by 1894 Act, s. 25, transferred to rural district councils. The liability so transferred to a rural district council is passed on to an urban district council by an order which transfers to it the liabilities of a rural district council on part of the rural district being turned into an urban district.—JONES *v.* LLANRWST URBAN DISTRICT COUNCIL, [1911] 1 Ch. 393; 80 L. J. Ch. 145; 75 J. P. 68; *sub nom.* ISGOED JONES *v.* LLANRWST URBAN DISTRICT COUNCIL, 103 L. T. 751; 27 T. L. R. 133; 55 Sol. Jo. 125; 9 L. G. R. 222; *subsequent proceedings, sub nom.* JONES *v.* LLANRWST URBAN DISTRICT COUNCIL (1912), 76 J. P. Jo. 243.

**Annotations:—***Mentd.* *Re* Porter, Amphlett & Jones (1912), 81 L. J. Ch. 544; *Re* Roney, [1914] 2 K. B. 529; *White v. London General Omnibus Co.* (1911), 58 Sol. Jo. 339; *Seal v. Turner*, [1915] 3 K. B. 194.

**— As sanitary authority.]—***See* SEWERS & DRAINS.

**Nuisance.]—***See, generally*, NUISANCE.

#### SUB-SECT. 3.—CONTRACTS.

*See* 1875 Act, s. 173, & *generally*, CORPORATIONS, Vol. XIII., pp. 378 *et seq.*

**679. Necessity for seal—Contract under Housing of the Working Classes Act, 1890 (c. 70).]**—NIXON *v.* ERITH URBAN DISTRICT COUNCIL, No. 105, *ante*.

#### SUB-SECT. 4.—OFFICERS.

*See* 1875 Act, s. 190, & *generally*, Part II., Sect. 6, *ante*.

**680. Clerk—Whether entitled to fulfil all duties—Clerk to council as highway authority.]—**The K. rural district council were the successors to a rural sanitary authority & a highway board. Pltf., as clerk to the guardians, acted as clerk to the rural sanitary authority, & on the rural district council coming into office, became clerk to the council in their capacity as sanitary authority. J. was clerk to the highway board, & on the council succeeding to the duties of the highway board,

DISTRICT JJ. *v.* HURON DISTRICT COUNCIL (1848), 5 U. C. R. 574.—CAN.

**g. Liabilities — For transactions of council's predecessors.]—**McKEE *v.* HURON DISTRICT COUNCIL (1844), 1 U. C. R. 368.—CAN.

**h. — — —.]—**The District Council Act, 1841, did not subject a district council to be sued upon an implied *assumpsit* by reason of any transaction between pltf. & the justices in quarter sessions, or the treasurer of the district, before the existence of the council.—LOW *v.* OTTAWA DISTRICT COUNCIL (1847), 4 U. C. R. 194.—CAN.

became their clerk as highway authority. The district council subsequently directed that several of the duties formerly done by pltf. as clerk should be done by J., but they did not modify, & did not propose to modify, pltf.'s salary or remuneration as clerk in any way. Pltf. claimed an injunction to restrain the council from preventing him acting as clerk to the rural district council so long as he was able & willing to perform the duties attaching to the office of clerk & remained clerk to the guardians. Injunction refused.—*GENN v. EAST KERRIER RURAL DISTRICT COUNCIL* (1898), 62 J. P. 215.

**681. — Provision for performance of duties in absence—Production of minute book.]—***R. v. ANDOVER RURAL DISTRICT COUNCIL, Ex p. THORNHILL*, No. 682, *post*.

**Succession to other authorities—Effect on existing officers.]—***See* 1894 Act, s. 81.

**Compensation on abolition of office.]—***See* PUBLIC AUTHORITIES.

#### SUB-SECT. 5.—MEETINGS AND COMMITTEES.

**Meetings.]—***See* 1894 Act, s. 59; P. H. Act, 1875, Sched. I., & generally, Part II., Sect. 7, *ante*.

**Committees.]—***See, generally*, Part II., Sect. 8, *ante*.

**Joint committees.]—***See* 1894 Act, s. 57.

#### SECT. 3.—BOOKS AND DOCUMENTS.

**Right of inspection.]—***See* 1894 Act, s. 58 (5).

**682. — Duty of clerk to provide for — During absence.]—**When the clerk to a rural district council goes away, he should leave some person with authority to produce the minute book to any one entitled to see it.—*R. v. ANDOVER RURAL DISTRICT COUNCIL, Ex p. THORNHILL* (1913), 77 J. P. 296; 29 T. L. R. 419; 11 L. G. R. 996, D. C.

**683. — “ Documents ” — Counsel’s opinion.]—**A parochial elector of a parish in a rural district having threatened litigation against the council of the district, the council took the opinion of counsel as to their liability. The parochial elector claimed a right under 1894 Act, s. 58 (5) to inspect the case submitted to counsel & his opinion thereon:—*Held*: the case & opinion were “ documents ” within sect. 58, but under the circumstances the ct. would not enforce the parochial elector’s right of inspection by *mandamus*.—*R. v. GODSTONE RURAL COUNCIL*, [1911] 2 K. B. 465; 80 L. J. K. B. 1184; 105 L. T. 207; 75 J. P. 413; 27 T. L. R. 424; 9 L. G. R. 665, D. C.

*Annotation*:—*Consd. R. v. Hampstead B. C., Ex p. Woodward* (1917), 116 L. T. 213.

**684. — Unless privileged—Counsel’s opinion concerning subject-matter of dispute—Dispute subject of action.]—**Appct. had commenced proceedings against one E. with regard to an alleged trespass over his lands. E. presented a petition to the rural district council, calling upon the council to take action with regard to certain alleged rights of way over appct.’s lands, & in consequence, the council took counsel’s opinion on a case laid before him. Appct., as a parochial elector, claimed the

right under 1894 Act, s. 58 (5) to see the case & opinion:—*Held*: under the circumstances, he had no such right.—*R. v. BRADFORD-ON-AVON RURAL DISTRICT COUNCIL, Ex p. THORNTON* (1908), 99 L. T. 89; 72 J. P. 348; 6 L. G. R. 847, D. C.

*Annotation*:—*Folld. R. v. Godstone R. C.*, [1911] 2 K. B. 465.

**685. — — — Dispute subject of proposed action.]—***R. v. GODSTONE RURAL COUNCIL*, No. 683, *ante*.

—*See, generally*, CORPORATIONS, Vol. XIII., pp. 302 *et seq.*

#### SECT. 4.—FINANCE.

##### SUB-SECT. 1.—THE COMMON FUND.

*See, generally*, P. H. Act, 1875, s. 229; RATES & RATING.

**How raised.]—***See* P. H. Act, 1875, s. 229.

**686. — Whether by district rate — Urban powers conferred on rural district.]—**The Local Govt. Board, acting under P. H. Act, 1875, s. 276, made an order that the provisions of sect. 161, relating to lighting streets, etc., should be in force within part of the district of a rural sanitary authority, & that the said authority should be invested with all the powers, rights, duties, capacities, liabilities, & obligations of an urban sanitary authority “ under those provisions ”:—*Held*: the effect of the order was to invest the said authority with the power of an urban authority to incur expenses under sect. 161, but not to apply to it the conditions as to rating applicable under sects. 207–211 to an urban authority, & inasmuch as the order did not declare the expenses incurred thereunder to be special expenses within sect. 229, they were to be treated as general expenses. Therefore a railway co. was liable to be assessed to any rate made for meeting such expenses on the whole, not on one fourth part only, of the net value of land occupied as a railway.—*LANCASHIRE & YORKSHIRE RY. CO. v. BOLTON UNION ASSESSMENT COMMITTEE & GREAT LEVER OVERSEERS* (1890), 15 App. Cas. 323; 60 L. J. Q. B. 118; 63 L. T. 358; 54 J. P. 532, H. L.

**687. Payment out of—Expenses of promoting bill in Parliament.]—**A rural sanitary authority has no power to charge the rates with the expenses of promoting a bill in Parliament.

A rural sanitary authority, being unable to acquire by purchase land & water rights necessary for the purpose of procuring a water supply for their district, which it was the duty of the authority to do under the Public Health Acts, instructed their solr. to promote a bill in Parliament for the purpose of obtaining powers to purchase the land & water rights compulsorily:—*Held*: the rural sanitary authority had no power to promote such a bill, & therefore their solr. could not recover his costs from them.—*CLEVERTON v. ST. GERMAIN’S UNION RURAL SANITARY AUTHORITY* (1886), 56 L. J. Q. B. 83; 3 T. L. R. 43.

**General expenses.]—***See* P. H. Act, 1875, s. 229.

— **Highway expenses.]—***See* 1894 Act, s. 29; HIGHWAYS, Vol. XXVI., pp. 396, 397; RATES & RATING.

**Urban powers conferred on rural district—No special provision in order.]—**LAN-

#### PART X. SECT. 4, SUB-SECT. 1.

**k. Surtax.]—**The surtax imposed under the surtax provisions of Rural Municipality Act is the property of

the province, & a municipal council has no right to use it for municipal purposes, although the Act provides for the use of the municipal machinery for the purpose

of collection.—*COUNCIL OF RURAL MUNICIPALITY OF SNIPE LAKE NO. 259 v. MARTIN* (Sask.), [1918] 1 W. W. R. 841; *reversd.* 2 Sask. L. R. 46.—CAN.



1, 2 & 3: *Sub-sect. 1.*

ASSESSMENT COMMITTEE &  
SEERS, No. 686, *ante*.

## SUB-SECT. 2.—EXPENSES.

**General expenses—Payable out of common fund.**—*See* Sect. 4, sub-sect. 1, *ante*.

**Special expenses.**—*See* P. H. Act, 1875, s. 221 1894 Act, s. 29.

**Drainage expenses.**—*See* SEWERS DRAINS.

**Provision of water supply.**—*See* WATER SUPPLY.

**689.** — Urban powers conferred on rural district — No special provision in order.] — LANCASHIRE & YORKSHIRE RY. CO. v. BOLTON UNION ASSESSMENT COMMITTEE & GREAT LEVER OVERSEERS, No. 686, *ante*.

**Assessment of contributory place.**—*See* P. H. Act, 1875, ss. 229, 230.

**Assessment raised by rate.**—*See* RATES & RATING.

**690.** — Recovery before justices—Jurisdiction to refuse warrant—Expenditure disapproved by Local Government Board.]—DILLWYN v. DONNE (1889), 53 J. P. Jo. 52.

**691.** — Jurisdiction to adjourn application—Appeal to Local Government Board pending.]—A rural authority having incurred expenses in the execution of the P. H. Act, 1875, pursuant to sect. 229, purported to apportion them between certain parishes, & issued their precepts for the amounts due under the apportionments. The overseers of one parish having received notice of such apportionment, appealed to the Local Govt. Board under that sect. against such apportionment. Before the decision of the Local Govt. Board was made known application was made to justices under sect. 231 for a distress warrant to recover the amount of the precept. The justices adjourned the hearing of such application until the decision of the Local Govt. Board was made known:—*Held*: the justices were entitled to do so.—R. v. FOX, *Ex p.* PLYMPTON ST. MARY RURAL DISTRICT COUNCIL (1908), 99 L. T. 90; 72 J. P. 331; 6 L. G. R. 1068, D. C.

*Annotation*:—*Refd.* Plympton St. Mary R. C. v. Reynolds (1909), 78 L. J. K. B. 417.

**Private improvement expenses.**—*See* P. H. Act, 1875, ss. 23, 41, 62, 150, 232; HIGHWAYS, Vol. XXVI., pp. 532 *et seq.*, 535, 536; SEWERS & DRAINS; WATER SUPPLY.

## SUB-SECT. 3.—BORROWING.

*See, generally*, Part II., Sect. 9, sub-sect. 1, *ante*.

## PART X. SECT. 5, SUB-SECT. 1.

**1. Suit against council for debt—Debt must be shown to be legally incurred.**—A district council cannot be

sued upon the common money count on account stated, unless at least the subject-matter of the account be averred, & it is seen to be such as can by law create a debt from debts to

pltf. to be satisfied out of the funds of the district.—HURON DISTRICT COUNCIL v. LONDON DISTRICT COUNCIL (1847), 4 U. C. R. 302.—CAN.

## SECT. 5.—LEGAL PROCEEDINGS

## SUB-SECT. 1.—IN GENERAL.

*See, generally*, Part II., Sect. 11, *ante*.

**692. Parties—Whether district or parish council—Trespass to roadside herbage.**—By an award under an inclosure Act the herbage on an occupation road was sold by auction yearly by an auctioneer appointed by the inhabitants of the parish, or in default it was sold by the surveyor or surveyors of highways, & the money derived from such sale was, under the award, used in repairing the roads of the parish. An action was brought by the district council, as successors to such surveyors of highways, against deft. for damages & an injunction for wrongfully depasturing his cattle on the said road, the A.-G. being joined on their relation:—*Held*: as the property in the said herbage was in the parish council, as representing the inhabitants of the parish, who had the beneficial interest in the said sale, which council, & not the district council, was held to be the proper pltf., & consequently only the interests of a small part of the community were involved & not those of the community at large, the A.-G. could not be joined as a pltf.—A.-G. & SPALDING RURAL COUNCIL v. GARNER, [1907] 2 K. B. 480; 76 L. J. K. B. 965; 97 L. T. 486; 71 J. P. 357; 23 T. L. R. 563; 5 L. G. R. 944.

*See, also*, No. 182, *ante*.

**693.** — Whether Attorney-General joined.]—A.-G. & SPALDING RURAL COUNCIL v. GARNER, No. 692, *ante*.

**694.** — Protection of public right of way.]—Pltf. council asked for a declaration as to a public right of way & for consequential relief. Deft., by his defence, admitted the claim as to part, but denied it as to another part, & submitted that the action was not maintainable, the A.-G. not being a party. The action was subsequently settled, judgment being taken on agreed minutes, the defence being withdrawn. At the hearing it was submitted on behalf of pltf. that the action was rightly constituted:—*Held*: this was so, & in the circumstances the A.-G. was not a necessary party.—NEWTON ABBOT RURAL DISTRICT COUNCIL v. WILLS (1913), 77 J. P. 333.

—*See, generally*, CONSTITUTIONAL LAW, Vol. XI., p. 513; CROWN PRACTICE, Vol. XVI., pp. 488 *et seq.*

**Protection of public rights of way.**—*See* 1894 Act, s. 26, & *generally*, HIGHWAYS, Vol. XXVI., pp. 391, 392.

## SUB-SECT. 2.—ENFORCEMENT OF DUTIES.

*See, generally*, Part II., Sect. 11, sub-sect. *ante*.

**By county council—On application of parish council.**—*See* 1894 Act, s. 16 (1), (2), 26 (4).

**By Ministry of Health.**—*See* P. H. Act, 1875, ss. 106, 299–302.

## Part XI.—United Districts.

*See, generally, P. H. Act, 1875, ss. 279–285.*

**695. Expenses — How apportioned.]**—A provisional order of the Local Govt. Board confirmed by a local Act, provided that the expenses incurred by the joint board for the district should be defrayed out of a common fund to be contributed by the component districts in manner provided by P. H. Act, 1875, s. 283, & that the contributions of certain of the component districts should be contributed & raised as if they were required to

defray special expenses within P. H. Act, 1875 :—*Held* : on a special case that the joint board should apportion the contributions of the component districts according to the ratable values of the properties in such districts to be ascertained according to the valuation list.—*DARENTH MAIN VALLEY SEWERAGE BOARD v. DARTFORD UNION GUARDIANS* (1887), 19 Q. B. D. 270 ; 56 L. J. Q. B. 615 ; 57 L. T. 233 ; 36 W. R. 43, D. C.

**Borrowing powers.]**—*See* P. H. Act, 1875, s. 244.

## Part XII.—The County.

## SECT. 1.—IN GENERAL.

**Definition.]**—*See* 1888 Act, s. 100.

**Administrative county.]**—*See* 1888 Act, s. 100.

## SECT. 2.—BOUNDARIES.

*See* 1888 Act, ss. 50–63.

**696. Counties separated by river — Medium flum rule applies.]**—At the trial of a presentment for the non-repair of half a bridge, being a county bridge, the jury returned a special verdict showing that the bridge in question is in the parish of G., which is partly in the county of R. & partly in the county of B. ; that it is thrown over the Wye ; & if that river had always been the boundary of those two counties, the part of G. parish on the B. side, the right bank, containing about 470 acres, would always have been in the county of B., & the duty of repairing one half of the bridge would have rested on the inhabitants of that county. These 470 acres had been taken to be part of the county of R. ; & previously to the passing of Counties detached Parts Act, 1844 (c. 61), whole of the bridge had always been repaired by the inhabitants of the county of R. By 2 & 3 Will. 4, c. 64, a part of the parish of G., is described as an isolated part of B., as locally situate in B., or R. ; & is by sect. 26 annexed to B. for the purpose of election for members to serve in Parliament. By Counties detached Parts Act, 1844 (c. 61), from & after Oct. 21, 1844, every part of any county in England & Wales, which is detached from the main body of such county, shall be considered for all purposes as forming part of that county of which it is considered a part for the purposes of the election of members, etc., under the provisions of 2 & 3 Will. 4, c. 64. At the hearing, an amendment was made in the special verdict, by which it was conceded that the above-mentioned piece of 470 acres was the only part of G. parish to which the provision in 2 & 3 Will. 4, c. 64, sched. M., could apply :—*Held* : in the absence of any words in the Act determining

the boundary on the side of the river, the ordinary rule applied, & the boundary of the two counties was the line of the midchannel of the river.—*R. v. BRECON (INHABITANTS)* (1850), 15 Q. B. 813 ; 4 New Mag. Cas. 121 ; 4 New Sess. Cas. 272 ; 19 L. J. M. C. 203 ; 15 L. T. O. S. 432 ; 14 J. P. 655 ; 15 Jur. 351 ; 117 E. R. 665.

*Annotations* :—*Mentd.* *R. v. Glamorganshire J.J.* (1849), 13 Q. B. 561 ; *R. v. Estcourt* (1855), 24 L. T. O. S. 299 ; *Re Staffordshire & Derbyshire County Councils* (1890), 54 J. P. 566.

*See, generally, WATERS & WATERCOURSES.*

## SECT. 3.—THE COUNTY COUNCIL

## SUB-SECT. 1.—IN GENERAL.

**Constitution.]**—*See* 1888 Act, ss. 1, 79.

**697. Status — Distinguished from municipal common law corporation.]**—1888 Act, s. 2, which provides that the council of a county is to be in the like position in all respects, as the council of a borough divided into wards, does not confer upon such county the powers of a corp'n. created by charter, but merely assimilates the procedure of the one with that of the other.—*LONDON COUNTY COUNCIL v. A.-G.*, [1902] A. C. 165 ; 71 L. J. Ch. 268 ; 86 L. T. 161 ; 66 J. P. 340 ; 50 W. R. 497 ; 18 T. L. R. 298, H. L. ; *affg.* S. C. *sub nom.* *A.-G. v. LONDON COUNTY COUNCIL*, [1901] 1 Ch. 781, C. A.

*Annotations* :—*Mentd.* *A.-G. v. Wimbledon House Estate Co.*, [1904] 2 Ch. 34 ; *A.-G. v. Manchester Corp'n.*, [1906] 1 Ch. 643 ; *A.-G. v. Mersey Ry.*, [1907] A. C. 415 ; *A.-G. v. West Gloucestershire Water Co.*, [1909] 2 Ch. 338 ; *A.-G. v. Birmingham, Tame & Rea District Drainage Board*, [1910] 1 Ch. 48 ; *Vacher v. London Soc. of Compositors*, [1912] 3 K. B. 547 ; *A.-G. v. Westminster City Council*, [1924] 2 Ch. 416 ; *Deuchar v. Gas Light & Coke Co.*, [1924] 2 Ch. 426 ; *A.-G. v. Denby*, [1925] Ch. 596.

**698. Functions — Whether administrative or judicial—Council as licencing authority.]**—The County Council in determining applications for music & dancing licences are acting judicially, & are bound by the same principles as are binding on justices in determining questions which come before them for judicial decision.

The London County Council delegated to a

## PART XI.

**m. Expenses — Liability of separated unit—Expenses incurred when united.]**—*COUNTY OF WELLINGTON v. TOWNSHIP OF WATERLOO* (1858), 8 C. P. 358.—**CAN.**

**n. — — — — —.]** — Pltf. con-

tracted under seal with the united counties of H. & B., to construct a gravel road in B. The counties were separated on Jan. 1, 1867 :—*Held* : pltf. could not afterwards sue the county of B. alone for work done in making the road.—*EKINS v. COUNTY OF BRUCE CORPN.* (1870), 30 U. C. R. 48.—**CAN.**

## PART XII. SECT. 1.

**o. Selection of county town — By resolution—Bye-law not indispensable.]**—*Re IBSON & PEEL COUNTY PROVISIONAL CORPN.* (1860), 19 U. C. R. 174.—**CAN.**



**Sect. 3.—The county council: Sub-sects. 1, 2 & 3, A., B., C. & D. (a).]**

committee of their body the hearing of applications for music & dancing licences. The committee by a majority recommended that a licence which had been applied for should not be granted. Appct. thereupon applied to the County Council for a licence. At the hearing before the County Council certain members of that body, who were also members of the committee & had voted in the majority against granting a licence at the hearing before the committee, instructed counsel to represent them before the County Council & oppose the application for a licence. The councillors so instructing counsel were present at the hearing, but did not vote. The council by a majority refused the application for a licence:—*Held*: the presence at the hearing of those members of the County Council who had instructed counsel to oppose the application vitiated the proceedings, & a rule for a *mandamus* to hear & determine the application according to law was accordingly made absolute.—*R. v. LONDON COUNTY COUNCIL, Ex p. AKKERSDYK, Ex p. FERMENTIA*, [1892] 1 Q. B. 190; 61 L. J. M. C. 75; 66 L. T. 168; 56 J. P. 8; 40 W. R. 285; 8 T. L. R. 175, D. C.

*Annotations*:—**Apld.** *Royal Aquarium & Summer & Winter Garden Soc. v. Parkinson*, [1892] 1 Q. B. 431. **Consd.** *R. v. L. C. C., Re Empire Theatre* (1894), 71 L. T. 638; *Frome United Breweries Co. v. Bath J.J.*, [1926] A. C. 586. **Refd.** *R. v. Budden Kent J.J.* (1896), 60 J. P. 166; *R. v. London J.J., Ex p. Kerfoot* (1896), 45 W. R. 58; *Murray v. Epsom L. B.*, [1897] 1 Ch. 35; *R. v. Howard Farnham Licensing J.J.* (1902), 71 L. J. K. B. 54.

**699.** ————.]—At a meeting of the London County Council held for the purpose of hearing applications for music & dancing licences, upon plffs. applying for a renewal of such a licence for a place of entertainment belonging to them, deft., a member of the council, stated that he had been to the place in question, & had witnessed a most indecent performance there, & gave that as his reason for voting against the renewal. In an action of slander brought by plffs. in respect of such statement, the jury found a verdict for plffs.:—*Held*: (1) deft. was not entitled to absolute immunity from liability for the words spoken, the duties of the County Council in dealing with music & dancing licences being administrative, & not judicial; (2) deft. was not entitled to notice of action under Justices Protection Act, 1847 (c. 44), ss. 8, 9, words spoken not being anything done within the meaning of those sects.—*ROYAL AQUARIUM & SUMMER & WINTER GARDEN SOCIETY v. PARKINSON*, [1892] 1 Q. B. 431; 61 L. J. Q. B. 409; 66 L. T. 513; 56 J. P. 404; 40 W. R. 450; 8 T. L. R. 352, C. A.

*Annotations*:—*As to* (1) **Consd.** *Barratt v. Kearns*, [1905] 1 K. B. 504. **Apld.** *Attwood v. Chapman*, [1914] 3 K. B. 275. **Consd.** *Everett v. Griffiths*, [1920] 3 K. B. 163. **Refd.** *R. v. L. C. C., Re Empire Theatre* (1894), 71 L. T. 638; *Hodson v. Pare*, [1899] 1 Q. B. 455; *R. v. Russell, Ex p. Morris* (1905), 93 L. T. 407; *Tenby Corp. v. Mason*, [1908] 1 Ch. 457; *Burr v. Smith* (1909), 78 L. J. K. B. 889; *R. v. L. G. Board, Ex p. Arldge* (1913), 78 J. P. 25; *R. v. L. C. C., Ex p. London & Provincial Electric Theatres*, [1915] 2 K. B. 466; *Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405; *Roff v. British & French Chemical Manufacturing Co. & Gibson*, [1918] 2 K. B. 677; *Slack v. Barr* (1918), 82 J. P. 91; *Pratt v. British Medical Assn.*, [1919] 1 K. B. 244; *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520; *R. v. Bath Compensation Authority*, [1925] 1 K. B. 685.

**PART XII. SECT. 3, SUB-SECT. 2.**

**p. Warden**—*Must be a councillor.*  
*Ex p. STAVERT* (1909), 39 N. B. R. —CAN.

**q. Deputy reeve contractor to county**  
—*Disqualified for county council*

*membership.*—A township councillor being a contractor with the county, & having been elected a deputy reeve:—*Held*: disqualified for the county council.—*R. (LUTZ) v. WILLIAMSON* 1 P. R. 91.—CAN.

**700.** ————.]—A member of the London County Council sat & voted at the hearing of an application for a music & dancing licence which was refused. Several weeks previously he had attended a meeting of persons who afterwards served notices upon the council of their intention to oppose the application. At this meeting the witnesses it was proposed to call at the hearing were present & their evidence was discussed. He took no part in this discussion, but on being requested to do so explained the procedure before the licensing committee, & also said that assuming the facts to be as stated the matter should be placed before the committee, but he declined to give any opinion as to what importance the committee or council would attach to them. He took no further part in the meeting & the terms of the notices of opposition were not settled there, & he did not at any time take part in assisting to settle them or in advising thereon:—*Held*: the facts did not furnish sufficient grounds for inferring such bias in favour of the promoters as to disqualify the member from voting on the application & thereby to invalidate the council's decision.—*R. v. LONDON COUNTY COUNCIL, Re EMPIRE THEATRE* (1894), 71 L. T. 638; 11 T. L. R. 24; 39 Sol. Jo. 63; *sub nom. R. v. LONDON COUNTY COUNCIL, Ex p. EDWARDES*, 15 R. 66, D. C.

*Annotation*:—**Mentd.** *R. v. Huggins, Ex p. Clancy* (1895), 15 R. 203.

**701.** ———— **Whether ministerial—Council as education authority.**—County councils in the exercise of their powers in respect of public elementary education do not merely act ministerially, & therefore they are liable to be sued for breach of contract, or for damages resulting from negligence in the performance of those duties.—*CHING v. SURREY COUNTY COUNCIL*, [1909] 2 K. B. 762; 78 L. J. K. B. 927; 100 L. T. 940; 73 J. P. 441; 25 T. L. R. 702; 7 L. G. R. 845; *on appeal*, [1910] 1 K. B. 736, C. A.

*Annotations*:—**Mentd.** *Morris v. Carnarvon County Council*, [1910] 1 K. B. 840; *Smith v. Martin & Kingston-upon-Hull Corp.*, [1911] 2 K. B. 775; *Gateshead Union v. Durham County Council*, [1918] 1 Ch. 146.

**SUB-SECT. 2.—THE ALDERMEN AND COUNCILLORS.**

*See, generally*, 1888 Act, ss. 2, 75.

**Qualifications & disqualifications.**—*See* 1888 Act, s. 75; Part VII., Sect. 2, sub-sect. 2, B. & C., *ante*.

**Penalties for acting when disqualified.**—*See* Act, s. 75, Part VII., Sect. 1, sub-sect. 7, C., *ante*.

**Election.**—*See* ELECTIONS, Vol. XX., pp. 138, 139.

**702. Liability for defamatory statements at meeting—Council acting in administrative capacity.**

—*ROYAL AQUARIUM & SUMMER & WINTER GARDEN SOCIETY v. PARKINSON*, No. 699, *ante*.

**SUB-SECT. 3.—POWERS, DUTIES AND LIABILITIES.**

**A. In General.**

**703. Powers—Whether co-extensive with those of common law corporation.**—*LONDON COUNTY COUNCIL v. A.-G.*, No. 697, *ante*.

— **As to boundaries.**—*See* Sect. 3, sub-sect. 3, D. (b), *post*.

**PART XII. SECT. 3, SUB-SECT. 3.—A.**

**r. Defalcation of county treasurer—Accounts represented correct by auditors—Audit accepted by council—liability for misrepresentation.**

**704. — To contribute to costs of private person—Defending public right of way—On default of district council.]—**By 1894 Act, s. 26 (1), it is the duty of every district council to protect all public rights of way, & to prevent as far as possible the stopping or obstruction of any such right of way; & by sub-sect. 3 a district council may for the purpose of carrying the sect. into effect institute or defend any legal proceedings, & generally take such steps as they deem expedient:—*Held*: a district council might, under the powers conferred by the sect., contribute to the costs of the defence, of an action brought against a private individual who had removed an obstruction in the assertion of an alleged public right of way.—*R. v. NORFOLK COUNTY COUNCIL*, [1901] 2 K. B. 268; 70 L. J. K. B. 575; 17 T. L. R. 437; *sub nom. R. v. NORFOLK COUNTY COUNCIL, Ex p. GREEN*, 84 L. T. 822; 65 J. P. 454; 49 W. R. 543; 45 Sol. Jo. 468, D. C.

*Annotation*:—*Distd. Thornhill v. Weeks* (No. 3), [1915] 1 Ch. 106.

— **To make bye-laws.]—**See 1888 Act, s. 16; generally, PUBLIC HEALTH.

**As education authority.]—**See, generally, EDUCATION, Vol. XIX., pp. 554 *et seq.*

— **Promoting & opposing bills in Parliament.]—**See 1888 Act, s. 15; Railway & Canal Traffic (Provisional Orders) Amendment Act, 1891 (c. 12); County Councils (Acts in Parliament) Act, 1903 (c. 9).

— **In respect of particular matters.]—**See, further, the list of cross-references at the head of this Title.

**Transfer of powers to council—By Ministry of Health.]—**See 1888 Act, ss. 4, 10.

— **By order of county council.]—**See 1894 Act, s. 26 (4).

**By statute.]—**See Sect. 3, sub-sect. 3, B., *post*.

**Liabilities—As highway authority.]—**See HIGHWAYS, Vol. XXVI., pp. 395, 396, 398 *et seq.*

#### *B. Powers etc. Transferred to Council.*

See, generally, 1888 Act, ss. 3, 28, 36, 38, 124.

Disputes as to transferred powers & duties, see 1888 Act, s. 29.

**705. Transfer of liability—Carries transfer of ancillary right—Road material for main road.]—**A highway was duly declared a main road. Before that time the highway surveyor of B. parish was entitled to take gravel from a pit for repairs. The county council under 1888 Act, s. 11, claimed also to take from the gravel pit:—*Held*: the right to the gravel passed to the county council with the duty to repair the highway.—*Re NORFOLK COUNTY COUNCIL v. BITTERING HIGHWAY SURVEYOR* (1894), 58 J. P. 497, D. C.

**706. — From borough of less than ten thousand inhabitants—Effect of existing contracts.]—**By an agreement made in 1844 between the county of S. & the borough of W. it was agreed that the county & borough should unite for the purpose of providing a county lunatic asylum for paupers, to be erected at their joint expense in certain specified proportions, & an asylum was erected accordingly. By an agreement in 1846,

the county of M. joined this union, & agreed to pay a specified sum in respect of the expenses already incurred & to be incurred in the erection of the asylum, & it was also agreed that these three bodies should contribute to the future maintenance of the asylum in certain shares. These three bodies thus became the joint owners of the asylum. By subsequent agreements, made in 1851, 1866, & 1869 respectively, the boroughs of O., B., & L. in the county of Salop were admitted to & joined this union, & became united with the counties of S. & M. & the borough of W., for the purpose of using the joint asylum for their lunatics, each having a representative on the board of visitors. These agreements provided that these three boroughs should pay an annual rent to the treasurer of the asylum for the privilege of using the asylum, & they also provided that in case of a dissolution of the union these boroughs should not be entitled to any right, claim, or interest in the asylum, & in consideration thereof should not be liable, during the continuance of the union, to contribute towards the expenses of the asylum. Each of the three boroughs was, at the date when 1888 Act came into operation, a quarter sessions borough with a population of less than 10,000:—*Held*: (1) the liability of the boroughs of O., B., & L., under the above agreements, to provide for the maintenance, management of, & other dealings with the joint asylum, was not extinguished, but was transferred under 1888 Act, sect. 38 (1), from the borough to the county council of Salop, but subject to the contracts which had been entered into between these boroughs & the visiting justices of the asylum; (2) in a case stated under 1888 Act, sect. 29, the ct. has no jurisdiction to decide questions of adjustment of liabilities under sect. 62.—*Re SALOP COUNTY COUNCIL* (1891), 65 L. T. 416; 56 J. P. 213, D. C.

**Damage by rioters.]—**See 1888 Act, s. 3 (xiii); POLICE.

**Expenses of troops called in to quell riots.]—**See Nos. 742, 743, *post*.

#### *C. Powers etc. Transferred to Joint Committees.*

**Standing joint committee of council & quarter sessions.]—**See Sub-sect. 5, C., *post*.

**Joint committees of councils.]—**See Sub-sect. 5, B., *post*.

#### *D. Control of Other Districts.*

##### *(a) In General.*

**As to election of councillors.]—**See 1894 Act, ss. 18, 46 (3), 47 (5), 48 (5), 59 (5); Local Government (Elections) Act, 1896 (c. 1), s. 1, ELECTIONS, Vol. XX., p. 182, Nos. 1589.

**Power to fix number of rural district councillors or guardians.]—**See 1894 Act, s. 60.

**707. — Power to re-fix at former number included.]—**A parish which was an urban district was for the purpose of the election of urban district councillors divided into five wards, but for the purpose of the election of the guardians of the poor for the parish who were seven in number it remained undivided, the guardians being elected

—*SIMCOE COUNTY v. BURTON* (1898), 25 A. R. 478.—CAN.

**t. Power to dismiss officers.]—**A new county council of a municipality may, before recognition on their part, dismiss the officers appointed by the preceding council, & such officers have no right of action against the municipality for their year's salary.—*HICKEY*

*r. COUNTY OF RENFREW* (1870), 20 C. P. 429.—CAN.

**a. Provision of offices & appointments for local master in Chancery.]—**The office of a local master in Chancery is an office within Municipal Act, 1903, s. 506, which enacts that the county council shall provide proper offices for all officers connected with the High Ct. of Justice.—*Re LOCAL OFFICES OF*

HIGH COURT (1906), 12 O. L. R. 16; 7 O. W. R. 316.—CAN.

#### PART XII. SECT. 3, SUB-SECT. 3.— D. (a).

**b. Power to order new election of district councillors—District council not duly constituted.]—**Casual vacancies on a district council may be filled by co-option if the council co-opting is already



**Sect. 3.—The county council: Sub-sect. 3, D. (a), (b) & (c), & E.; sub-sects. 4 & 5, A., B. & C.]**

in one election for the whole parish. In these circumstances the county council made an order that for the purpose of the election of guardians the parish should be divided into the same five wards, & that of the seven guardians for the parish three of the wards should have one guardian each & the other two wards two guardians each:—*Held*: the order, notwithstanding that it reaffirmed the existing number of guardians for the parish, namely, seven, could properly be said to "fix" the number of guardians for the parish within the earlier part of sub-sect. 1 of 1894 Act, s. 60, & therefore, having been made for that purpose, in purporting to divide the parish into wards under the later part of sub-sect. 1 it was a valid order.—*R. v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL, Ex p. HEMSWORTH POOR LAW UNION*, [1922] 2 K. B. 368; 92 L. J. K. B. 17; 127 L. T. 146; 86 J. P. 102; 20 L. G. R. 388, D. C.

**As to retirement of councillors.]—See 1894 Act, ss. 20 (6), 23 (6), 24 (4), 60 (2).**

**As to transfer of powers—To other authorities.]—See 1894 Act, s. 25 (1) (7).**

**As to names of districts or parishes.]—See 1894 Act, ss. 24 (7), 55 (2) (3).**

— **To county council.]—See 1894 Act, s. 26 (4).**

**Consent to legal proceedings.]—See 1894 Act, s. 26 (2).**

**Control of parishes.]—See 1894 Act, ss. 9, 11, 12, 17 (9), 37.**

**708. — Custody of parish documents—Extent of statutory power.]—1894 Act, s. 17 (8), provides that the county council shall determine any difference between the incumbent & churchwardens of a parish & the parish council regarding the custody of & access to public books, writings, & papers of the parish, does not repeal Tithe Act, 1860 (c. 93), s. 28, which provides that whenever any person, other than the person legally entitled to the possession of the same, shall have possession of the sealed copy of any confirmed instrument of apportionment, it shall be lawful for justices to order such copy to be removed from the custody of the person holding it, & to be deposited in such other custody as the justices may think fit. The justices, therefore, still possess the discretionary jurisdiction conferred on them by the latter sect., although the county council has already given a decision on the matter under the former section.**

1894 Act, s. 17 (8), only empowers the county council to make an order regarding the custody of or access to, books, documents, writings, & papers. The county council are nowhere empowered to make an order regarding a portion of a book, document, writing or paper. Certainly they had no power to do so in this case without an order of the Comrs. under Tithe Act, 1860 (c. 93), s. 26 (*DARLING, J.*).—*FOX v. PETT*, [1918] 2 K. B. 196; 87 L. J. K. B. 929; 119 L. T. 187; 82 J. P. 252; 16 L. G. R. 674, D. C.

**(b) Alteration, Creation and Division of Areas.**

1894 Act, ss. 57, 59, 60; 1894 Act, ss. 30, 38, 39, 42, 54, 55, 69, & generally, Part II., Sect. 12, ante.

**709. Alteration of boundaries—Power to alter—Includes power to amend Act of local or personal**

duly constituted. The district council, not being duly constituted, cannot co-opt, & the county council has power to order a new election for the vacant seats on the district council.—*R. v. BERGAN* (1911), 45 L. L. T. 185.—*IR.*

**PART XII. SECT. 3, SUB-SECT. 3.—D. (b).**

**c. Detaching township from high school district.]—A county council has power to detach a township from a high**

**nature — Though public general Act.]—Under Local Acts, land in the parish of St. Pancras, London, was purchased as a burial ground for the parish of St. George, Bloomsbury, &, on consecration, became part of the latter parish. By an Order in Council burials were discontinued in the burial-ground, & the parish of St. Pancras subsequently applied to the London County Council, under 1888 Act, s. 57, for an order transferring the burial-ground from the parish of St. George, Bloomsbury, to the parish of St. Pancras, & the council gave notice of their intention to hold an inquiry under the Act. On an application for a prohibition to the council:—*Held*: the power of the County Council to amend, by scheme or order, any local or personal Act extends to the amendment of any portion of an Act, whether public & general or local & personal, provided the portion amended is of a local & personal nature; the clauses of the local Acts which related to the burial-ground were of a local & personal nature; &, consequently, the County Council had authority to entertain the proposal & make an order.**

**Qu. : if prohibition would lie in such a case.—R. v. LONDON COUNTY COUNCIL**, [1893] 2 Q. B. 454; 63 L. J. Q. B. 4; 69 L. T. 580; 58 J. P. 21; 42 W. R. 1; 9 T. L. R. 601; 37 Sol. Jo. 669; 4 R. 531, C. A.

**Annotation:—Refd. R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co. (1920), Ltd.**, [1924] 1 K. B. 171.

**710. — Costs of inquiry.]—1894 Act, sect. 72 (4) provides that where a county council holds a local inquiry under that Act or under 1888 Act, on the application of any inhabitant of a district, the expenses incurred by the county council in relation to the inquiry, including the expenses of any committee or person authorised by the county council, shall be paid by the council of that district:—*Held*: a district council is not liable under that sect. to pay for the remuneration of a barrister appointed by a county council to hold a local inquiry under 1888 Act, sect. 57.—*MIDDLESEX COUNTY COUNCIL v. KINGSBURY URBAN DISTRICT COUNCIL*, [1909] 1 K. B. 554; 78 L. J. K. B. 442; 100 L. T. 421; 73 J. P. 153; 25 T. L. R. 256; 53 Sol. Jo. 227; 7 L. G. R. 463, C. A.**

— **Effect on powers of statutory undertakers—Water company.]—See WATER SUPPLY.**

*See, generally*, BOUNDARIES, Vol. VII., pp. 265 et seq.

**711. Formation of district — Urban district—Whether "local government district"—Within Metropolitan Commons Act, 1866 (c. 122).]—R. v. BARNES, Ex p. RATCLIFF (1896), 13 T. L. R. 25, D. C.**

*See, generally*, COMMONS, Vol. XI., pp. 88 et seq.

**712. Undue exercise of power — Remedy—Whether prohibition lies.]—R. v. LONDON COUNTY COUNCIL, No. 709, ante.**

**Financial adjustments.]—See 1888 Act, s. 62; 1894 Act, ss. 68, 70, & generally, Part II., Sect. 12, sub-sect. 3, ante.**

**(c) Enforcement of Duties.**

**By district council—On complaint of parish.]—See 1894 Act, ss. 16, 19, 26, 63.**

**713. — Right of district council to be heard.]—R. v. HUNTINGDONSHIRE COUNTY COUNCIL**

school district without the consent of that township or of the other townships included in the high school district in question.—*Re WILSON & COUNTY OF ELGIN* (1894), 21 A. R. 585; 24 S. C. R. 706.—*CAN.*

1902), County Council Times Supplement 44; cited in Halsbury's Laws of England, Vol. XVI. p. 150, n.

#### *E. Delegation of Powers.*

**To county justices in petty sessions.]—**See 1888 Act, s. 28 (2), (3); & generally, MAGISTRATES.

**To district councils.]—**See 1894 Act, s. 64; & generally, Parts V., X., *ante*.

**To committees.]—**See Sub-sect. 5, *post*.

**Powers under particular Acts.]—**See the list of cross-references at the head of this Title.

#### SUB-SECT. 4.—PROCEEDINGS.

See 1888 Act, s. 75; & generally, Part VII., Sect. 2, sub-sect. 1, D., *ante*.

**Quarterly meeting.]—**See 1888 Act, s. 75; County Councils (Elections) Act, 1891 (c. 68), s. 1 (3); County Councils (Elections) Amendment Act, 1900 (c. 13), s. 2.

**714. Admission of public.]—**TENBY CORPN. v. MASON, No. 370, *ante*.

**Admission of reporters.]—**See, now, Local Authorities (Admission of the Press to Meetings) Act, 1908 (c. 43).

**715. Proceedings as licencing authority—Avoidance by presence of biased members—Though member does not vote.]—**R. v. LONDON COUNTY COUNCIL, *Ex p.* AKKERSDYK, *Ex p.* FERMENTIA, No. 698, *ante*.

**716. — Evidence of bias.]—**R. v. LONDON COUNTY COUNCIL, *Re* EMPIRE THEATRE, No. 700, *ante*.

**717. Defamatory statements at meeting—Council exercising administrative function—Liability of member.]—**ROYAL AQUARIUM & SUMMER & WINTER GARDEN SOCIETY v. PARKINSON, No. 699, *ante*.

#### SUB-SECT. 5.—COMMITTEES.

##### *A. In General.*

See, generally, 1888 Act, ss. 75, 82; Part VII., Sect. 2, sub-sect. 1, E., *ante*; & generally, Part II., Sect. 8, *ante*.

**Finance committee.]—**See 1888 Act, s. 80 (1), (3).

**Public health committee.]—**See Housing, Town Planning, etc., Act, 1909 (c. 44), s. 71 generally, PUBLIC HEALTH.

Committees for particular purposes, see the cross-references at the head of this Title.

##### *B. Joint Committees of County and Other Councils.*

**Particular counties.]—**See 1888 Act, ss. 46 (2), (3), (7), 47.

**718. Finance — Application of common fund — Promotion of bill in Parliament.]—**By a provisional order of the Local Govt. Board made in pursuance of 1888 Act, s. 14, & confirmed by Local Government Board's Provisional Orders Confirmation Act, 1893, a joint committee called the West Riding of Yorkshire Rivers Board, consisting of members of the county & county borough councils, was constituted for the purpose of enforcing the provisions of the Rivers Pollution Prevention Act, 1876 (c. 75), & the expenses

incurred by the board were to be defrayed out of a common fund to be contributed by the constituent authorities. The board proposed to bring into Parliament a bill to extend their powers. The ct. granted an injunction to restrain them from applying any moneys produced by contributions towards the payment of any costs or expenses in or in relation to the preparation, introduction, or promotion of the bill, unless & until authorised by lawful authority so to do, & from employing at the expense or upon the credit of the board any of the servants or officers of the board or other person for the purposes of the promotion of the bill.—A.-G. v. WEST RIDING OF YORKSHIRE RIVERS BOARD (1905), 69 J. P. 177; 3 L. G. R. 764.

##### *C. Standing Joint Committee of Council and Quarter Sessions.*

See 1888 Act, ss. 9, 30.

**719. Relations with county council — Jurisdiction in regard to accommodation of quarter sessions.]—**Certain questions arose between the S. county council & the standing joint committee in respect of the transfer or non-transfer of certain powers & duties with regard to the management, maintaining, & repairing of the following classes of buildings: the Shire Hall at T. & the cts. at W., buildings each containing under one roof the cts. used for assizes, for the sittings of the county council, quarter sessions & petty sessions, the high sheriff's room, the grand jury room, & the judges' lodgings. Also, of various petty sessional ct. houses, justices' rooms, police stations, & lock up houses in different parts of the county. These questions had reference to the points whether the power & duty of managing, controlling, maintaining, or repairing the above ct. buildings, or any of them, was transferred to the county council or to the standing joint committee, & as to which body was transferred the power & duty of acquiring additional buildings for the like purposes; & as to whether the power of determining expenditure, vested in the standing joint committee by 1888 Act, s. 30 (3), enables that committee to repair, erect, or acquire ct. buildings without previous application or intervention by the county council, or whether such power only enables them to do so on the default of the council to provide proper accommodation; & also as to which body is transferred the power of making standing orders & regulations as to the management of the said buildings:—*Held*: (1) all the questions ought to be answered in favour of the standing joint committee; because, though the property in the buildings is vested in the county council, yet by 1888 Act, s. 30 (3), the standing joint committee have complete control of all the questions arising within the sub-sect.; & with respect to all buildings & premises which are within the purview of the sub-sect., all questions with regard to them, or to anything incidental to them, are to be determined by the standing joint committee, & it is their duty to say what expenditure shall be required, & then, upon requisition, the county council are to supply the funds, & it is the duty of the county council to obey the requisition & pay the money; (2) as to the power of making standing orders & regulations for the management & control of such buildings, that power is conferred on both bodies of making such standing

#### PART XII. SECT. 3, SUB-SECT. 4.

**d. Place of meeting — Whether necessarily county town — Bye-law authorising other venue.]—***Re* PAFFARD

& COUNTY OF LINCOLN CORPN. (1864), 24 U. C. R. 16.—CAN.

**e. Power to rescind previous rescinding resolution—Where no standing**

**orders to contrary.]—**WEIR v. FERMANAGH COUNTY COUNCIL & ENNISKILLEN RURAL DISTRICT COUNCIL, [1913] 1 I. R. 63.—IR.



*Sect. 3.—The county council: Sub-sect. 5, C. Sect. 4: Sub-sects. 1, 2, 3, 4 & 5. Sect. 5: . 1.]*

orders, provided that such orders do not conflict with each other.—*Re LOCAL GOVERNMENT ACT, 1888, Ex p. SOMERSET COUNTY COUNCIL (1889), 58 L. J. Q. B. 513; 61 L. T. 512; sub nom. Re SOMERSET COUNTY COUNCIL, 54 J. P. 182; 5 T. L. R. 712, D. C.*

*Annotations:—As to (1) Consd. Standing Joint Committee for County of London v. L. C. C. (1911), 104 L. T. 923. Refd. Glamorgan Coal Co. v. Glamorganshire Standing Joint Committee, Powell Duffryn Steam Coal Co. v. Same, [1916] 2 K. B. 206.*

**720.** ———.]—As between the London County Council & the standing joint committee, the London County Council has, subject to the approval by a Secretary of State of any scheme made in that behalf, the power & duty of determining whether any & what new site shall be acquired for the accommodation of quarter sessions in the county of London. The power & duty of determining the accommodation to be afforded on such site or sites has been transferred & is vested in the standing joint committee; & such accommodation is to be provided by the London County Council.—*LONDON COUNTY STANDING JOINT COMMITTEE v. LONDON COUNTY COUNCIL (1911), 104 L. T. 923; 75 J. P. 455; 27 T. L. R. 567; 9 L. G. R. 1239, D. C.*

**721.** ——— *Contracts for employment of extra police.*—Riots occurred in connection with strikes of workmen at pl'tfs.' coal mines. The police force of the county being unable to cope with the disturbances, the chief constable with the authority of the magistrates of the petty sessional division, telegraphed for the military to be sent down, but the Home Secretary instead sent some metropolitan police. The chief constable also made agreements under Police Act, 1890 (c. 45), s. 25, with the police authorities of other counties & boroughs for the supply of extra police. These agreements contained provisions for the housing & feeding by the aided authority of the imported police. Pl'tfs. at the request of the chief constable, provided housing accommodation & meals for a number of the police so brought into the county & for the metropolitan police. The standing joint committee, who were the police authority for the county, expressly repudiated liability in respect of the metropolitan police on the ground that their assistance had not been requested. In an action by pl'tfs. against the standing joint committee & the county council to recover the expenses so incurred by them for housing & feeding the imported police:—*Held: (1) defts. were liable for the expense of housing & feeding the police other than the metropolitan police, the evidence showing either that the chief constable had antecedent authority from the standing joint committee to make the necessary contracts under s. 25 of the Police Act, 1890, for bringing them in & for housing & feeding them, or that the standing joint committee had ratified his acts; but (2) defts. were not liable in respect of the metropolitan police, the standing joint committee not having asked for their assistance & having repudiated all liability in respect of them; (3) (PICKFORD, L.J. & BRAY, J.) the standing joint committee had power to enter into the contracts so as to bind themselves, & they were therefore rightly sued upon them, the county council being properly joined as parties to the action as they were the persons who would have to pay the amount found due & against whom an order for payment might be necessary;*

(4) (PHILLIMORE, L.J.) the contracts were the contracts of the county council though made by the standing joint committee, & the latter were properly made parties to the action as it was convenient that the matter should be decided in the presence of the committee who actually made the contracts.—*GLAMORGAN COAL CO. v. GLAMORGANSHIRE STANDING JOINT COMMITTEE, POWELL DUFFRYN STEAM COAL CO. v. GLAMORGANSHIRE STANDING JOINT COMMITTEE, [1916] 2 K. B. 206; 85 L. J. K. B. 1193; 114 L. T. 717; 80 J. P. 289; 32 T. L. R. 293; 14 L. G. R. 419, C. A.*

*Annotation:—Generally, Mentd. Glasbrook v. Glamorgan County Council, [1925] A. C. 270.*

**722.** ——— *Settlement of disputes by case stated—Must be based on actual occurrences.*—*Re CARDIGAN COUNTY COUNCIL (1890), 54 J. P. 792.*

**723.** ——— *Jurisdiction to determine police districts.*—The control over the division of a county into police districts is, under 1888 Act, vested in the standing joint committee of the county.—*Re LOCAL GOVERNMENT ACT, 1888, Ex p. LEICESTERSHIRE COUNTY COUNCIL & STANDING JOINT COMMITTEE OF LEICESTER COUNTY, [1891] 1 Q. B. 53; 60 L. J. M. C. 45; 64 L. T. 25; 39 W. R. 160; 17 Cox, C. C. 205; sub nom. Re POLICE DISTRICTS, Ex p. LEICESTERSHIRE COUNTY COUNCIL, 7 T. L. R. 61; 55 J. P. Jo. 87, D. C.*

**724.** *Liability for expense of extra police—Metropolitan police employed on strike duty—Police sent on request for troops.*—*GLAMORGAN COAL CO. v. GLAMORGANSHIRE STANDING JOINT COMMITTEE, POWELL DUFFRYN STEAM COAL CO. v. SAME, No. 721, ante.*

**725.** ——— *Power of chief constable to make binding contract.*—*GLAMORGAN COAL CO. v. GLAMORGANSHIRE STANDING JOINT COMMITTEE, POWELL DUFFRYN STEAM COAL CO. v. SAME, No. 721, ante.*

#### SECT. 4.—OFFICERS AND SERVANTS.

SUB-SECT. 1.—THE CLERK OF THE PEACE AND OF THE COUNTY COUNCIL.

*See, generally, MAGISTRATES.*

SUB-SECT. 2.—THE COUNTY TREASURER.

*Appointment & removal.*—*See County Rates Act, 1738 (c. 29), ss. 6, 11; 1888 Act, ss. 3 (x), 75 (16) (e).*

**726.** *Incompatible office — Alderman & justice of city within county.*—(1) A statute directed the payment of county rates to a person to be appointed by the justices' county treasurer, he first giving sufficient security to the justices to be accountable to them for the moneys which he shall so receive. The giving of the security is not a condition precedent to the vesting of the office of the treasurer in the person so appointed, or to his liability to account.

(2) An alderman elected by the whole corporate body, does not vacate his office by the acceptance of an incompatible office conferred upon him by a select body. *Semble: such second appointment is void.*—*R. v. PATTESON (1832), 4 B. & Ad. 9; 1 Nev. & M. K. B. 612; 1 Nev. & M. M. C. 488; 2 L. J. K. B. 33; 110 E. R. 358.*

*Annotations:—As to (2) Refd. R. v. Cheshire JJ. (1840), 4 J. P. 122; Worth v. Newton (1854), 10 Exch. 247; R. v. Douglas (1898), 46 W. R. 377. Generally, Mentd. Arkwright v. Cantrell (1837), 7 Ad. & El. 565; Davis v. Pembrokeshire JJ. (1881), 7 Q. B. D. 513.*

**Duties.]—***See* County Rates Act, 1738 (c. 29), ss. 7, 9; 1888 Act, ss. 32 (8), 67, 80.

**727. — In respect of sums payable by other counties—Whether bound to recover.]—**(1) A bond given by a county treasurer pursuant to County Rates Act, 1738 (c. 29), with a condition for the performance of his duties as county treasurer, renders him liable in respect of a breach of duty created by Act of Parliament passed subsequent to that under the authority of which the bond is taken, but before the taking of the bond.

(2) 43 Geo. 3, c. 47, ss. 9, 16, 17, casts certain duties upon a county treasurer: among them, that of transmitting to other county treasurers accounts of money paid by him in pursuance of the Act, & which it is the duty of the other county treasurers to reimburse him:—*Held*: it is no part of the duty of the county treasurer to demand or recover such money from the other county treasurers. Nor is it any part of the duty cast upon the county treasurer, after he has duly transmitted such account to the other county treasurers, & payment has not been made, to notify to the sessions the fact of the transmitting to, & of the non-payment by, the other county treasurers. Nor, where he has paid to another county treasurer a sum chargeable to a parish in his own county, is it a part of his duty to obtain from the justices at sessions an order upon their parish officers to reimburse him.—*FARR v. HOLLIS* (1829), 9 B. & C. 315; 4 Man. & Ry. K. B. 230; 8 L. J. O. S. M. C. 14; 109 E. R. 117.

**728. — In respect of sums paid to another county—Chargeable on individual parish.]—***FARR v. HOLLIS*, No. 727, *ante*.

**729. — Payment improperly ordered.]—***R. v. SAUNDERS*, No. 739, *post*.

**730. — Order irregular in form — Whether ground for disallowing.]—**Some disturbances having occurred during a contested election, the justices appointed special constables, whose expenses were subsequently directed to be paid. The orders for payment were not made at special sessions as required by Special Constables Act, 1831 (c. 41), s. 13, & in form they were mere directions to the county treasurer to pay specified sums. Payment was made by him, & his account was afterwards allowed at the quarter sessions. It was held that the order not having been made at a "special session held for the purpose" was invalid; but, the ct. being of opinion that there was no objection to the order in point of form, & that the treasurer was therefore justified in paying it, & taking into consideration the fact that the money had been paid, & the account allowed, discharged a rule which had been obtained for a writ of *certiorari* to bring the order up to be quashed.—*R. v. NEWBOROUGH* (LORD) (1869), L. R. 4 Q. B. 585; 10 B. & S. 586; 38 L. J. M. C. 129; 17 W. R. 861; *sub nom.* *R. v. CARNARVONSHIRE JJ.*, 20 L. T. 818.

*Annotations:—**Refd.* *R. v. Surrey JJ.* (1870), L. R. 5 Q. B. 466. *Mentd.* *R. v. Johnson* (1905), 74 L. J. K. B. 585.

**— Enforcement—Whether by mandamus, indictment or attachment.]—***See* CROWN PRACTICE, Vol. XVI., p. 298, No. 1113.

**731. Liability—For illegal payment.]—***R. v. SAUNDERS*, No. 739, *post*.

**732. Security — Whether duties under subsequent statutes covered.]—***FARR v. HOLLIS*, No. 727, *ante*.

**733. — Whether condition precedent to liability to account.]—***R. v. PATTESON*, No. 726, *ante*.

#### SUB-SECT. 3.—THE COUNTY SURVEYOR.

*See* Statute of Bridges, 1530 (c. 5), s. 4, & 1888 Act, s. 3 (x).

**734. Bill for estimates & expenses — Whether payment enforceable by mandamus— Where allowance discretionary.]—**This ct. will not grant a *mandamus* to compel county justices to make an order on the county treasurer for the payment of the amount of the county surveyor's bill for estimates & expenses, after deducting the items objected to by the finance committee, the costs & charges to be allowed being in the magistrates' discretion.—*R. v. SOUTHAMPTON JJ.* (1854), 23 L. T. O. S. 76; 2 W. R. 409.

#### SUB-SECT. 4.—THE CORONER.

*See* CORONERS, Vol. XIII., pp. 233, 235, 236, Nos. 14-16, 37-47.

#### SUB-SECT. 5.—OTHER OFFICERS.

*See* 1888 Act, s. 3 (x).

#### SECT. 5.—FINANCE.

##### SUB-SECT. 1.—THE COUNTY FUND.

**Payments in.]—***See* 1888 Act, ss. 68 (1), 80 (1).

**— Fines imposed & fees received by session.]—***See* MAGISTRATES.

**Payments out.]—***See* 1888 Act, s. 80.

**735. — What are — Payments in respect of undertaking — Though producing profits.]—**A county council constituted under the Local Government 1888 Act is not in the position of a municipal corpn. created by Royal Charter, but is the creation of statute, & can only exercise such powers as are conferred upon it by statute. Any power, therefore, the assumption of which cannot be justified by the statutes under which the council acts, must be taken not to exist.

The London County Council, which was constituted under 1888 Act, had power under Tramways Act, 1870 (c. 75), s. 43, to purchase compulsorily, & under London Tramways Co. (Limited) Act, 1896 (c. clxxxix), s. 31, to purchase by agreement, the undertakings of certain tramways including any works & property connected therewith. Under London County Tramways Act, 1896 (c. li), s. 2, the Council had power to work the tramways, & provide carriages, horses, cars, & fixed & movable plant for that purpose. Under London County Council (Vauxhall Bridge Tramways) Act, 1896 (c. cexi), s. 21, the Council were to cause accounts to be kept of their receipts & expenditure "in connection with tramways," & set off one against the other; & so far as the tramway revenue was insufficient to cover the expenses the deficiency was to be paid as payment & for general or special county purposes under 1888 Act, & any surplus was to be carried to the county fund. The Council purchased by agreement the whole undertaking of a tramway co. The co. at that time were running omnibuses as feeders to their tramways on certain routes. The Council took over the omnibuses with the tramways, & continued to run them, & extended the route of one line. Passengers used the omnibuses who were not going to or coming from the tramways, & a profit was earned from running them:—*Held*: (1) the omnibus business was a separate & distinct business from the tramway



**Sect. 5.—Finance: Sub-sects. 1, 2, 3 & 4, A.  
B. (a).]**

business; & the London County Council had no power, either express or implied, under 1888 Act, or the London County Tramways Act, 1896, or the London Tramways Co. (Ltd.) Act, 1896, to carry it on; & the fact that it might be beneficial to them or to the public made no difference; (2) s. 21 of Vauxhall Bridge Tramways Act, 1896, only applied to receipts & payments in connection with tramways, & would not relieve the Council from making payments in respect of the omnibus business in the first instance out of the county fund under 1888 Act, s. 68; (3) an action for injunction was properly brought in the name of the A.-G. by rival omnibus proprietors who were also ratepayers of the county.—*A.-G. v. LONDON COUNTY COUNCIL*, [1901] 1 Ch. 781; 70 L. J. Ch. 367; 84 L. T. 245; 17 T. L. R. 309; 45 Sol. Jo. 325, C. A.; *on appeal, sub nom. LONDON COUNTY COUNCIL v. A.-G.*, [1902] A. C. 165, H. L.

*Annotations*:—*As to* (1) *Consd. A.-G. v. Manchester Corpn.*, [1906] 1 Ch. 643. *Refd. A.-G. v. Mersey Ry.*, [1907] A. C. 415; *Deuchar v. Gas Light & Coke Co.*, [1924] 2 Ch. 426. *As to* (3) *Consd. A.-G. v. Wimbledon House Estate Co.*, [1904] 2 Ch. 34. *Refd. A.-G. v. Birmingham, Tame, & Rea District Drainage Board*, [1910] 1 Ch. 48; *Vacher v. London Society of Compositors*, [1912] 3 K. B. 547; *A.-G. v. Westminster City Council*, [1924] 2 Ch. 416; *A.-G. v. Denby*, [1925] Ch. 596. *Generally, Mentd. A.-G. v. West Gloucestershire Water Co.*, [1909] 2 Ch. 338.

**736. — Costs of defending legal proceedings.]**

—If a fine be imposed on a county, which the justices of the sessions think illegal, they may order the treasurer to defray the expense of litigating the question out of the county stock.—*R. v. ESSEX (INHABITANTS)* (1792), 4 Term Rep. 591; *Nolan*, 56; 100 E. R. 1193.

*Annotations*:—*Consd. R. v. Tower Hamlets, Sewers Comrs.* (1830), 1 B. & Ad. 232; *A.-G. v. Norwich Corpn.* (1837), 2 My. & Cr. 406. *Appld. Wildes v. Russell* (1866), L. R. 1 P. 722; *R. v. White* (1884), 14 Q. B. D. 358. *Distd. R. v. Glamorgan County Council*, [1899] 2 Q. B. 536. *Refd. R. v. Lichfield Town Council* (1843), 4 Q. B. 893; *Glamorgan Coal Co. v. Glamorganshire Standing Joint Committee, Powell Duffryn Steam Coal Co. v. Same*, [1916] 2 K. B. 206. *Mentd. R. v. Houldgrave* (1818), 1 B. & Ald. 312; *Re Lodge* (1834), 2 Ad. & El. 123; *A.-G. v. Thomson*, [1913] 3 K. B. 198.

**737. — Private persons maintaining public rights.]—***R. v. NORFOLK COUNTY COUNCIL*, No. 704, *ante*.

**738. — Expenses of private person apprehending offender.]—**58 Geo. 3, c. 70, s. 4, authorises the ct. to order the county treasurer to pay to prosecutor or witnesses who shall appear to have been active in the apprehension of any person, & who shall give evidence against any person accused of grand or petty larceny, etc., the costs of prosecuting & appearing before the grand jury; & also to compensate them for their loss of time & trouble in such apprehension. Where a person had travelled 300 miles & incurred an expense of £17 in tracing & endeavouring to bring two horse stealers to justice, & had succeeded in apprehending them:—*Held*: under this statute he was not entitled to any compensation for the money so expended.—*R. v. AUSTEN* (1822), Dow. & Ry. N. P. 24; 1 Dow. & Ry. M. C. 364.

**Expenses of local inquiries.]—***See* 1894 Act, s. 72 (4); & *generally*, Part II., Sect. 13, *ante*.

**PART XII. SECT. 5, SUB-SECT. 1.**

**742 i. Payments out—Costs of quelling riots—Where troops employed.]—**There is no power in the Supreme Ct. to amerce a county for charges incurred in calling out the active militia to quell a riot.—*Re CAPE BRETON COUNTY* (1877), 2 R. & C. 410.—**CAN.**

**742 ii. — — — .]**—The senior officer present in any locality is authorised to call out the militia in aid of the civil power, for the purpose of preventing or suppressing riots when thereunto required, in writing. When so called out the liability to pay for the services of the militia is imposed upon the municipality for which such

**739. — — — Refreshments.]—**The quarter sessions of the county of L. made rules to regulate the payment of moneys by the treasurer for the expenses of the gaols & houses of correction, by which the expenses were to be from time to time certified by two visiting justices, & then to be paid by the county treasurer. It was the custom to allow refreshments to the justices & jurors at the sessions held at the court house in one of the gaols, & to charge them as part of the expenses of the gaol. At a public inquiry into the conduct of a county ct. judge in Nov., 1851, refreshments were furnished to those who attended, & two visiting justices ordered the amount to be paid by the treasurer. At an adjourned general sessions in Sept. 1852, this payment was disallowed in the accounts of the treasurer, & an abstract of his accounts, with this disallowance, was transmitted to the Secretary of State, in pursuance of County Rates Act, 1852 (c. 81), s. 50. At the annual sessions in June, 1853, the disallowance was rescinded, & the payment allowed. On motion to quash the order of sessions of June, 1853, which had been brought by *certiorari*:—*Held*: the order of the visiting justices, directing the payment of expenses not connected with the county business, did not justify the treasurer in paying them, & the ct. of quarter sessions was bound to disallow them; & this ct. quashed so much of the order as allowed them.—*R. v. SAUNDERS* (1854), 3 E. & B. 763; 2 C. L. R. 1689; 24 L. J. M. C. 45; 23 L. T. O. S. 157; 18 J. P. 584; 1 Jur. N. S. 86; 2 W. R. 492; 118 E. R. 1327; *previous proceedings, sub nom. R. v. LANCASHIRE JJ.*, 22 L. T. O. S. 259.

*Annotations*:—*Consd. A.-G. v. De Winton*, [1906] 2 Ch. 106. *Mentd. R. v. Woodhouse*, [1906] 2 K. B. 501.

**740. — — — What are.]—**MIDDLESEX COUNTY COUNCIL *v. KINGSBURY URBAN DISTRICT COUNCIL*, No. 710, *ante*.

**741. — — — What expenses allowed.]—**MIDDLESEX COUNTY COUNCIL *v. KINGSBURY URBAN DISTRICT COUNCIL*, No. 710, *ante*.

**742. — Cost of quelling riots — Where troops employed.]—***Re LANCASHIRE RIOTS* (1879), *Times*, Feb. 21, D. C.

*Annotation*:—*Distd. R. v. Glamorgan County Council*, [1899] 2 Q. B. 536.

**743. — — — .]**—Troops were brought into a county, on the application of the county magistrates, for the purpose of suppressing riots, & preserving peace & order in the county. By agreement with the magistrates certain tradesmen supplied the troops with food & lodging while quartered in the county. On an application for a *mandamus* to the county council to pay for the food & lodging supplied:—*Held*: no duty was imposed by law on those who administered the county funds to pay the expenses of the maintenance of the troops, & a *mandamus* could not be granted.—*R. v. GLAMORGAN COUNTY COUNCIL*, [1899] 2 Q. B. 536; 68 L. J. Q. B. 1047; 64 J. P. 115; 48 W. R. 112; 15 T. L. R. 536; *sub nom. R. v. GLAMORGANSHIRE COUNTY COUNCIL, Ex p. MILLER*, 81 L. T. 372, C. A.

*Annotation*:—*Refd. Glamorgan Coal Co. v. Glamorganshire Standing Joint Committee, Powell Duffryn Steam Coal Co. v. Same*, [1915] 1 K. B. 471.

services are required.—**CREWE-READ v. CAPE BRETON COUNTY MUNICIPALITY** (1887), 14 S. C. R. 8; 7 R. & G. 260; 7 C. L. T. 349.—**CAN.**

**742 iii. — — — .]**—*A.-G. OF CANADA v. CITY OF SYDNEY* (1913), 10 E. L. R. 51; 12 E. L. R. 448; 9 D. L. R. 282.—**CAN.**

744. ——— **Extra police employed by agreement.**—GLAMORGAN COAL CO. v. GLAMORGANSHIRE STANDING JOINT COMMITTEE, POWELL DUFFRYN STEAM COAL CO. v. SAME, No. 721, *ante*.

745. ——— **Metropolitan police sent by Home Secretary—On request for troops.**—GLAMORGAN COAL CO. v. GLAMORGANSHIRE STANDING JOINT COMMITTEE, POWELL DUFFRYN STEAM COAL CO. v. SAME, No. 721, *ante*.

746. ——— **Damages against constable for false imprisonment.**—STOPS v. NORTHAMPTONSHIRE JJ. (1887), 4 T. L. R. 78, D. C.

——— **Costs of promoting & opposing bills in Parliament.**—See 1888 Act, s. 15; Railway & Canal Traffic (Provisional Orders) Amendment Act, 1891 (c. 12); County Councils (Bills in Parliament) Act, 1903 (c. 9).

——— **Contribution to County Councils Association.**—See County Councils Association Expenses Act, 1890 (c. 3).

——— **Grants in aid of emigration.**—See 1888 Act, s. 69 (1) (d).

#### SUB-SECT. 2.—THE COUNTY RATE. RATES & RATING.

#### SUB-SECT. 3.—BORROWING.

See, generally, 1888 Act, s. 69.

**No power to delegate power.**—See 1888 Act, s. 28 (3), 81 (3).

**In respect of particular matters.**—See the list of cross-references at the head of this Title.

#### SUB-SECT. 4.—RELATIONS WITH OTHER AUTHORITIES.

##### A. The Exchequer.

**Local taxation account.**—See REVENUE.

**Exchequer contribution account.**—See 1888 Act, ss. 23, 24; Local Taxation (Customs & Excise) Act, 1890 (c. 60), s. 1 (1), (b).

747. ——— **Payments out—Liability of county fund.**—Under 1888 Act, s. 24, the county council in substitution for the Exchequer held bound to pay out of the county fund local grants in respect of the period between Sept. 24 & Apr. 1, 1889, though they did not come into existence till Apr. 1, 1889.—*Re* WEST RIDING COUNTY COUNCIL (1890), 54 J. P. 533; 6 T. L. R. 265.

748. **Costs of prosecutions—Right of Treasury to tax.**—The accounts of costs of prosecutions in the county of Lancaster, after having been duly taxed by the proper officers, & paid out of the county rates, were re-taxed by officers of the Treasury, & part of them were disallowed. The justices of the county obtained a rule *nisi* for a *mandamus* to compel the Lords of the Treasury to pay the disallowed balance to their treasurer:—*Held*: the Lords of the Treasury had no right to tax these costs after they had been allowed by the proper officers; but this ct. had no jurisdiction to issue a *mandamus* to compel the Lords of the Treasury to pay the balance.—*R. v. TREASURY LORDS COMRS.* (1872), L. R. 7 Q. B. 387; 41 L. J. Q. B. 178; 36 J. P. 661; 20 W. R. 336; *sub nom.* *R. v. TREASURY LORDS, Ex p.*

LANCASHIRE JJ., 26 L. T. 64; 12 Cox, C. C. 277, D. C.

*Annotations*:—**Expld.** *Armytage v. Wilkinson* (1878), 3 App. Cas. 355; *Re Nathan, R. v. I. R. Comrs.* (1884), 12 Q. B. D. 461; *R. v. Speyer, R. v. Cassel*, [1916] 1 K. B. 595. **Refd.** *Dixon v. Farrer* (1886), 35 W. R. 95; *R. v. Income Tax Special Purposes Comrs., Ex p. Cape Copper Mining Co.* (1888), 57 L. J. Q. B. 513; *Hollinshead v. Hazleton*, [1916] 1 A. C. 428; *R. v. Army Council, Ex p. Ravenscroft*, [1917] 2 K. B. 504; *R. v. Income Tax Special Purposes Comrs., Ex p. Dr. Barnardo's Homes National Incorporated Assocn.* (1921), 7 Tax Cas. 646. **Mentd.** *Willcock v. Terrell* (1878), 3 Ex. D. 323; *R. v. Joint Stock Cos. Registrar* (1888), 21 Q. B. D. 131; *R. v. Secretary of State for War*, [1891] 2 Q. B. 326; *R. v. Incorporated Law Soc.* (1895), 11 T. L. R. 557; *R. v. Treasury Lords Comrs., Ex p. Devon Standing Joint Committee* (1909), 73 J. P. 299.

749. ——— **Enforcement of payment by Treasury Whether mandamus will issue.**—*R. v. TREASURY LORDS COMRS.*, No. 748, *ante*.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 303 *et seq.*

**Expenditure on main roads.**—See HIGHWAYS, Vol. XXVI., p. 396, No. 1226.

**Expenses of prisons & prisoners.**—See PRISONS.

#### B. Boroughs.

##### (a) Adjustment.

See 1888 Act, ss. 32, 62; 1894 Act, s. 68; Local Government (Adjustments) Act, 1913 (c. 19), as amended by Local Government (County Boroughs & Adjustments Act), 1926 (c. 38).

750. **What are questions of adjustment—Jurisdiction of court to decide—As dispute arising on transfer of powers.**—*Re* SALOP COUNTY COUNCIL, No. 706, *ante*.

**On creation or alteration of areas.**—See Part II., Sect. 12, sub-sect. 3, *ante*.

751. **Redemption of liability—County borough included in stipendiary district.**—9 & 10 Vict. c. lxxv., created a stipendiary justice's district. Under the Act the quarter sessions of the county could levy rates on the district in the same manner as was then authorised for making county rates. There are now two county boroughs under 1888 Act in the district. On a question submitted summarily to the ct. under 1888 Act, s. 29:—*Held*: the county council has the power to levy the rates on such part of the stipendiary district as is not included within either of the county boroughs, & the liability of the county boroughs should be redeemed by an adjustment under 1888 Act, s. 32.—*Ex p. STAFFORD COUNTY QUARTER SESSIONS CHAIRMAN* (1889), 54 J. P. 72; 6 T. L. R. 45, D. C.

752. ——— **How calculated.**—A grant of a ct. of quarter sessions was made to a county borough which was contributing annually to the county in which it was situated a share of the costs specified in 1888 Act, s. 32 (3) (b). The county council having claimed that the borough should redeem their liability to such contribution under the provisions of the sect., & the borough having tendered evidence before an arbitrator that the share of the costs incurred by the county in respect of the borough exceeded the amount of the contribution:—*Held*: the words "redeem the liability" in 1888 Act, s. 32 (3) (b), did not mean that, although the county were no longer to render services to the borough, yet the annual payment was to be capitalised for an amount which would bring in annually for the same sum as the county had been receiving from the borough in respect of services which the

#### PART XII. SECT. 5, SUB-SECT. 4.—B. (a).

1. **Proceeds of non-resident land fund—Appropriation & distribution without bye-law.**—UNITED TOWNSHIPS OF MARA & RAMA v. ONTARIO COUNTY (1867), 13 Gr. 347.—CAN.



*Sect. 5.—Finance: Sub-sect. 4, B. (a), (b), (c), (f), (g), (h) & (i), C., D. & E.; sub-sect. 5. Sect. 6: Sub-sects. 1 & 2. Sect. 7.]*

county had been rendering, but had ceased to render; & evidence was rightly admitted to show that, in consequence of the grant of quarter sessions to the borough, the county were relieved from incurring in respect of the borough costs greater than the sums they received for rendering the services; (2) where an arbitrator has stated his award in the form of a special case for the opinion of the ct., there is no power to remit to the arbitrator otherwise than in the terms of the special case.—**NORTH RIDING OF YORKSHIRE COUNTY COUNCIL v. MIDDLESBROUGH COUNTY BOROUGH COUNCIL**, [1914] 2 K. B. 847; 83 L. J. K. R. 1004; 110 L. T. 961; 78 J. P. 257; 58 Sol. Jo. 431; 12 L. G. R. 555, C. A.

**753. — Admissibility of evidence.] — NORTH RIDING OF YORKSHIRE COUNTY COUNCIL v. MIDDLESBROUGH COUNTY BOROUGH COUNCIL**, No. 752, *ante*.

**754. — Special case stated by arbitrator—Jurisdiction of court to remit.] — NORTH RIDING OF YORKSHIRE COUNTY COUNCIL v. MIDDLESBROUGH COUNTY BOROUGH COUNCIL**, No. 752, *ante*.

**755. Readjustment — Jurisdiction of Minister of Health to order—County boroughs counties before 1888 Act.] — R. v. MINISTER OF HEALTH**, No. 117, *ante*.

(b) *Liability for County Rate.*

See RATES & RATING.

(c) *Expenses of General and Quarter Sessions.*

See MAGISTRATES, pp. 380 *et seq.*, *post*.

(d) *Contribution to Cost of Borough Police.*

See POLICE.

(e) *Penalties and Fees Received by the Clerk of the Peace.*

See MAGISTRATES, pp. 459, 460, *post*.

(f) *Maintenance of Main Roads.*

See HIGHWAYS, Vol. XXVI., pp. 395, 396.

(g) *Maintenance of County Bridges.*

See HIGHWAYS, Vol. XXVI., p. 576.

(h) *Expenses in Connection with Diseased*

See ANIMALS, Vol. II., p. 301, Nos. 695, 698.

(i) *Other Expenses.*

**756. Expenses of prisoners confined in county gaol—Committed to assizes from borough.] — Under Municipal Corporations Act, 1835 (c. 76), s. 114, the county treasurer may order the council of any borough within the county, having separate quarter sessions, to pay the county the expenses of prisoners committed from such borough for trial at the assizes & confined in the county gaol, though such prisoners were committed before trial to the borough gaol, not the county gaol, & were not confined in the county gaol till after the bills against them were found. Such order may be made without any contract between the borough**

& county justices. The expenses are to be estimated by dividing the whole expenses of the gaol according to the number of prisoners & the periods of their confinement, & are not limited to the expenses incurred in respect of the individual prisoners.—**R. v. JOHNSON** (1839), 10 Ad. & El. 740; 2 Per. & Dav. 610; 8 L. J. M. C. 99; 113 E. R. 280.

*Annotations:—Distd. Birmingham Corpn. v. R.* (1849), 18 L. J. M. C. 176. **Appld. R. v. Gravesend Council** (1855), 5 E. & B. 459.

**757. Maintenance of shirehall — Construction of private Act.] — Sect. 31 of a local Act for building a new shirehall for the county of S., enacted (*inter alia*) that, on the completion of the shirehall, such hall should be for ever thereafter insured, supported & provided with proper furniture, etc., from time to time as occasion should require, at the expense & charge of the said county of S., in the following proportions, viz. one-tenth of the charges & expenses to be occasioned as aforesaid, should be from time to time paid by the mayor & burgesses of the borough, & the remainder by the inhabitants of the county, in such manner as the gaol & other public buildings of the county were maintained, etc., & that it should be lawful for the justices of the peace for the county at any general quarter sessions, or the major part of them then assembled, from time to time to order the said shirehall to be insured & maintained, etc., & to be repaired & altered in such manner as they should think fit; & the said justices at such quarter sessions should & might, from time to time, appoint one or more persons to take care of the said rooms, etc., & should & might order such salary, or allow such fees, to such person or persons as they the said justices should think proper; & also should & might order the expense & charge thereof, as likewise of the furniture, etc., & repairs of the said shirehall, from time to time, to be paid in the proportions before mentioned; & such part thereof as should be borne by the inhabitants of the county, to be defrayed & paid out of the moneys to be raised by the general rates by virtue of certain Acts, etc.:—*Held*: (1) the justices were empowered to make an order upon the mayor, aldermen & burgesses of the town of S. *ex p.*; (2) they were empowered to make such order, & the amount thereby required to be paid was payable, before the expenses for the purposes of the hall had been actually disbursed.—**HINCKLEY v. STAFFORD CORPN.** (1851), 6 Exch. 279; 20 L. J. M. C. 111; 155 E.**

#### C. District Councils

**Highways expenses.] — See HIGHWAYS**, Vol. XXVI., pp. 395 *et seq.*

**Housing expenses.] — See PUBLIC HEALTH.**

**758. Local inquiry expenses.] — MIDDLESEX COUNTY COUNCIL v. KINGSBURY URBAN DISTRICT COUNCIL**, No. 710, *ante*.

—.]—*See, generally*, Part II., sect. 13, *ante*.

**Sewers & drainage expenses.] — See SEWERS & DRAINS.**

#### D. Board of Guardians and Lunacy Authorities.

*See, generally*, POOR LAW.

**Maintenance of pauper lunatics.] — See LUNATICS.**

#### PART XII. SECT. 5, SUB-SECT. 4.—B. (i).

**g. Maintenance of offices — Registrar of deeds—& sheriff & clerk of the peace.] — 42 Vict. c. 41, does not impose any liability upon the city of F. to pay**

a portion of the expenses incurred by the county council of Y. under 45 Vict. c. 65, in fitting up offices for the registrar of deeds, & for sheriff & clerk of the peace for the county of Y.—**MUNICIPALITY OF YORK v. FREDERICTON**

**CORPN.** (1884), 29 N. B. R. 662.—**CAN.**

**h. — County attorney & clerk of the peace.] — LEES v. COUNTY OF CARLETON CORPN.** (1873), 33 U. C. R. 409.—**CAN.**

## PART XII.—THE COUNTY.

### *E. Other Counties.*

**Costs of joint committees.]—**See 1888 Act, s. 81 (6).

**Bridge lying in two counties.]—**See HIGHWAYS, Vol. XXVI., p. 582, No. 2724.

### SUB-SECT. 5.—ACCOUNTS AND AUDIT.

See 1888 Act, ss. 68 (7), 71, 73, 74 & generally, Part II., Sect. 9, sub-sect 2, *ante*.

### SECT. 6.—PROPERTY.

#### SUB-SECT. 1.—IN GENERAL.

**Vesting.]—**See, generally, 1888 Act, s. 64 (1).

**759. — Subject to restrictions & conditions—Whether statutory liability not connected with property included.]—**The justices of a county, as the local authority for the county neglected, between the years 1869 & 1878, to recoup to ptfs., as the local authority for a borough within the county, the proportionate amount contributed by the borough to the expenses incurred by the local authority of the county, in carrying out the provisions of Contagious Diseases (Animals) Act, 1869 (c. 70), which they were bound to repay under sect. 97 of that Act. After the passing of 1888 Act, ptfs. sued defts., as successors of the local authority for the county, to recover the sums which should have been recouped:—*Held*: (1) the only remedy against the justices would have been by *mandamus* to them to pay the amounts claimed out of moneys in their hands; or to levy a rate for the purpose; &, as the 1888 Act vests in the county council the property of the justices for the county subject to the same conditions & restrictions as if the Act had not been passed, defts. were not liable in the action; (2) if any action would lie, it would be an action on the case, & not an action for debt on a statute.—*SALFORD CORPN. v. LANCASHIRE COUNTY COUNCIL* (1890), 25 Q. B. D. 384; 59 L. J. Q. B. 576; 63 L. T. 409; 55 J. P. 85; 38 W. R. 661; 6 T. L. R. 362, C. A.

*Annotations*:—As to (1) *Consd. Aylott v. West Ham Corpn.*, *Sisson v. West Ham Corpn.* (1926), 90 J. P. 99. *Refd. Bootle-cum-Linacre Corpn. v. Lancashire County Council* (1890), 60 L. J. Q. B. 323; *Everett v. Griffiths*, [1924] 1 K. B. 941. As to (2) *Consd. Aylott v. West Ham Corpn.*, *Sisson v. West Ham Corpn.* (1926), 90 J. P. 99.

**Highways.]—**See HIGHWAYS, Vol. XXVI., pp. 329 *et seq.*

**Roadside waste.]—**See HIGHWAYS, Vol. XXVI., p. 391, No. 1174.

**Compulsory acquisition.]—**See, generally, COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 291 *et seq.*

**Powers of management.]—**See 1888 Act, s. 64 (3).

**760. Agreement for use of building—Agreement with clerk of the peace on behalf of quarter sessions—Whether benefit transferred to county council.]—**By an agreement between a private owner of certain rooms & the clerk of the peace, as trustees for the justices in quarter sessions, the justices in quarter sessions were permitted to use the rooms for the purpose of transacting their duties in quarter sessions free of charge:—*Held*: the use of the rooms by the county council, free of charge, was not transferred by 1888 Act, s. 64, to the county council.—*MONTGOMERYSHIRE*

*COUNTY COUNCIL v. PRYCE-JONES* (1892), 57 J. P. 308; 8 T. L. R. 754, C. A.

**Buildings used for administration of justice—Relations with standing joint committee.]—**See Nos. 719, 720, *ante*.

**Lunatic asylum.]—**See LUNATICS.

### SUB-SECT. 2.—DOCUMENTS.

**761. Whether property subject to apportionment—On alteration of areas—Middlesex county records.]—***WESTMINSTER (DUKE) & LONDON COUNTY COUNCIL v. BEDFORD (DUKE)* (1899), 16 T. L. R. 114; 44 Sol. Jo. 120.

*Annotation*:—*Mentd. Bostock v. Ramsey U. C.* (1900), 69 L. J. Q. B. 945.

**Right of inspection.]—**See 1888 Act, s. 71 (2).

### SECT. 7.—LEGAL PROCEEDINGS.

**762. Jurisdiction of court—On case stated under 1888 Act, s. 29—As to adjustment of liabilities.]—***Re SALOP COUNTY COUNCIL*, No. 706, *ante*.

**763. — — — As to authority to determine place for holding quarter sessions.]—**Upon the true construction of above sect. the High Ct. can properly entertain a special case stated for its opinion involving the question whether the determination of places in the County of London at which quarter sessions are to be held is now vested in the London County Council, or in the standing joint committee of quarter sessions & council.—*LONDON COUNTY STANDING JOINT COMMITTEE v. LONDON COUNTY COUNCIL* (1911), 104 L. T. 923; 75 J. P. 455; 27 T. L. R. 473; 9 L. G. R. 1239, D. C.

**764. Form of action — Enforcement of duty—Payments to other authorities—Mandamus—Or action.]—***SALFORD CORPN. v. LANCASHIRE COUNTY COUNCIL*, No. 759, *ante*.

**765. — — — — —.]—***BOOTLE-CUM-LINACRE CORPN. v. LANCASHIRE COUNTY COUNCIL*, No. 640, *ante*.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 316–319.

**Construction of sewers.]—**See SEWERS & DRAINS.

**766. — — — Restraint of ultra vires act — Whether prohibition lies—Amendment of local statutory provision.]—***R. v. LONDON COUNTY COUNCIL*, No. 709, *ante*.

—*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 386 *et seq.*

**767. — — — Injunction.]—***A.-G. v. LONDON COUNTY COUNCIL*, No. 735, *ante*.

—*See, generally*, INJUNCTION, Vol. XXVIII., p. 468, Nos. 778–782.

**768. In whose name action brought — Application for injunction—To restrain ultra vires act.]—***A.-G. v. LONDON COUNTY COUNCIL*, No. 735, *ante*.

—*See, generally*, INJUNCTION, Vol. XXVIII., pp. 493 *et seq.*

**769. — — — Officers — Criminal or quasi-criminal proceedings—Proof of authority.]—***JONES v. WILSON*, No. 643, *ante*.

**770. Parties — Proceedings against standing joint committee—Whether county council necessary party.]—***GLAMORGAN COAL CO. v. GLAMORGANSHIRE STANDING JOINT COMMITTEE*, *POWELL*

### PART XII. SECT. 5, SUB-SECT. 4.—E.

**k. Payment of registrar of deeds — Services rendered before separation of**

**counties — Contribution.]—***Held*: the counties of Y. & P. were jointly liable to the registrar of P. for services rendered by him under Registry Act,

ss. 26 & 33, before the separation of these counties.—*CAMPBELL v. YORK & PEEL CORPN.* (1867), 26 U. C. R. 635; 27 U. C. R. 138.—*CAN.*



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## Part I.—In General.

## SECT. 1.—DEFINITIONS.

See Lunacy Act, 1890 (c. 5); Mental Deficiency Act, 1913 (c. 28).

1. "**Lunatic.**"—(1) Return to a commission of lunacy, that the party is so far debilitated in his mind as to be incapable of the general management of his affairs, quashed; & a new commission issued: a "*Melius Inquirendum*" not issuing in lunacy. (2) The commission of lunacy applicable to incapacity from causes, distinct from lunacy; as old age: but the return, if not in the words of the commission, must have equivalent words; & in such a case the proper return is, that the party is of unsound mind; so that he is not sufficient for the government of himself, etc. (3) Privilege of the party, who is the subject of a commission of lunacy, to be present at the execution. (4) Order, that a person, against whom a commission of lunacy was established, should be delivered up to the committee. *Habeas Corpus* not necessary.

Littleton explaineth a man of no sound memory to be *non compos mentis* (LORD ERSKINE, C.).

Lord Coke . . . puts that person [*lunaticus*] by himself; describing him to be a man, who hath sometimes his understanding, & sometimes not; & this is the ancient law of the country (LORD ERSKINE, C.).—*Ex p. CRANMER* (1806), 12 Ves. 445; 33 E. R. 168.

*Annotation* :—*As to* (1) *Reid. Re Holmes* (1827), 4 Russ. 182.

2. — **Imbecile.**—Imbecility & loss of mental power, whether arising from natural decay or from paralysis, softening of the brain, or other natural cause, & although unaccompanied by frenzy or delusion of any kind, constitute unsoundness of mind amounting to lunacy within the meaning of 8 & 9 Vict. c. 100.—*R. v. SHAW* (1868), L. R. 1 C. C. R. 145; 37 L. J. M. C. 112; 18 L. T. 583; 16 W. R. 913; 11 Cox, C. C. 109, C. C. R.

3. — **Diseased mind—Making restraint of person essential.**—*R. v. BISHOP*, No. 1884, *post*.

4. "**Idiot.**"—*BALL v. MANNIN*, No. 82, *post*.

5. —.—*BANNATYNE v. BANNATYNE*, No. 361, *post*.

6. "**Unsoundness of mind.**"—*Ex p. CRANMER*, No. 1, *ante*.

7. — **Strong belief in non-existent things.**—Partial insanity is good in defeasance of a will founded immediately, so to be presumed, in or upon such partial insanity. If A. then make a will plainly inofficious, in respect to B., & is proved at the time of making it to have been under a morbid delusion, as to the character & conduct of B., the Ct. of Probate will relieve against, by pronouncing this will to be invalid, & holding A. to have died intestate, in law; how sane soever, in other particulars, or even generally, <sup>A</sup>, at the time in question of making the will, may be proved to have been.

Still, however, with all this, among the vulgar, some are for reckoning madmen those only who are frantic, or violent, to some extent. Insanity, however decided, unaccompanied with such symptoms, they are content to refer to eccentricity or extravagance. Others, again, in the

opposite extreme, are too apt to confound mere folly with frenzy; & to describe as odd, or eccentric, or in some such phrase, patients who, in better judgments, are actually, & essentially, insane. What, then, to come back to our proposed subject of inquiry, is the true criterion of insanity? &, principally, how is it distinguished, this being, obviously, our principal concern, from eccentricity, or extravagance, merely. The true criterion—the true test—of the absence or presence of insanity, I take to be, the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely—delusion. Wherever the patient once conceives something extravagant to exist, which has, still, no existence whatever but in his own heated imagination; & wherever, at the same time, having once so conceived, he is incapable of being, or, at least, of being permanently, reasoned out of that conception; such a patient is said to be under a delusion, in a peculiar, half-technical, sense of the term; & the absence, or presence, of delusion, so understood, forms, in my judgment, the true, & only test, or criterion, of absent, or present, insanity. In short, I look upon delusion, in this sense of it, & insanity, to be, almost, if not altogether, convertible terms; so that a patient, under a delusion, so understood, on any subject, or subjects, in any degree, is, for that reason, essentially mad, or insane, on such subject, or subjects, in that degree. On the contrary, in the absence of any such delusion, with whatever extravagances a supposed lunatic may be justly chargeable, & how like soever to a real madman he may either speak or act, on some, or on all subjects; still, in the absence, I repeat, of any thing in the nature of delusion, so understood as above, the supposed lunatic is, in my judgment, not properly, or essentially, insane (SIR JOHN NICHOLL).—*DEW v. CLARK & CLARK* (1826), 3 Add. 79; 162 E. R. 410.

*Annotations* :—*Consd. Chambers v. Queen's Proctor* (1840), 2 Curt. 415. *Reid. Mudway v. Croft* (1843), 3 Curt. 671; *Waring v. Waring* (1848), 6 Moo. P. C. C. 341; *Smith v. Tebbitt* (1867), L. R. 1 P. & D. 398; *Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549; *Boughton v. Knight* (1873), L. R. 3 P. & D. 64; *Roe v. Nix* (1892), 9 T. L. R. 128. *Mentd. Dew v. Clarke* (1851), 17 L. T. O. S. 249.

8. — **Not pretended belief in non-existent facts.**—*DITCHBURN v. FEARN*, No. 217, *post*.

9. — **Eccentricity & delusions.**—*DEW v. CLARK & CLARK*, No. 7, *ante*.

10. —.—*Exposition of the doctrine of monomania & partial insanity, as applied to wills.*

If the mind is unsound on one subject, provided that unsoundness is, at all times, existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects; it is only sound in appearance, for if the subject of the delusion be presented to it, the unsoundness would be manifested by such a person believing in the suggestions of fancy, as if they were realities; any act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind.

Delusion is the belief of things as realities, which

## PART I. SECT. 1.

2i. "**Lunatic**"—**Imbecile.**—A person whom it was sought to have a lunatic was shown to be in

a state of mind described as senile imbecility :—*Held* : he might properly be declared a lunatic.—*Re KELLY* (1875), 6 P. R. 220.—*CAN.*

a. "**Insanity.**"—There is no such

thing as equitable insanity. It is a legal thing, understood according to a legal definition. A deprivation of sense & a total want of understanding to contract: a deprivation of a man's



*Sect. 1.—Definitions. Sects. 2 & 3: Sub-sects. 1, 2, 3, 4 & 5.]*

exist only in the imagination of the patient. The frame of mind which indicates his incapacity to struggle against such an erroneous belief constitutes an unsound frame of mind.

To constitute a lucid interval, the party must freely & voluntarily, & without any design at the time, of pretending sanity & freedom from delusion, confess his delusion.

Where delusions are proved to have existed, both before & after the *factum*, the presumption is, that they existed at the time of the *factum*, & in such case, proof of a lucid interval, at the time of the *factum*, is thrown upon the party propounding a will. It is immaterial that the delusions do not appear on the face of the will.

A will written in 1834, by a widow, without children, a person originally eccentric, & in after-life, developing unsound delusions, conferred great benefit on a stranger, the will not betraying, on the face of it, marks of insanity, in the circumstances, pronounced against.

By far the greater number of morbid cases belong to this class. They have acquired a name, the disease called familiarly, as well as by physicians, "monomania," on the supposition of its being confined, which it rarely is, to a single faculty, or exercise of the mind: a person shall be of sound mind, to all appearance, upon all subjects save one or two; & on these he shall be subject to delusions, mistaking for realities, the suggestions of his imagination. The disease here is said to be in the imagination; that is, the patient's mind is morbid, or unsound, when it imagines; healthy & sound when it remembers. Nay; he may be of unsound mind when his imagination is employed on some subjects, in making some combinations; & sound when making others, or making one single kind of combination. Thus, he may not believe all his fancies to be realities, but only some, or one; of such a person we usually predicate, that he is of unsound mind only upon certain points (LORD BROUGHAM, C.).

In the well known case of *Dew v. Clark*, No. 7, *ante*, . . . we find SIR JOHN NICHOLL stating that mere eccentricity is not enough to constitute mental unsoundness, nor great caprice, nor violence of temper, but that there must be an aberration of reason; & he adopts a definition of delusion . . . that "it is a belief of facts which no rational person would have believed," Perhaps, in a strictly logical view, this definition is liable to one exception, or at least exposed to one criticism, that it gives a consequence for a definition; & it may be more strictly accurate to term "delusion" the belief of things as realities, which exist only in the imagination of the patient. The frame or state of mind which indicates his incapacity to struggle against such an erroneous belief, constitutes an unsound frame of mind (LORD BROUGHAM, C.).—*WARING v. WARING* (1848), 6 Moo. P. C. C. 341; 6 Notes of Cases, 388; 12 Jur. 947; 13 E. R. 715, P. C.

*Annotations:—Consd. Fowles v. Davidson* (1848), 6 Notes of Cases, 461; *Dyce Sombre v. Troup*, Solaroli (intervening) & *Prinsep & East India Co. (intervening)* (1856), Dea. & Sw. 22; *Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549. *Reid. Austen v. Graham* (1854), 8 Moo. P. C. C. 493; *Bennett v. Manchester* (1854), 2 W. R. 644; *Sutton v. Sadler* (1857), 3 C. B. N. S. 87; *Elms v. Elms* (1858), 1 Sw. & Tr. 155; *Smith v. Tebbitt* (1867),

L. R. 1 P. & D. 398; *Jenkins v. Morris* (1880), 14 Ch. D. 674; *Jackson (otherwise Macfarlane) v. Jackson* (1908), 52 Sol. Jo. 535.

11. — **Partial unsoundness.]**—*WARING v. WARING*, No. 10, *ante*.

12. — **Under Trustee Act, 1850 (c. 60), s. 2.]**—*Re PHELPS' SETTLEMENT TRUSTS*, No. 1323 *post*.

13. — — —.]—*Re DEWHIRST'S TRUSTS* No. 1351, *post*.

14. — — —.]—A person is of "unsound mind" within the meaning of Trustee Act, 1850 (c. 60), where from permanent incapacity of mind he is incapable of managing his affairs, though his state of mind is not such that he would be found lunatic on inquisition.

NORTH, J., in an action in the Ch. Div., gave a judgment removing a trustee of unsound mind & appointing a new trustee in his place, but declined to make an order under s. 34 of the above Act vesting the estate in the new trustee, considering that it ought to be applied for in Lunacy. The Lords Justices sitting in Lunacy made the vesting order.—*Re MARTIN'S TRUSTS, LAND, BUILDING, INVESTMENT & COTTAGE IMPROVEMENT CO. v. MARTIN*, *Re MARTIN* (1887), 34 Ch. D. 618; 56 L. J. Ch. 229, 695; 56 L. T. 241; 35 W. R. 524, C. A.

*Annotations:—Reid. Re Weston* (1898), 43 Sol. Jo. 29; *Re M.*, [1899] 1 Ch. 79.

15. — — —.]—A person who is paralytic & deprived of the power of speech & unable to read & write, but is not suffering from any mental disease, is not a person of unsound mind within the above sect. Therefore in such a case the petition should not be presented in Lunacy, but in the Ch. Div.

We have considered whether the order might not be made in the Ch. Div. only by virtue of the jurisdiction delegated to us at the special request of the Lord Chancellor that we should act as judges of the Ch. Div. in matters connected with our jurisdiction in Lunacy, but we think that such jurisdiction can only be exercised in aid of the jurisdiction in Lunacy, & that we ought not to make an order only in the Ch. Div. (COTTON, L.J.).—*Re BARBER* (1888), 39 Ch. D. 187; 57 L. J. Ch. 756; 58 L. T. 756; 37 W. R. 182, C. A.

*Annotation:—Reid. Re Weston* (1898), 43 Sol. Jo. 29.

16. "Sound mind"—Not necessarily perfectly balanced.]—*BOUGHTON v. KNIGHT*, No. 234, *post*.

17. "Insanity"—Delusions & perversion of mind.]—*DEW v. CLARK & CLARK*, No. 7, *ante*.

—.]—*GODDARD v. VERE*, No. 321, *post*.

—.]—Moral insanity, or a moral perversion of the feelings unaccompanied with delusion, does not afford a sufficient ground to invalidate & nullify the acts of one so affected, if no fraud is practised upon him, & his eccentricity cannot be resolved into intellectual insanity, the test of which is delusion.—*FRERE v. PEACOCKE* (1846), 1 Rob. Eccl. 442; 163 E. R. 1095; *sub nom. FREER v. PEACOCKE*, 11 Jur. 247.

*Annotation:—Mentd. Davies v. Gregory* (1873), L. R. 3 P. & D. 28.

20. — Not mere eccentricity.]—*DEW v. CLARK & CLARK*, No. 7, *ante*.

21. — — —.]—*GODDARD v. VERE*, No. 321, *post*.

22. — — —.]—*MUDWAY v. CROFT*, No. 209, *post*.

reason. The genus of it has been described also by the general word *non compos*; & it includes both idiocy & lunacy.—*ROCHFORD v. ELY* (LORD

(1768), 1 Ridg. Parl. Rep. 532.—IR.

b. "Lunatic patient."]—An infant lunatic permitted to reside with his relations under Lunacy Statute,

No. 309, s. 60, is not a "lunatic patient" within sect. 149.—*Re MCGREGOR'S SETTLED ESTATES* (1878), 4 V. L. R. 1.—AUS.

23. ———.]—WARING *v.* WARING, No. 10, *ante*.

24. ———.]—Eccentricity, & the indulgence in expensive & frivolous pursuits, unless they show a person to be incapable of taking care of his person or property, do not amount to legal insanity.—*Re* HUGHES (1848), 13 L. T. O. S. 541.

25. ——— Not mere holding of unfounded or absurd opinions.]—DITCHBURN *v.* FEARN, No. 217, *post*.

26. ——— Not mere extravagance & frivolity.]—*Re* HUGHES, No. 24, *ante*.

27. Delusion—Gross exaggeration of slight circumstances.]—DITCHBURN *v.* FEARN, No. 217, *post*.

28. ——— Belief of imaginary things as realities.]—WARING *v.* WARING, No. 10, *ante*.

29. ——— Belief in impossible or improbable things.]—PRINSEP & EAST INDIA CO. *v.* DYCE SOMBRE, No. 431, *post*.

30. ——— Test for insanity.]—BANKS *v.* GOODFELLOW, No. 204, *post*.

———.]—*See* Nos. 7, 19, *ante*.

31. Monomania.]—WARING *v.* WARING, No. 10, *ante*.

## SECT. 2.—CLASSIFICATION.

*See* Lunacy Act, 1890 (c. 5); Mental Deficiency Act, 1913 (c. 28).

32. “Non compos mentis” — Kinds of.] — (1) There are four manners of *non compos mentis*: (a) Idiot or fool natural; (b) He who was of good & sound memory & by the visitation of God has lost it; (c) *Lunaticus, qui gaudet lucidis intervallis*, & sometimes is of good & sound memory, & sometimes *non compos mentis*; (d) By his own act, as a drunkard.

(2) Acts done by a lunatic *inter lucida intervalla*, shall bind him.

(3) Every deed, feoffment, or grant, which any man *non compos mentis* makes, is voidable not by himself, but by his privies in blood, or in representation.

(4) If a man *non compos mentis* levies a fine, or suffers a recovery, or acknowledges a statute or recognisance, neither his heir nor his exors. shall avoid them, for these are matters of record.

(5) By the civil law, the acts of idiots & *non compos mentis* without their tutor void.

(6) Alienation by fine or recovery shall bind the idiot.—BEVERLEY’S CASE (1603), 4 Co. Rep. 123 b; 76 E. R. 1118.

*Annotations*:—As to (1) *Extd.* *Ex p.* Cranmer (1806), 12 Ves. 445. As to (3) *Consd.* Imperial Loan Co. *v.* Stone, [1892] 1 Q. B. 599. *Refd.* Yates *v.* Boen (1738), 2 Stra. 1104; Molton *v.* Camroux (1848), 2 Exch. 487. As to (4) *Consd.* Molton *v.* Camroux (1848), 2 Exch. 487. *Refd.* Murley *v.* Sherren (1838), 8 Ad. & El. 754. As to (5) *Consd.* *Re* Walker, [1905] 1 Ch. 160. *Generally*, *Mentd.* Tourson’s Case (1610), 8 Co. Rep. 170 a; Shaftesbury *v.* Shaftesbury (1725), Gilb. Ch. 172; *Ex p.* Southcot

(1751), 2 Ves. Sen. 401; Oxenden *v.* Compton (1793), 4 Bro. C. C. 231; Humphreys *v.* Griffiths (1840), 6 M. & W. 89; Stanton *v.* Percival (1855), 5 H. L. Cas. 257.

## SECT. 3.—LUCID INTERVALS.

### SUB-SECT. 1.—IN GENERAL.

Acts during lucid interval—Binding.]—*See* Sect. 3, sub-sect. 2, *post*.

33. Lunacy with lucid intervals—Distinguished from soundness of mind subject to occasional unsoundness.]—*Re* J. B., No. 569, *post*.

34. Voluntary confession of delusion.]—WARING *v.* WARING, No. 10, *ante*.

35. More frequent in delusion than in lunacy.]—Lucid intervals are much easier to be proved as they are much more likely to occur in cases of delirium than in cases of proper insanity.—BROGDEN *v.* BROWN (1825), 2 Add. 441; 162 E. R. 356.

*Annotation*:—*Consd.* Bennet *v.* Manchester (1854), 23 L. T. O. S. 331.

### SUB-SECT. 2.—ACTS DURING LUCID INTERVALS.

36. General rule — Binding.] — BEVERLEY’S CASE, No. 32, *ante*.

37. ———.]—HALL *v.* WARREN, No. 69, *post*.

38. ———.]—WHITE *v.* DRIVER, No. 285, *post*.

39. Power of attorney.] — DAILY TELEGRAPH NEWSPAPER CO. *v.* McLAUGHLIN, No. 124, *post*.

———.]—*See, generally*, AGENCY, Vol. I., pp. 295 *et seq.*

Contracts.]—*See* Part II., Sect. 2, sub-sect. 1, D., *post*.

### SUB-SECT. 3.—MARRIAGE DURING LUCID INTERVAL.

*See* Part II., Sect. 3, sub-sect. 2, B., *post*.

### SUB-SECT. 4.—WILL EXECUTED DURING LUCID INTERVAL.

*See* Part II., Sect. 8, sub-sect. 5, *post*.

### SUB-SECT. 5.—PROOF OF.

Degree of sanity to be proved.]—*See* Part III., Sect. 2, *post*.

Burden of proof.]—*See* Part III., Sect. 4, sub-sect. 2, B., *post*.

——— In case of wills.]—*See* Part II., Sect. 8, sub-sect. 4, B., *post*.

## PART I. SECT. 3, SUB-SECT. 2.

36 i. General rule—Binding.]—CREAGH *v.* BLOOD (1845), 8 I. Eq. R. 434; 2 Jo. & Lat. 509.—IR.



## Part II.—Civil Capacity.

### SECT. 1.—IN GENERAL.

**40. Contracts of idiots.]—**A civil contract, though for necessities, by an idiot, after he is found by office to be an idiot, or a lunatic, after he is found by office to be a lunatic is void (BRIDGMAN, C.J.).—*MANBY v. SCOTT* (1663), as reported in O. Bridg. 229; 1 Sid. 109; 1 Keb. 441; 124 E. R. 561, Ex. Ch.

*Annotations:—*Refd. Davidson v. Wood (1863), 11 W. R. 791; *Re Rhodes*, Rhodes v. Rhodes (1890), 44 Ch. D. 94. *Mentd.* Dyer v. East (1669), 2 Keb. 554; Tod v. Stokes (1698), 12 Mod. Rep. 244; Gibbons v. Cloyne (Bp.) (1706), Holt, K. B. 599; R. v. Haughton (1718), 1 Stra. 83; Bolton v. Prentice (1744), 2 Stra. 1214; Hatchett v. Baddeley (1776), 2 Wm. Bl. 1079; Compton v. Collinson (1790), 1 Hy. Bl. 334; Jennings v. Rundall (1799), 8 Term Rep. 335; Nurse v. Craig (1806), 2 Bos. & P. N. R. 148; Montague v. Baron (1825), 5 Dow. & Ry. K. B. 532; Hunt v. De Blaquiere (1829), 5 Bing. 550; Belton v. Hodges (1832), 9 Bing. 365; Leeds & Thirsk Ry. v. Fearnley (1849), 4 Exch. 26; Newry & Enniskillen Ry. v. Coombe (1849), 3 Exch. 565; Johnston v. Sumner (1858), 3 H. & N. 261; Woodward v. Dowse (1861), 8 Jur. N. S. 413; Bartlett v. Wells (1862), 1 B. & S. 836; Jolly v. Rees (1864), 15 C. B. N. S. 628; Bazeley v. Forder (1868), L. R. 3 Q. B. 559; Debenham v. Mellon (1880), 29 W. R. 141; Wilson v. Glossop (1887), 19 Q. B. D. 379; Morcl v. Westmoreland (1902), 87 L. T. 635; Miss Gray v. Cathcart (1922), 38 T. L. R. 562; Selby v. Atkins (1926), 135 L. T. 45.

**41. Acts without consent of guardian.]—**BEVERLEY'S CASE, No. 32, ante.

**42. —.] —**LEACH v. THOMPSON (1698), Show. Parl. Cas. 150; 1 E. R. 102, H. L.; *affg.* S. C. *sub nom.* THOMPSON v. LEACH (1697), 3 Mod. Rep. 301.

*Annotations:—*Refd. Yates v. Boen (1738), 2 Stra. 1104; Zouch d. Abbot & Hallet v. Parsons (1765), 3 Burr. 1794; Daily Telegraph Newspaper Co. v. McLaughlin, [1904] A. C. 776. *Mentd.* Burgoigne v. Fox (1738), 1 Atk. 575.

**43. Acts of bankruptcy.]—**Suppose the case of two partners, one an infant or a lunatic, & the other a bkpt., the creditors would be without remedy under the statutes of bkpt. if such a commission could not be sued out, for an infant or a lunatic cannot be a bkpt. (WILLES, C.J.).—*CRISPE v. PERRIT* (1744), Willes, 467; 125 E. R. 1272.

*Annotations:—*Mentd. *Ex p.* Layton, *Ex p.* Hardwicko (1801), 6 Ves. 434; *Re Corson*, *Ex p.* De Tastet (1810), 1 Rose, 10; *Ex p.* Brown, *Ex p.* Munton (1812), 1 Ves. & B. 60; *Re Chambers*, *Ex p.* Chambers (1835), 1 Deac. 197.

**44. Acts for benefit of lunatic.]—**ELLIOT v. INCE, No. 126, *post*.

**45. Effect of single delusion—Relating to subject-matter.]—**Action by purchaser against exors. of vendor for specific performance of an agreement to sell an estate. Defence, unsoundness of mind & incapability. It was held on the evidence that the vendor, who was eighty years of age, suffered from brain disease & insanity produced thereby as well as, & distinct from, insanity evidencing itself in delusions, & also from general enfeeblement of mind. One of such delusions did to some extent enter into the matter of the contract, but, in the opinion of the ct., not so far as to form

the foundation of it. The medical evidence was that the vendor, though capable to some extent of transacting business, was not competent to enter into the contract in question, which, however, was reasonable & simple. There was strong lay evidence that the vendor perfectly understood the transaction. The ct. being of opinion on the whole evidence, notwithstanding the medical testimony, that the vendor was sufficiently sane at the time to understand, & did understand, the transaction, granted specific performance.—*BIRKIN v. WING* (1890), 63 L. T. 80.

**46. — Question for jury.]—**JENKINS v. MORRIS, No. 216, *post*.

**Contracts of drunkards—Whether void or voidable—At option of drunkard.]—**See CONTRACT, Vol. XII., pp. 41 *et seq.*

### SECT. 2.—CONTRACTS.

#### SUB-SECT. 1.—CONTRACTS GENERALLY.

##### A. *Bonâ fide* Transactions Without Notice.

**47. General rule—Not set aside.]—**A bill was filed to set aside a deed of conveyance twenty-seven years after its execution, on the ground of the lunacy of grantor & other collateral circumstances of fraud. At the hearing of the cause these collateral circumstances were not established:—*Held*: *pltf.* was not entitled to an issue to try the question of the lunacy of the grantor.

*Qu.*: whether a conveyance executed by a lunatic is absolutely void in the absence of notice of the lunacy to the party claiming under the conveyance, & of all circumstances of fraud.

*Qu.*: whether such a conveyance is voidable, & if so, under what circumstances.

Such a conveyance executed under circumstances of fraud, the lunacy being one of those circumstances, might be set aside. It is an established doctrine of equity, that where a bill sets up a case of fraud as a ground for relief & such fraud is not proved, *pltf.* is not entitled to relief by establishing some other fact independent of the fraud, which might of itself create a title to relief under a head of equity distinct from that applicable to the case of the fraud alleged.—*PRICE v. BERRINGTON* (1851), 3 Mac. & G. 486; 18 L. T. O. S. 56; 15 Jur. 999; 42 E. R. 348, L. C.

*Annotations:—*Refd. Jacobs v. Richards, Jacobs v. Porter (1854), 18 Beav. 300; Elliot v. Ince (1857), 7 De G. M. & G. 475; York Glass Co. v. Jubb (1925), 134 L. T. 36.

**48. —.]—**ELLIOT v. INCE, No. 126, *post*.

**49. — Impossibility of putting parties in statu quo.]—**A ct. of equity will not interfere to set aside a contract, overreached by an inquisition in lunacy, if fair & without notice; especially where the parties cannot be reinstated.

—AUS.

**47 ii. —.]—**The rule both of law & equity, as to a contract entered into by a person apparently of sound mind & not known by the other contracting party to be insane, is that such a contract, if fair, *bonâ fide*, & completely executed, is valid. Even though such a contract might be void at law, it will only be set aside in equity for fraud.—*HASSARD v. SMITH* (1872), 5 I. R. Eq. 429.—IR.

#### PART II. SECT. 1.

*c. General rule.]—*All acts done during lunacy to bind the lunatic's estate shall be avoided.—*ELY'S (LORD) CASE* (1764), 1 Ridg. Parl. Rep. 515, 519.—IR.

**44 i. Acts for benefit of lunatic.]—**MCLAUGHLIN v. CITY BANK OF SYDNEY (1912), 14 C. L. R. 684.—AUS.

#### PART II. SECT. 2, SUB-SECT. 1.—A.

**47 i. General rule — Not set aside.]—**

A contract entered into by a person who does not know or suspect the other contracting party to be a lunatic cannot be avoided on the ground merely of the inadequacy of the consideration. To set aside such a contract there must have been some fraud, imposition or over-reaching on the part of the person seeking to uphold the contract or some evidence to show that the contract was not fairly made.—*TREMILIS v. BENTON* (1892), 18 V. L. R. 607.

It is impossible to give pltf. the relief he prays, or any relief, except upon the ground, that he was a lunatic at the time the contract took place. The establishment of that fact is indispensably necessary (GRANT, M.R.).—*NIELL v. MORLEY* (1804), 9 Ves. 478; 32 E. R. 687.

*Annotations*:—*Apld.* Price v. Berrington (1851), 3 Mac. & G. 486. *Consd.* Campbell v. Hooper (1855), 3 Sm. & G. 153. *Distd.* Elliot v. Ince (1857), 7 De G. M. & G. 475. *Refd.* Molton v. Camroux (1848), 2 Exch. 487; Jacobs v. Richards, Jacobs v. Porter (1854), 18 Beav. 300; Wiltshire v. Marshall (1866), 14 W. R. 602; York Glass Co. v. Jubb (1925), 134 L. T. 36.

50. ———.]—Unsoundness of mind will not vacate a contract, if it be unknown to the other contracting party, & no advantage be taken of the lunatic especially where the contract is executed in whole or in part, so that the parties cannot be restored to their original position.

Therefore, where a lunatic purchased certain annuities for his life, of a society which at the time had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of human affairs, & fair & *bonâ fide* on the part of the Society:—*Held*: after the death of the lunatic his personal representatives could not recover back the premiums paid for the annuities.

This special verdict hardly shows any such state of mind [lunacy]; but, even if it did, the modern cases show, that when that state of mind was unknown to the other contracting party, & no advantage was taken of the lunatic the defence cannot prevail, especially where the contract is not merely executing, but executed in the whole or in part, & the parties cannot be restored altogether to their original position (PATTERSON, J.).—*MOLTON v. CAMROUX* (1849), 4 Exch. 17; 18 L. J. Ex. 356; 13 L. T. O. S. 305; 154 E. R. 1107, Ex. Ch.

*Annotations*:—*Consd.* Price v. Berrington (1851), 3 Mac. & G. 486. *Apld.* Beavan v. M'Donnell (1854), 9 Exch. 309. *Consd.* Campbell v. Hooper (1855), 3 Sm. & G. 153. *Distd.* Elliot v. Ince (1857), 7 De G. M. & G. 475. *Consd.* Imperial Loan Co. v. Stone, [1892] 1 Q. B. 599. *Apld.* York Glass Co. v. Jubb (1925), 134 L. T. 36. *Refd.* Jacobs v. Richards, Jacobs v. Porter (1854), 18 Beav. 300; Moss v. Tribe (1862), 3 F. & F. 297; Matthews v. Baxter (1873), L. R. 8 Exch. 132. *Mentd.* Re London Celluloid Co. (1888), 39 Ch. D. 190.

51. *Deed securing money advanced.*—In a suit in which a person found lunatic sought to set aside a deed executed by her as a security for moneys advanced at a time subsequent to that from which she was found lunatic, & in which deft. by his answer denied notice of the lunacy, the deed was not set aside, although at the hearing deft. by his counsel admitted that pltf. was at the time of executing the deed of unsound mind; enquiries were directed as to the fact of the advance & the circumstances attending it, & as to the application of the money; & upon further directions the deed was ordered to stand as security for the money reported to have been actually advanced, with interest & costs.—*KIRK-WALL v. FLIGHT* (1842), 3 W. R. 529.

*Annotation*:—*Apld.* Campbell v. Hooper (1855), 3 Sm. & G. 153.

52. *Agreement to purchase land—Payment of deposit.*—Pltf. entered into a written contract for the purchase of certain land at a specified price from certain persons, vendors thereof on behalf of deft., on the terms & conditions that pltf. should forthwith pay a sum of £415 as a

deposit on the purchase; that the purchase should be completed by Mar. 25, 1852; that within four weeks after the contract the vendors should deliver to pltf. an abstract of title to the property & deduce a good title thereto; that within two months after the delivery of such abstract, pltf. should deliver to the vendors a statement of any objections to the title, & if no objections were so delivered, the title should be considered as accepted; that on payment of the residue of the purchase-money on the said Mar. 25 the vendors would convey the premises to pltf.; & that if pltf. should neglect or fail to comply with these conditions his deposit money should be forfeited to the vendors. Pltf. paid the deposit at the time of entering into the contract, & an abstract of title was afterwards duly delivered to him, to which no objection was made. At the time he entered into the contract he was a lunatic, & incapable of understanding its nature; but this deft. did not know, & the contract on his part was a *bonâ fide* one:—*Held*: as the contract was entered into by deft., & the money received, fairly & in good faith, & without knowledge of the lunacy, & so far as concerned the deposit, the transaction was completely executed, pltf. was not entitled to the return of the money so deposited.—*BEAVAN v. M'DONNELL* (1854), 9 Exch. 309; 2 C. L. R. 474; 22 L. T. O. S. 243; 156 E. R. 131; *subsequent proceedings*, 10 Exch. 184.

*Annotation*:—*Refd.* Wiltshire v. Marshall (1866), 14 W. R. 602.

*See, generally*, SALE OF LAND.

53. *Supplying goods to agent.*—Pltf. was a tradesman, & deft. had given his wife authority to deal with pltf., & had held her out as his agent & as entitled to pledge his credit. Afterwards deft. became insane, & whilst his malady lasted, his wife ordered goods from pltf. who accordingly supplied them. At the time of supplying the goods pltf. was unaware that deft. had become insane. Deft. afterwards recovered his reason, & then refused to pay for the goods supplied to his wife by pltf.:—*Held*: deft. was liable for the price of the goods.—*DREW v. NUNN* (1879) 4 Q. B. D. 661; 48 L. J. Q. B. 591; 40 L. T. 671; 43 J. P. 541; 27 W. R. 810, C. A.

*Annotations*:—*Refd.* Burke v. Amalgamated Soc. of Dyers, [1906] 2 K. B. 583. *Mentd.* Chili Republic v. London River Plate Bank (1894), 10 T. L. R. 658; Willis, Faber v. Joyce (1911), 104 L. T. 576; Edwards v. Porter, McNeill v. Hawes, [1923] 2 K. B. 538.

*Contracts of drunkards.*—*See* CONTRACT, Vol. XII., pp. 41 *et seq.*

### B. Knowledge of Lunacy.

54. *Whether a sufficient defence.*—Where a tradesman supplied a person with goods suited to his station, & afterwards, by an inquisition taken under a commission of lunacy, that person was found to have been lunatic before & at the time when the goods were ordered & supplied:—*Held*: this was not a sufficient defence to an action for the price of the goods, the tradesman at the time when he received the orders & supplied the articles, not having any reason to suppose that deft. was a lunatic.

A lunatic is capable of contracting for necessities.—*BAXTER v. PORTSMOUTH (EARL)* (1826),

### PART II. SECT. 2, SUB-SECT. 1.—B.

54 i. *Whether a sufficient defence.*—Pltfs. made certain necessary repairs upon deft.'s vessel. At the time the agreement for the repairs was made, one of pltfs. knew that deft. was sub-

ject to insane delusions, believing that people were conspiring against him to do him some injury. He, however, superintended the repairs, & talked intelligently to the workmen employed about the vessel; but some months afterwards he became violent, & was

confined in asylum for the insane:—*Held*: pltfs. were entitled to recover for the work done.—*ROBERTSON v. KELLY* (1882), 2 O. R. 163.—*CAN.*

d. *Sufficiency of knowledge.*—A vendor was insane, but not on all subjects; & apart from his delusions,



*Sect. 2.—Contracts: Sub-sect. 1, B., C., D. & E.; sub-sect. 2, A., B. & C.]*

5 B. & C. 170; 2 C. & P. 178; 108 E. R. 63; *sub nom.* BAGSTER v. PORTSMOUTH (EARL), 7 Dow. & Ry. K. B. 614.

*Annotations:—*Consd. Molton v. Camroux (1848), 2 Exch. 487; Campbell v. Hooper (1855), 3 Sm. & G. 153. *Refd.* Browne v. Joddrell (1827), Mood. & M. 105; Howard v. Digby (1834), 8 Bli. N. S. 224; Imperial Loan Co. v. Stone, [1892] 1 Q. B. 599; York Glass Co. v. Jubb (1925), 134 L. T. 36. *Mentd.* Gore v. Gibson (1844), 13 M. & W. 623.

55. —.]—LEVY v. BAKER (1827), Mood. & M. 106, n., N. P.

56. —.]—In an action for work done by pltf., as an attorney, for deft., who pleaded lunacy:—*Held*: this was no defence unless pltf. knew it; & it appearing that deft. had been duly placed in an asylum while he suffered under delirium tremens, & was mad from time to time when under the influence of drink, but that pltf. did not do business with him at those times; it was for the jury to say whether, when he took his instructions, deft. was insane to his knowledge.—MOSS v. TRIBE (1862), 3 F. & F. 297, N. P.

57. —.]—Where deft. in an action of contract, sets up the defence that he was insane when the contract was made, in order to succeed in his defence he must show that at the time of the contract his insanity was known to pltf.—IMPERIAL LOAN CO. v. STONE, [1892] 1 Q. B. 599; 61 L. J. Q. B. 449; 66 L. T. 556; 56 J. P. 436; 8 T. L. R. 408, C. A.

*Annotations:—*Consd. Leaver v. Torres (1899), 43 Sol. Jo. 778. *Apld.* York Glass Co. v. Jubb (1925), 134 L. T. 36.

58. —.]—Deft. entered into a contract by correspondence, after inspection of the property, to purchase pltf. co.'s glassworks & business as a going concern for £54,600, a lower price than that originally asked by the vendors. At that date he was suffering from general paralysis of the insane, & was shortly afterwards removed to a lunatic asylum. The purchase was not completed, & some months later the receiver of deft.'s estate, appointed under the Lunacy Acts, repudiated the contract. The co. then brought an action for damages for breach of contract. The judge before whom the action was tried, gave judgment for pltf. & ordered an inquiry into the damages suffered by them, the result of which was that he awarded the sum of £21,000. Deft. appealed from the judgment & the award of damages:—*Held*: as deft. had failed to prove that pltf. co., or their representatives knew, or had any reason to suppose that he was insane at the date of entering into the contract, there was a valid & binding contract at common law, there was no equitable ground such as that of unfairness for relieving deft. & his estate of liability under the contract, as the price of the works was the result of bargaining & was fair & reasonable, & having regard to the rapid depreciation of the property between the dates of the contract & its repudiation by the receiver, the damages were not excessive.—YORK GLASS CO., LTD. v. JUBB (1925), 134 L. T. 36; 42 T. L. R. 1, C. A.

59. — Lunatic imposed upon.]—No person can in defending an action, be allowed to stultify himself; & therefore deft. cannot, in an action for work & labour, set up his own insanity as a defence, unless he has been imposed upon by pltf. in consequence of his mental imbecility.

—BROWN v. JODRELL (1827), 3 C. & P. 30; Mood. & M. 105, N. P.

*Annotations:—*Consd. Molton v. Camroux (1848), 2 Exch. 487. *Refd.* Imperial Loan Co. v. Stone, [1892] 1 Q. B. 599. *Mentd.* Gore v. Gibson (1844), 13 M. & W. 623.

60. —.]—To constitute a defence to an action for use & occupation of a house taken by deft. under a written agreement, at a stipulated sum *per annum*, it is not enough to show that deft. was a lunatic, & that the house was unnecessary for her; but it must be also shown that pltf. knew this, & took advantage of deft.'s situation; & if that be shown, the jury should find for deft.; & they cannot, on these facts, find a verdict for pltf. for any smaller sum than that specified in the agreement.—DANE v. KIRKWALL (VISCOUNTESS) (1838), 8 C. & P. 679, N. P.

*Annotations:—*Consd. Molton v. Camroux (1848), 2 Exch. 487; Campbell v. Hooper (1855), 3 Sm. & G. 153. *Refd.* Imperial Loan Co. v. Stone, [1892] 1 Q. B. 599; York Glass Co. v. Jubb (1925), 134 L. T. 36.

—.]—MOLTON v. CAMROUX, No. 50, *ante*.

62. —.]—The insanity of a mtgor. at the date of the mtge. will not annul the right of a mtgee. to a foreclosure decree, unless the mtgee. knew of the mtgor.'s insanity & took advantage of it.

If to the fact of lunacy of one party, you add dishonest conduct on the part of the other contracting party, & show that he knew of the lunacy, & took advantage of it, then the right to recover under the contract is gone, & the lunacy has its full effect of totally annulling the contract (*per CUR.*)—CAMPBELL v. HOOPER (1855), 3 Sm. & G. 153; 3 Eq. Rep. 727; 24 L. J. Ch. 644; 25 L. T. O. S. 220; 1 Jur. N. S. 670; 3 W. R. 528; 65 E. R. 603.

*Annotation:—*Consd. York Glass Co. v. Jubb (1925), 134 L. T. 36.

63. Obtained after contract but before action.]—YORK GLASS CO., LTD. v. JUBB, No. 58, *ante*.

Contracts of drunkards.]—See CONTRACT, Vol. XII., pp. 41 *et seq.*

#### C. Contracts Wholly or Partially Performed.

64. Not set aside—Lapse of time—Subsequent purchase for value.]—WINCHCOMB v. HALL (1630), 1 Rep. Ch. 40; 21 E. R. 501.

65. — If fair & without notice—Inability to reinstate parties.]—NIELL v. MORLEY, No. 49, *ante*.

66. —.]—MOLTON v. CAMROUX, No. 50, *ante*.

67. —.]—KIRKWALL v. FLIGHT, No. 51, *ante*.

68. —.]—BEAVAN v. M'DONNELL, No. 52, *ante*.

Contracts of drunkards.]—See CONTRACT, Vol. XII., pp. 41 *et seq.*

#### D. Contracts during Lucid Interval.

69. Deed executed before inquisition—Inquisition relating back.]—Upon a bill for specific performance of a contract, over-reached by a commission of lunacy, pltf. not having traversed the inquisition, an issue was directed, whether deft. was a lunatic at the execution: if so, whether he had lucid intervals; & whether the contract was executed during a lucid interval; the difficulties in executing the contract, which was for the sale of an estate vested in the lunatic, viz. that the

a stranger might not perceive his insanity. In the negotiation for a sale of land, he said to the purchaser that

he was bewitched, which, it was shown, was one of his delusions:—*Held*: this was not sufficient to affect the vendee

with notice of the vendor's condition.—MCDONALD v. MCDONALD (1869), 16 Gr. 37.—CAN.

price was to be fixed by persons to be nominated, not appearing strong enough to preclude the previous inquiry, with a view to performance: *pltf.* being willing to take the title.

The law upon this subject is, that all acts done during a lucid interval are to be considered done by a person perfectly capable of contracting, managing, & disposing of, his affairs, at that period. This has more frequently occurred upon wills. A multitude of questions has been raised upon the execution of a will during a lucid interval; & that being proved, the will has been held valid & effectual to all intents & purposes for the conveyance of real & personal estate; as if testator had never been deranged. It must be the same as to contract, or any disposition of property. If he had made an absolute conveyance, it would have been good, if made in a lucid interval (GRANT, M.R.).—HALL *v.* WARREN (1804), 9 Ves. 605; 32 E. R. 738.

*Annotations*:—*Reid.* Milnes *v.* Gery (1807), 14 Ves. 400; *Re Walker* (1904), 74 L. J. Ch. 86. *Mentd.* Agar *v.* Macklew (1825), 4 L. J. O. S. Ch. 16.

**70. Deed executed after inquisition.]**—*Re WALKER*, No. 172, *post*.

**71. Deed executed in lunatic asylum—Acquiescence after discharge.]**—Deeds were executed by a party while he was in confinement in a lunatic asylum. He read them over before he executed them, & suggested several alterations, & acquiesced in them for several months after his discharge from the asylum. A bill, filed by him afterwards for the purpose of setting these deeds aside, was, under the circumstances, dismissed.

The only question for my decision in this case is, were the deeds executed under such circumstances as to be binding upon *pltf.*; & for the reasons that I have stated I think that they are binding upon *pltf.* I am satisfied that no coercion was used & also that he perfectly understood the nature & objects of the deeds (LORD LYNDHURST, C.).—SELBY *v.* JACKSON (1844), 6 Beav. 192; 13 L. J. Ch. 249; 2 L. T. O. S. 366; 49 E. R. 799, L. C.

*Annotation*:—*Reid.* Molton *v.* Camroux (1848), 2 Exch. 487.

**Contracts of drunkards.]**—*See CONTRACT*, Vol. XII., pp. 41 *et seq.*

#### *E. Lunacy after Contract Made.*

**Performance with leave of judge.]**—*See Part X.*, Sect. 5, sub-sect. 5, *post*.

**Lunacy of solicitor—Position of articulated clerk.]**—*See SOLICITORS*.

**Lunacy of surety—Continuing guarantee.]**—*See GUARANTEE*, Vol. XXVI., p. 209, No. 1643.

**Breach of promise of marriage.]**—*See HUSBAND & WIFE*, Vol. XXVII., p. 33, No. 86.

**Lunacy of member of trade union—Alteration of rules.]**—*See TRADE & TRADE UNIONS*.

**Lunacy of partner.]**—*See Part X.*, Sect. 4, *post*.

**Lunacy of principal—Termination of agent's**

**authority.]**—*See AGENCY*, Vol. I., pp. 660, 692, Nos. 2763, 3015–3017.

*Compare Nos. 183, 185, post.*

#### SUB-SECT. 2.—PARTICULAR INSTANCES.

##### *A. Assignments.*

**72. Assignment of debt.]**—PALMER *v.* PARKHURST (1668), 1 Cas. in Ch. 112; 22 E. R. 719.

*Annotation*:—*Reid.* Molton *v.* Camroux (1848), 2 Exch. 487.

**73. Assignment of personal estate—Made under misapprehension.]**—MANNING *v.* GILL, No. 170, *post*.

##### *B. Bills of Exchange, Promissory Notes, etc.*

*See, generally*, BILLS OF EXCHANGE, Vol. VI.

**74. Promissory note—Drawn in unusual form—Right of indorsee.]**—If a person, perfectly imbecile in mind, is imposed upon, & induced to sign a promissory note, which is drawn in an unusual form, such note is bad, even in the hands of an indorsee.—SENTANCE *v.* POOLE (1827), 3 C. & P. 1, N. P.

**75. — Insanity of indorser—Defence by maker.]**—The maker of a promissory note, sued by an indorsee, was allowed to plead that the indorser was a lunatic at the time of the indorsement.—ALCOCK *v.* ALCOCK (1841), 3 Man. & G. 268; 133 E. R. 1144.

*Annotation*:—*Consd.* Molton *v.* Camroux (1848), 2 Exch. 487.

*Compare No. 57, ante.*

##### *C. Deeds and Conveyances.*

Sales, purchases, & leases, *see Sub-sect. 2, I., post*.

**76. Deeds.]**—BEVERLEY'S CASE, No. 32, *ante*.

**77. —.]**—LEACH *v.* THOMPSON (1698), Show. Parl. Cas. 150; 1 E. R. 102, H. L.; *affg.* S. C. *sub nom.* THOMPSON *v.* LEACH (1697), 3 Mod. Rep. 301.

*Annotations*:—*Reid.* Yates *v.* Boen (1738), 2 Stra. 1104; Zouch *d. Abbot & Hallet v. Parsons* (1765), 3 Burr. 1794; Daily Telegraph Newspaper Co. *v.* McLaughlin, [1904] A. C. 776. *Mentd.* Burgoyne *v.* Benson (1738), West temp. Hard. 340.

**78. — Executed in extremis—No direct proof of insanity.]**—Although there is no direct proof that a man is *non compos* or delirious, yet if the deed be executed *in extremis*, it cannot be supposed that he had a mind adequate to the business he was about; & might more easily be imposed upon.—FANE *v.* DEVONSHIRE (DUKE) (1718), 6 Bro. Parl. Cas. 137; 2 E. R. 984, H. L.

**79. — Plea of non est factum—Evidence of lunacy.]**—Lunacy may be given in evidence on *non est factum*.—YATES *v.* BOEN (1738), 2 Stra. 1104; 93 E. R. 1060.

*Annotations*:—*Reid.* Gore *v.* Gibson (1845), 13 M. & W. 623; Molton *v.* Camroux (1848), 12 Jur. 800.

**80. — Obtained by keeper.]**—Deed set aside, as obtained by fraud, & undue influence by

#### PART II. SECT. 2, SUB-SECT. 2.—B.

**Promissory note—Insanity of**

*Reid.* CAMERON (1893),

#### PART II. SECT. 2, SUB-SECT. 2.—C.

**76 i. —.]**—The deed of a lunatic is not absolutely void, but voidable, & can only be avoided by the grantor or his representatives.—DOE *d. R.* *v.* KING (1869), 12 N. B. R. (1) 330.—CAN.

**76 ii. —.]**—In order to avoid a deed made by a lunatic, or a person in a state of intoxication, two things must be established, his incapacity to con-

tract, & his equitable right to be relieved; & where the incapacity to contract, as the result of dissipation, was established, & inadequacy of consideration shown, the ct. granted relief.—JONES *v.* CALKIN (1876), 3 Pug. 356.—CAN.

**76 iii. —.]**—A man, by putting his seal to an instrument, does not make it his deed, if at the time of so doing he was so weak as to be incapable of understanding it if explained to him, although he might not fall within the strict legal definition of an idiot.—BALL *v.* BALL (1825), Sm. & Bat. 183; *affd.*, 3 Bl. N. S. 1; 1 Dow. & Cl. 880;

Sm. & Bat. 454.—IR.

**76 iv. —.]**—FENTON & MACAN *v.* ARMSTRONG (1835), 4 Ir. L. Rec. N. S. 167.—IR.

**76 v. —.]**—CREAGH *v.* BLOOD (1845), 8 I. Eq. R. 434; 2 Jo. & Lat. 509.—IR.

**76 vi. —.]**—Found that a deed executed by a person who had a few months before been quite insane & who was still of weak mind, was nevertheless effectual as his deed, there being no proof of fraud on the part of those in whose favour it was granted.—MORRISON *v.* MORRISON (1841), 4 Dunl. (Ct. of Sess.) 337.—SCOT.



## LUNATICS AND PERSONS OF UNSOUND MIND.

*Sect. 2.—Contracts: Sub-sect. 2, C., D., E.,  
1. (a) & (b).]*

a keeper of a house for lunatics from a person under his care; as within the general principle arising from the relation of guardian & ward, attorney & client, etc.—*WRIGHT v. PROUD* (1806), 13 Ves. 136; 33 E. R. 246, L. C.

*Annotations:—Mentd.* Hunter v. Atkins (1834), Coop. temp. Brough. 464; Cheslyn v. Dalby, Dalby v. Cheslyn (1836), 2 Y. & C. Ex. 170; Liles v. Terry, [1895] 2 Q. B. 679.

**Degree of weakness of mind.]—**Deeds set aside, the execution of which had been obtained by imposition from an imbecile old man. A degree of weakness of mind, far below what would be necessary to justify a commission of lunacy, if it has been taken advantage of to procure the execution of a deed, will be sufficient ground for setting that deed aside.—*BLACHFORD v. CHRISTIAN* (1829), 1 Knapp, 73; 12 E. R. 248, P. C.

**82. ———.]—**On a question whether a deed was void in law, on the ground of unsoundness of mind in the person by whom it was executed, the judge directed the jury that the question for them to try was, whether B. was a person of sound mind or not; & that, to constitute such unsoundness of mind as should avoid a deed at law, the person executing must be incapable of understanding & acting in the ordinary affairs of life. Exception to this—for that the judge ought to have directed the jury that the unsoundness must amount to idiocy, in the strict legal definition of the term. But the judge's direction held by the cts. below to be good, & the judgment affirmed by the Lords.

The strict legal definition of an idiot, in an old book which I have brought down with me, is, that if a man can repeat the letters of the alphabet, or read what is set before him, he cannot be taken to be an idiot. But you would say that this was contrary to common sense; for as to repeating the letters of the alphabet, or reading what is set before him, a child of three years old may do that. Then the question is whether the party was of sound mind or not, & that is the question here. To be sure the judge goes on to say that, as one test of capacity or incapacity, the jury was at liberty to consider whether the party was capable of understanding what he did by executing the deed in question, when its general import was explained to him; & surely that is one good test, & there is nothing irregular in that. But the question is whether, taking the whole direction together, it is right, & I think it is (*LORD TENTERDEN*).—*BALL v. MANNIN* (1829), 3 Bli. N. S. 1; 1 Dow. & Cl. 380; 4 E. R. 1241, H. L.

**83. ———.]—****Effect of subsequent finding of inquisition.]—***SERGESON v. SEALEY*, No. 436, *post*.

**84. ———.]—***JACOBS v. RICHARDS*, *JACOBS v. PORTER*, No. 94, *post*.

**85. ———.]—***FERGUSON v. BORRETT*, No. 446, *post*.

**86. ———.]—****Executed by committee—On behalf of lunatic.]—***LAWRIE v. LEES*, No. 1173, *post*.

**83 i. ———.]—***Effect of subsequent finding of inquisition.]—*Where the deed to the vendor was executed on Feb. 1, 1854, & in Dec. a commission of lunacy was issued against the grantor in that deed, under which it was found that he was insane, & had been so from Feb. or Mar. previous, the ct. refused to enforce the contract.—*FRANCIS v. ST. GERMAIN* (1858), 6 Gr. 636.—*CAN.*

**1. ———.]—***Executed during lucid interval—Onus of proof.]—*Where the grantor under a deed is shown to have been afflicted with a continuous type of insanity for some time prior to the date of the deed the *onus* is on those

upholding the deed to prove its execution during a lucid interval.—*HOOVER v. NUNN* (1912), 22 O. W. R. 28; 3 O. W. N. 1223; 3 D. L. R. 503.—*CAN.*

**g. ———.]—**A deed executed by a party who is insane with lucid intervals, will not be set aside unless it is shown that he was insane at the time of the execution of the deed, & that his insanity was known to the grantee.—*CONRAD v. HALIFAX LUMBER CO., LTD.* (1919), 52 N. S. R. 250.—*CAN.*

**91 i. Conveyance of land—Fraud.]—***YOUNG v. YOUNG* (1863) 10 Gr. 365.—*CAN.*

**87. ———.]—****Deeds & wills—Whether distinguishable.]—***LEACH v. THOMPSON* (1698), Show. Parl. Cas. 150; 1 E. R. 102, H. L.; *affg.* S. C. *sub nom.* *THOMPSON v. LEACH* (1697), 3 Mod. Rep. 301.

*Annotations:—Refd.* Zouch d. Abbot & Hallet v. Parsons (1765), 3 Burr. 1794; Daily Telegraph Newspaper Co. v. McLaughlin, [1904] A. C. 776. *Mentd.* Burgoyne v. Benson (1738), West temp. Hard. 340; Yates v. Boen (1738), 2 Stra.

**88. ———.]—****Distinction between.]—***Re WALKER*, No. 172, *post*.

**89. ———.]—****Procuring execution of—Whether fraud within Real Property Limitation Act, 1833 (c. 27), s. 26.]—**T., a person of unsound mind, living in the family of D. became entitled as heiress-at-law to certain lands. D. received the rents & profits of such lands for thirteen years during the life of T. & eleven years after her death, when D. died. D. had procured T. to execute a will devising part of her estate, & also indentures for conveying other parts, to D. & her heirs:—*Held*: D. had founded her title upon the instruments which she had procured T. to execute in her favour; & her claim to the lands in question must be deemed to be under, & not against T. & there was, therefore, no adverse possession as against T. or those claiming under her. *Semble*: procuring instruments of conveyance & devise to be executed by a person of unsound mind was a fraud within the above sect.—*LEWIS v. THOMAS* (1843), 3 Hare, 26; 67 E. R. 283.

*Annotation:—Refd.* Manby v. Bowicke (1857), 3 K. & J. 342.

**Wills.]—***See Sect. 8, post.*

**90. Conveyance of land.]—**A conveyance of land was obtained from a person of weak intellect; reconveyance ordered, although the land had been sold to purchasers, & there had been a descent.—*LEWIS v. VAUGHAN* (1807), Toth. 42; 21 E. R. 118.

**91. ———.]—****Fraud.]—***PRICE v. BERRINGTON*, No. 47, *ante*.

**Sales & purchases.]—***See Sub-sect. 2, I., post.*

### D. Life Insurance.

**Suicide of assured whilst insane.]—***See INSURANCE*, Vol. XXIX., pp. 366, 367, 372, Nos. 2945, 2949, 2952, 2955, 2987.

**Duty to disclose mental condition of assured.]—***See INSURANCE*, Vol. XXIX., p. 352, No. 2855.

### E. Marriage.

*See Sect. 3, post.*

### F. Mortgages.

*See, generally,* MORTGAGE.

**92. Voluntary conveyance of equity of redemption.]—**Conveyance voluntary made by a person weak, though no lunatic, avoided.—*WHITE v. SMALL* (1682), 2 Cas. in Ch. 103; 22 E. R. 867.

**93. Mortgage by lunatic—Subsequent inquisition finding antecedent lunacy—Foreclosure.]—***SNOOK v. WATTS*, No. 385, *post*.

### PART II. SECT. 2, SUB-SECT. 2.—F.

**h. Mortgage by lunatic.]—**Pltf., on Apr. 4, 1864, mtged. land to L., who covenanted thereby for quiet enjoyment by pltf. until default. Deft., L.'s administrator, pleaded that L. conveyed the land to pltf. on Mar. 31, 1864, which was pltf.'s only title to the land; that the mtge. sued on was to secure the purchase-money, & was executed immediately after the deed, & as a part of the same transaction; & that L. was of unsound mind when he executed the deed on Mar. 31, 1864, which was proved at the trial:—*Held*: the plea was bad; for the avoidance of

94. ———.]—(1) An inquisition finding a party to have been a lunatic for a period long antecedent to the date of a mtge. deed executed by him, will not prevent the ct. from making a decree of foreclosure upon the deed being proved in the usual manner by the attesting witness.

(2) A deed though overreached by the finding of an inquisition in lunacy, is not, therefore, necessarily *prima facie* void.

(3) A party claiming under a deed is not bound to prove the sanity of the person executing it; the burden of proof lies on the other side.—*JACOBS v. RICHARDS, JACOBS v. PORTER* (1854), 18 Beav. 300; 23 L. J. Ch. 557; 23 L. T. O. S. 44; 18 Jur. 527; 2 W. R. 174; 52 E. R. 118; on appeal, 5 De G. M. & G. 55.

Annotations:—*Reid. Campbell v. Hooper* (1855), 3 Sm. & G. 153; *Wood v. Divarris* (1856), 11 Exch. 493.

95. ———.]—*CAMPBELL v. HOOPER*, No. 62, ante.

96. ———. After receiver appointed.]—*Re MARSHALL, MARSHALL v. WHATELEY*, No. 173, post.

### G. Necessaries.

#### (a) Capacity to Contract.

97. General rule.]—*BAXTER v. PORTSMOUTH (EARL)*, No. 54, ante.

#### (b) Liability to Pay for.

See Sale of Goods Act, 1893 (c. 71), s. 2.

98. Obligation implied by law.]—(1) The Duchess of Norfolk was entitled, under the trusts of the settlement made in contemplation of her marriage with the Duke in 1771, to two annuities of £700 & £300, charged by way of pin-money, upon estates to which the Duke was entitled for his life. The Duke received all the rents & profits of the estates, & maintained the Duchess according to her rank, up to the time of his death in 1815. In 1816 the Duchess was found to have been a lunatic, without lucid intervals, from 1782, & she continued so until 1820, when she died intestate. Her personal representative claimed from the personal representative of the Duke, arrears of the pin-money from 1782 to 1815:—*Held*: the personal representative of the Duke was entitled to set off any payments made by the Duke in respect of the pin-money, against a claim for the arrears by the Duchess during her lifetime, & that the personal representative of the Duchess was not entitled to any arrears of her pin-money.

(2) Although satisfaction of arrears of pin-money cannot be presumed against a lunatic wife on the ground of her consent or acquiescence in her husband's retainer of them, there may be a presumption against her of satisfaction by reason of payments made by her husband in discharge of her debts, to the payment of which pin-money is applicable.

(3) A lunatic is liable for money paid to his use as for necessities, etc., as a person of sound mind.—*HOWARD v. DIGBY* (1834), 2 Cl. & Fin. 634; 8 Bli. N. S. 224; 6 E. R. 1293, H. L.; *revsq. S. C. sub nom. DIGBY (EARL) v. HOWARD* (1831), 4 Sim. 588.

Annotations:—As to (2) *Distd. Rowley v. Unwin* (1855), 2 K. & J. 138. *Reid. Ex p. Holden* (1863), 13 C. B. N. S.

the deed for insanity did not necessarily involve the avoidance of the mtge.—*ECCLES v. LOWRY* (1873), 32 U. C. R. 635.—CAN.

k. ———.]—The mere fact that a mtgor. is a lunatic & the mtgee. is proceeding to realise upon his mtge. is not a ground for a stay of proceedings.—*SMITH (Alta.)*, [1918] 2 W. W. R.

540.—CAN.

1. Insane conduct—Evidence of—Must bear on time of transaction.]—*CAMPBELL v. HILL* (1872), 22 C. P. 526.—CAN.

PART II. SECT. 2, SUB-SECT. 2.—G. (b).

981. Obligation implied by law.]—

641; *Dixon v. Dixon* (1878), 9 Ch. D. 587; *Edward v. Cheyne* (No. 2) (1888), 13 App. Cas. 385. As to (3) *Apld. Wentworth v. Tubb* (1842), 12 L. J. Ch. 61. *Foll. Re J.*, [1909] 1 Ch. 574. *Reid. Molton v. Camroux* (1848), 2 Exch. 487; *Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94. *Generally, Mentd. Leach v. Way* (1835), 5 L. J. Ch. 100; *Lea v. Grundy* (1855), 24 L. T. O. S. 287; *Moore v. Barber* (1865), 5 Giff. 43.

99. ———.]—In the case of necessities supplied to a lunatic the law raises a contract by implication on the part of the lunatic, under which the amount of such necessities may become payable as a debt out of his real or personal assets, on a bill filed for the administration of those assets.—*WENTWORTH v. TUBB* (1841), 1 Y. & C. Ch. Cas. 171; 5 Jur. 1150; 62 E. R. 840; *affd.* (1842), 12 L. J. Ch. 61, L. C.

Annotations:—*Consd. Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94. *Reid. Chester v. Rolfe* (1853), 4 De G. M. & G. 798; *Re Newbegin's Estate, Eggleton v. Newbegin* (1887), 36 Ch. D. 477.

100. ———.]—The law will raise an implied contract, & give a valid demand or debt against the lunatic or his estate, for moneys expended for the necessary protection of his person & estate.

Under a commission of lunacy, B. was, upon inquisition, found lunatic, & the verdict was confirmed upon the trial of a traverse. Before the costs had been ordered to be raised B. died:—*Held*: under 3 & 4 Will. 4, c. 104, the real estate of the lunatic was liable for the costs of the proceedings.—*WILLIAMS v. WENTWORTH* (1842), 5 Beav. 325; 49 E. R. 603.

Annotations:—*Apld. Tayler v. Tayler* (1851), 3 Mac. & G. 426. *Consd. Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94. *Reid. Molton v. Camroux* (1848), 2 Exch. 487; *Stedman v. Hart* (1854), 18 Jur. 744; *Richardson v. Du Bois* (1869), 10 B. & S. 830; *Re Meares* (1879), 10 Ch. D. 552; *Re E. G.*, [1914] 1 Ch. 927.

101. ———.]—(1) If a trustee be sued in Chancery for an account, & it appears that he has properly expended sums of money for the protection & safety, or for the maintenance & support, of his *cestui que trust*, at a time when he, though adult, was incapable of taking care of himself, the ct. will allow him credit, in account, for such sums of money.

(2) A bill may be filed in the name of a person alleged to be of unsound mind, though not so found by inquisition, by any one professing to be his next friend; & such a person may be sued as a deft., & the ct. then appoints a guardian to answer for him. In such cases, the ct. imposes all the restraints of infancy, & the party is bound by the acts of the guardian so appointed. The ct., having proper evidence that they are incapable of protecting their own interests, treats them as infants, or as insane, though not so found by inquisition; & being satisfied that their next friend or guardian pays proper attention to their interests, & making all necessary inquiries to ascertain their rights, & what is beneficial to them, or, if necessary, directing that a commission may be applied for, ultimately deals with their rights & property as justice may require.

(3) *Semble*: a contract may be implied in favour of a person who has supplied a person of unsound mind though not so found by inquisition, with necessities, or has provided him with proper protection & support.—*NELSON v. DUNCOMBE, DUNCOMBE v. NELSON* (1846), 9 Beav. 211; 15 L. J. Ch.

The estate of a lunatic is liable for necessities supplied to the lunatic; & the rule applies in the case of a lunatic not so found.—*MORROW v. MORROW* (1920), 47 O. L. R. 222; 18 O. W. N. 35.—CAN.

9811. ———.]—*Re HILKER* (1924), 55 O. L. R. 402.—CAN.



*Sect. 2.—Contracts: Sub-sect. 2, G. (b), (c) & (d), H. & I.]*

296; 7 L. T. O. S. 447; 10 Jur. 399; 50 E. R. 323.

*Annotations:—As to (2) Refd. Russell v. Walker (1851), 17 L. T. O. S. 241; Vane v. Vane (1876), 45 L. J. Ch. 381; Re Rhodes, Rhodes v. Rhodes (1890), 44 Ch. D. 94.*

**102. —**—Under Criminal Lunatics Act, 1884 (c. 64), s. 10 (3), which incorporates by reference the language of Lunatic Asylums Act, 1853 (c. 97), s. 104, the cost of the maintenance of a criminal lunatic can be recovered by the Crown against property to which the lunatic has become entitled, as being due under an implied obligation to pay for that maintenance as a necessary; & this is a statutory liability for the whole amount expended in respect of which there is no limitation against the Crown.

The obligation is not properly a contractual obligation; it is an obligation implied by law from the fact that necessities have been supplied to a person who is unable to contract, but it is none the less an obligation & it has exactly the same status as a debt (FLETCHER MOULTON, L.J.).—*Re J.*, [1909] 1 Ch. 574; 78 L. J. Ch. 348; 100 L. T. 281; 21 Cox, C. C. 766, C. A.

**103. —**—Circumstances justifying implication.]—Where a lunatic has property to which he is entitled for life under a settlement as well as property to which he is absolutely entitled, the ct. will apply the life interest in the first place towards his maintenance; unless the trustees of the settled property have an absolute discretion whether to employ the whole or any part of the income for the lunatic's benefit. Therefore where property was held upon trust to pay the income in such way, at such time, & in such manner as the trustees should think fit towards the maintenance of a lunatic during her life, with power to invest any surplus not required for the purpose as capital, it was held that the trustees had no such discretion as would oust the jurisdiction of the ct. to apply the whole of the income in the lunatic's maintenance in exoneration of her absolute property. The brother of a lunatic lady not so found by inquisition advanced money for the maintenance of his sister for several years under circumstances which left it doubtful whether he intended it for a gift or expected to be repaid. He died, & his sister was then found to be lunatic by inquisition. His exors. having brought in a claim against the lunatic's estate for repayment of the advances, the ct. made an allowance to testator's estate for past maintenance, but limited it to advances made within six years before testator's death. *Qu.*: whether a person who supplies a lunatic with necessities, knowing him to be a lunatic, can maintain an action against him on the ground of an implied contract.—*Re WEAVER* (1882), 21 Ch. D. 615; 48 L. T. 93; 47 J. P. 68; 31 W. R. 224, C. A.

*Annotations:—Refd. Re Newbegin's Estate, Eggleton v. Newbegin (1887), 38 Ch. D. 477; Re Rhodes, Rhodes v. Rhodes (1890), 44 Ch. D. 94; Birkenhead Union Grdns. v. Brookes (1906), 95 L. T. 359. Mentd. Wilton v. Turner (1883), 52 L. J. Ch. 270; Re Lofthouse (1885), 29 Ch. D. 921.*

**104. —**—Whenever necessities are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessities out of his own property. Accordingly, an obligation may be implied on the part of a lunatic, whether so found or not, to repay a person who has supplied necessities for him, when the necessities supplied are suitable to the position in life of the lunatic. But the provision

of money or necessities must be made under circumstances which would justify the ct. in implying the obligation, i.e., with the intention on the part of the person making the provision to be repaid for so doing, & to constitute a debt against the lunatic's estate. A lady of unsound mind who was never found a lunatic, & whose income was under £96 a year, was confined from 1855 down to her death in 1881 in a private lunatic asylum at a cost of £140 a year. Her brother received the income of her property, & applied it in part payment of the £140, paying the deficiency out of his own pocket until his death in 1875. After his death his son, who was his exor., continued to receive & apply the lady's income in the same manner, & the deficiency was made good partly by him & partly by his brother & sisters. No claim was ever made by any of these persons against the lady's estate during her life, nor did any of them appear to have kept any account against her. After her death:—*Held*: the deficiency was provided under circumstances from which no implied obligation could arise.

Whether the sums so expended were for necessities or not, must be determined according to the circumstances in each particular case.—*Re RHODES, RHODES v. RHODES* (1890), 44 Ch. D. 94; 59 L. J. Ch. 298; 62 L. T. 342; 38 W. R. 385, C. A.

*Annotations:—Consd. Re J.*, [1909] 1 Ch. 574; Pontypridd Grdns. v. Drew (1926), 90 J. P. 169. *Refd. Healing v. Healing* (1902), 51 W. R. 221; Birkenhead Union Grdns. v. Brookes (1906), 95 L. T. 359; Nash v. Inman, [1908] 2 K. B. 1. *Mentd. Re Clabbon* (1904), 73 L. J. Ch. 853; Catt v. Wood, [1908] 2 K. B. 458.

**105. —**—Effect of knowledge of lunacy.]—*BAXTER v. PORTSMOUTH (EARL)*, No. 54, *ante*.

**106. —**—*Re WEAVER*, No. 103, *ante*.

**107. Maintenance of children—Not of tender years—No committee appointed.]—HEALING v. HEALING, No. 116, *post*.**

*See, generally, INFANTS & CHILDREN*, Vol. XXVIII., p. 216, Nos. 757 *et seq.*

**Necessaries supplied to wife—Liability of husband.]—See HUSBAND & WIFE, Vol. XXVII., p. 203, Nos. 1756–1758.**

(c) *What are Necessaries.*

**108. Question of fact.]—Re RHODES, RHODES v. RHODES, No. 104, *ante*.**

**109. Goods suitable to station in life.]—BAXTER v. PORTSMOUTH (EARL), No. 54, *ante*.**

**110. Expenses incurred in protection of person & estate.]—WILLIAMS v. WENTWORTH, No. 100, *ante*.**

**111. —**—*NELSON v. DUNCOMBE, DUNCOMBE v. NELSON*, No. 101, *ante*.

—An order of lunacy directing the taxation of the costs, charges & expenses incurred by the solrs. employed in prosecuting the commission in lunacy, & subsequently as the solrs. of the committees, & directing an inquiry whether it would be fit & proper to raise these costs, etc., by sale or mtge. of the lunatic's real estate, did not constitute them a judgment debt, nor make them a charge in equity upon such real estate; but such costs, etc., were considered as a simple contract debt due by the lunatic for necessities.—*STEDMAN v. HART* (1854), Kay, 607; 2 Eq. Rep. 816; 23 L. J. Ch. 908; 18 Jur. 744; 2 W. R. 462; 69 E. R. 258.

*Annotation:—Refd. Re Watson, Stamford Union v. Bartlett*, [1899] 1 Ch. 72.

**113. —**—*BROCKWELL v. BULLOCK*, No. 535, *post*.

**114. Placing lunatic in expensive asylum.]—Re RHODES, RHODES v. RHODES, No. 104, *ante*.**

**115. Not goods with which lunatic sufficiently supplied.]—**(1) If a tradesman supplies to a lunatic goods which are not necessities, & has at the time of the contract notice of the lunacy, he cannot recover the value of such goods.

(2) If a lunatic is already sufficiently supplied with furniture, pictures, etc., goods of the same description, though otherwise suitable to his condition in life, & necessities, are not necessities.—*M'LEAN v. LEEMING* (1850), 16 L. T. O. S. 6, N. P.

**116. Not maintenance of lunatic's children—Children not of tender years.]—**Pltf., who had carried on a draper's business, was confined in a lunatic asylum from 1882 to 1894, but no committee of his estate had been appointed. In 1883 pltf.'s business was sold by deft., & the proceeds of the sale were with the authority & consent of pltf.'s wife expended by deft. in the maintenance of pltf.'s children, not of tender years, while he was in the asylum. Pltf. upon his release in 1894 refused to ratify what had been done, & brought an action against deft. to recover the proceeds of sale of the business:—*Held*: pltf. not being legally liable to maintain the children while in the asylum, & no committee having been appointed of his estate who might have sanctioned such expenditure, pltf. could recover the proceeds of the sale of his business as money had & received to his use.—*HEALING v. HEALING* (1902), 51 W. R. 221; 19 T. L. R. 90; 47 Sol. Jo. 110.

*See, generally*, INFANTS, Vol. XXVIII., p. 216, Nos. 757 *et seq.*

**117. Necessary outgoings of estate.]—***Re BEAVAN, DAVIES, BANKS & Co. v. BEAVAN*, No. 119, *post*.

(d) *Expenditure on behalf of Lunatic.*

**118. General rule.]—***BRAMWELL v. BRAMWELL* (1889), 5 T. L. R. 568.

**119. —.]—**A customer of a bank became of unsound mind. His son arranged with the bank to continue the lunatic's banking account & to draw upon it on behalf of the lunatic for the maintenance of the lunatic's household & for the necessary outgoings of his estate. At the death of the lunatic this banking account was overdrawn. In a creditors' action to administer the real & personal estate of the lunatic the bank claimed to prove as creditors for the amount of the overdraft, which included usual bank charges for interest & commission:—*Held*: (1) though the bank were not creditors of the lunatic, they were entitled under the doctrine of subrogation to stand in the shoes of creditors paid by the son by means of the banking account for necessities supplied for the maintenance of the lunatic's household, & for the necessary outgoings of his estate; (2) the bank were not entitled to prove for interest & commission on the overdraft.

(3) In a proper case necessities may include interest on mtges., repairs, insurance, & rent audit expenses.—*Re BEAVAN, DAVIES, BANKS & Co. v. BEAVAN*, [1912] 1 Ch. 196; 81 L. J. Ch. 113; 105 L. T. 784.

*Annotation*:—*Generally*, *Mentd.* *Lloyd v. Coote & Ball*, [1915] 1 K. B. 242.

**120. In excess of lunatic's income.]—**A person who was a lunatic, but had not been found to be so by inquisition, died seised of a small freehold estate, but not possessed of any personal property.

His stepfather had received the rents of the estate, & had expended more than the amount of them in maintaining the lunatic; he also paid the lunatic's funeral expenses:—*Held*: he was not entitled, under 3 & 4 Will. 4, c. 104, to be paid either the surplus expenditure, or the amount of the funeral expenses, out of the lunatic's freehold estate.

Pltf. could not claim, as a debtor, what he had expended, beyond the rents, in the maintenance of the lunatic, as it was an act of bounty on his part, & not a debt contracted by the lunatic, who was in a situation which incapacitated him from contracting a debt (*SHADWELL, V.-C.*).—*CARTER v. BEARD* (1839), 10 Sim. 7; 3 Jur. 532; 59 E. R. 514.

*Annotations*:—*Dbtd.* *Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94. *Refd.* *Wentworth v. Tubb* (1841), 1 Y. & C. Ch. Cas. 171.

**121. —.]—***Re RHODES, RHODES v. RHODES*, No. 104, *ante*.

**122. Funeral expenses.]—***CARTER v. BEARD*, No. 120, *ante*.

*H. Powers of Attorney.*

*See, generally*, AGENCY, Vol. I., pp. 295 *et seq.*

**123. Invalid unless executed in lucid interval.]—***ELLIOT v. INCE*, No. 126, *post*.

**124. —.]—**Where a power of attorney is executed by a person of unsound mind, it must be treated as invalid unless it be proved to have been executed in a lucid interval.—*DAILY TELEGRAPH NEWSPAPER CO. v. McLAUGHLIN*, [1904] A. C. 776; 73 L. J. P. C. 95; 91 L. T. 233; 20 T. L. R. 674, P. C.

*Annotations*:—*Consd.* *Molynoux v. Natal Land & Colonization Co.*, [1905] A. C. 555. *Mentd.* *Victorian Ry. Comrs. v. Brown, Ex p. Victorian Ry. Comrs.*, [1906] A. C. 381.

**Mental incapacity of principal—Whether attorney can act.]—***See* AGENCY, Vol. I., p. 692, No. 3015.

*I. Sales, Purchases and Leases.*

*See, generally*, SALE OF GOODS; SALE OF LAND; LANDLORD & TENANT, Vol. XXX., p. 435, Nos. 953–962.

Deeds & conveyances, *see* Sub-sect. 2, C., *ante*.

**125. Dealings with persons apparently sane—By parties acting in good faith.]—***PRICE v. BERRINGTON*, No. 47, *ante*.

**126. —.]—**Dealings of sale & purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding; but this doctrine is inapplicable to a case where the question is whether the deed of a lunatic altering the provisions of a settlement is valid. A lunatic tenant in tail of copyholds having executed powers of attorney authorising her attorney first to procure her admission as tenant in tail in the several manors of the copyholds in question; & secondly, to surrender them after admission & take a re-admission in fee:—*Held*: the transaction was invalid, & the estate tail was not barred; though at the instance of a creditor disputing the lunacy, an issue was directed as to whether the lunatic was, at the time of her executing the powers of attorney, of sound mind.

There is no such doctrine as that an act of a lunatic is to be valid if it be for his benefit.—*ELLIOT v. INCE* (1857), 7 De G. M. & G. 475; 26

belonging to his son-in-law R., & invested it with other money of A.'s own in the purchase of a farm, which cost \$3,200. It was assumed in the cause that R. was, at the time of the purchase & thenceforward, of unsound mind & unable to give a valid assent to the

**PART II. SECT. 2, SUB-SECT. 2.—H. m. General rule.]—**A power of attorney executed by a lunatic who does not understand what he is doing, such want of understanding being imputed to the person who procures its

execution, is void.—*DAILY NEWSPAPER CO., LTD. v. M.—* [1904] A. C. 776; 1 C. L. R. 243.—*AUS.*

**PART II. SECT. 2, SUB-SECT. 2.—I. n. Purchase.]—**A. received \$1,200



*Sect. 2.—Contracts: Sub-sect. 2, I. Sect. 3: Sub-sects. 1 & 2, A. (a) i.]*

L. J. Ch. 821; 30 L. T. O. S. 92; 3 Jur. N. S. 597; 5 W. R. 482; 44 E. R. 186, L. C.

*Annotations:—Consd.* Daily Telegraph Newspaper Co. v. McLaughlin, [1904] A. C. 776; York Glass Co. v. Jubbs (1925), 134 L. T. 36. *Refd.* Nicholson v. Tanham (1870), 18 W. R. 523; *Re* Walker, [1905] 1 Ch. 160. *Mentd.* Turner v. Ince (1859), 34 L. T. O. S. 71; *Re* Cumming, *Ex p.* Turner (1860), 3 L. T. 391; Picard v. Hine (1869), 5 Ch. App. 274.

**127. Sales by lunatic—Conveyance of land—At undervalue.]—**COLEBY v. SMITH (1683), 1 Vern. 205; 23 E. R. 416.

*Annotations:—Mentd.* A.-G. v. Vernon (1685), 1 Vern. 370; Baugh v. Price (1752), 1 Wils. 320.

**128. ———.]—**Sales at great undervalue from one that was afterwards a lunatic set aside; but the conveyances to stand a security for what was really paid.—ADDISON v. DAWSON (1711), 2 Vern. 678; 1 Eq. Cas. Abr. 278; 23 E. R. 1040, L. C.

*Annotation:—Refd.* Murley v. Sherren (1838), 8 Ad. & El. 754.

**129. ———.]—**Where M., an aged, illiterate, & weak-minded man, not a person absolutely incapable of managing his own affairs, but in such a state of mental incapacity as to make it necessary that he should have protection & advice executed a deed of conveyance of his property for a grossly inadequate consideration, the ct., on bill filed by the heiress & her husband, declared that the deed must be set aside as an absolute conveyance, & stand as a security only for money advanced by the purchaser, & properly expended by him on the property.—LONGMATE v. LEDGER (1860), 2 Giff. 157; 2 L. T. 256; 6 Jur. N. S. 481; 8 W. R. 386; 66 E. R. 67.

*Annotations:—Consd.* Clark v. Malpas (1862), 31 Beav. 80; Fry v. Lane, *Re* Fry, Whittet v. Bush (1888), 40 Ch. D. 312.

**130. ——— Consideration near value.]—**A ct. of equity may, upon the testimony of witnesses, determine upon the sanity of a person, without sending it to trial at law. A. obtains a conveyance from an insane person, long before any commission of lunacy issues or is executed. This is a fraud; & the conveyance shall be set aside, though the consideration money was near the value of the estate.—EVANS v. BLOOD (1746), 3 Bro. Parl. Cas. 632; 1 E. R. 1543, H. L.

*Annotation:—Consd.* Curson v. Belworthy (1852), 19 L. T. O. S. 233.

**131. ——— Agreement to sell land—Action for specific performance.]—**BIRKIN v. WING, No. 45, *ante*.

**132. Purchase by lunatic—At auction.]—**Estate sold before the master for payment of debts & A. reported the best bidder. Before the report was confirmed, it was discovered that A. was insane at the time of the bidding. It was moved on behalf of all the parties in the cause that B. the next best bidder might be reported the purchaser at the sum bidden by him & B. consented, but the ct. thought this was irregular, & directed estate to be re-sold generally.—BLACKBEARD v. LINDIGREN (1786), 1 Cox, Eq. Cas. 205; 29 E. R. 1130, L. C.

**133. ——— How far void.]—**The purchase of goods at an auction by an insane man is so far void as to exclude the liability of the auctioneer for the difference between the price obtained at that & a subsequent sale.—SAMUEL v. ROBINSON (1846), 7 L. T. O. S. 301, N. P.; *subsequent proceedings*, 8 L. T. O. S. 122, 367.

Auctions generally, *see* AUCTION & AUCTIONEERS, Vol. III., pp. 2 *et seq.*

*transaction:—Held:* on that assumption he was entitled to the \$1,200 as against A.'s estate.—GOODFELLOW v. ROBERTSON (1871), 18 Gr. 572.—CAN.

*o. Lease—Insanity of lessor.]—*The contract of a lunatic, voidable at his option, is binding upon the other party to the contract, & a lease is,

**134. ——— Agreement to purchase land—Repayment of deposit.]—**On claim by vendor for specific performance by purchaser, found by inquisition to have been lunatic at the time of the contract, the ct. declared the contract to have been null & void, & ordered the residue of the deposit, after deducting the vendor's costs, charges & expenses, to be repaid to the committee of the lunatic's estate.—FROST v. BEAVAN (1853), 22 L. J. Ch. 638; 17 Jur. 369.

**135. ——— Action for specific performance.]—**A demurrer will not lie to a bill for specific performance of an agreement to buy land on the ground that the present mental incapacity of a necessary party to the conveyance, to join therein or to concur in a parol variation of the original written contract, appears on the face of the bill.—BEAUFORT (DUKE) v. GLYNN (1856), 3 Sm. & G. 213; 25 L. T. O. S. 171; 1 Jur. N. S. 888; 3 W. R. 502; 65 E. R. 630, L. JJ.

**136. ——— Completion by committee—Sanction of court.]—**A person of unsound mind entered into a contract to purchase real estate: the purchaser was subsequently found by inquisition to be of unsound mind, & a committee of his estate was appointed. The master in lunacy directed the committee to complete the purchase, & the purchase-money was provided out of the lunatic's personal estate. The lunatic having died intestate:—*Held:* the direction to the committee to complete the purchase amounted to an election by the lunacy authorities to adopt the voidable contract entered into by the lunatic, & consequently that a conversion had been effected & the estate descended as realty.—BALDWIN v. SMITH, [1900] 1 Ch. 588; 69 L. J. Ch. 336; 82 L. T. 616; 48 W. R. 346; 44 Sol. Jo. 278.

*Necessaries.]—See* Sub-sect. 2, G., *ante*.

**137. Lease—To agents—At undervalue.]—**Leases for lives, obtained by agents of a deceased person of weak intellect, upon inadequate considerations set aside as fraudulent.—GARTSIDE v. ISHERWOOD (1783), 1 Bro. C. C. 558; 28 E. R. 1297, L. C.

*Annotation:—Refd.* Andrews v. Mowbray & Castle (1807), Wils. Ex. 71.

Relations between principal & agent generally, *see* AGENCY, Vol. I., pp. 424 *et seq.*

**138. ——— Insanity of lessee—Knowledge of lessor.]—**DANE v. KIRKWALL (VISCOUNTESS), No. 60, *ante*.

**139. ——— Effect of delusion connected with subject-matter—Question for jury.]—**JENKINS v. MORRIS, No. 216, *post*.

### SECT. 3.—MARRIAGE.

#### SUB-SECT. 1.—THE CONTRACT TO MARRY.

*See, generally,* HUSBAND & WIFE, Vol. XXVII., pp. 27 *et seq.*

**Defence to action for breach—Discovery of previous insanity.]—***See* HUSBAND & WIFE, Vol. XXVII., p. 32, No. 85.

#### SUB-SECT. 2.—THE CONTRACT OF MARRIAGE.

##### A. Insanity at Time of Marriage.

###### (a) Effect of.

###### i. On Contract of Marriage.

*See* Marriage of Lunatics Act, 1811 (c. 37); *see, generally,* HUSBAND & WIFE, Vol. XXVII., pp. 23 *et seq.*

even if pltf. is of unsound mind when it is executed, binding on deft.—KERR v. PETROLIA TOWN (1921), 64 D. L. R. 61 O. L. R. 74.—CAN.

**140. Whether marriage invalidated.]—**STILE *v.* WEST (1605), 1 Roll. Abr. 357.

*Annotation:—*Reid. Manby *v.* Scott (1663), 1 Sld. 109.

**141. —.]—**(1) The marriage of a lunatic doth not determine the custody of her, for the custody may be continued notwithstanding the marriage; (2) a lunatic during his lunacy is not capable of marriage, but in lucid intervals he may; & if such a marriage should be had during the lunacy, the civilians held, that by subsequent consent it might be made good, as the marriage of an infant before the age of discretion may be made good by a subsequent assent.

(3) If one marries a lunatic who is under the care of the committee of the ct., this is a contempt, for which the person marrying may be committed, & marriage is no *supersedeus* of the commitment, so as to take him or her out of the custody of the committee.—ASH'S CASE (1702), Freem. Ch. 259; Prec. Ch. 203; 22 E. R. 1196.

**142. —.]—**FUST *v.* BOWERMAN (1790), cited in 2 Hag. Con. at p. 170; 2 Add. 402, n.; 161 E. R. 705.

*Annotations:—*Reid. Parnell *v.* Parnell (1814), 2 Hag. Con. 169; Nokes *v.* Milward (1824), 2 Add. 386.

**143. —.]—**(1) Nullity of marriage, by reason of insanity of the husband, brought by himself after his recovery, sustained.

(2) It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity, & also that a defect of incapacity invalidates the contract of marriage, as well as any other contract (SIR WILLIAM SCOTT).

(3) When a commission of lunacy has been taken out, the conclusion against the marriage will be founded on that statute [15 Geo. 2, c. 30]; where there has been no such commission, the matter is to be established on evidence. The statute has made provisions against such marriages even in lucid intervals, till the commission has been superseded. In other cases the ct. will require it to be shown by strong evidence that the marriage was clearly had in a lucid interval, if it is found that the person was generally insane (SIR WILLIAM SCOTT).—TURNER *v.* MEYERS (1808), 1 Hag. Con. 414; 161 E. R. 600.

*Annotations:—*As to (1) Reid. Hancock *v.* Peaty (1867), L. R. 1 P. & D. 335; Jackson (otherwise Macfarlane) *v.* Jackson (1908), 52 Sol. Jo. 535. *Generally, Mentd.* Moss *v.* Moss, [1897] P. 263; R. *v.* Dibden, [1910] P. 57.

**144. —.]—**Sentence of the Ecclesiastical Ct. unnecessary, the marriage being void; as in the case of lunacy.—*Ex p.* TURING (1813), 1 Ves. & B. 140; 35 E. R. 55, L. C.

**145. —.]—**Nullity of marriage by reason of weakness & imbecility of mind, & of fraud—sustained. Irregularity in the proceeding by a father, appointed by the Ct. of Ch. to act as guardian of his daughter, of full age, & not found lunatic, in commencing the suit without the order of the Lord Chancellor.

In all cases of lunatics proceeding in these cts., no citation is ever issued except by the express order of the Lord Chancellor (DR. LUSHINGTON).—WILKINSON *v.* WILKINSON (1845), 4 Notes of Cases, 295.

*Annotation:—*Reid. Moss *v.* Moss, [1897] P. 263.

**146. — Degree of incapacity.]—**The claim of a widow to the administration of her husband's effects opposed on the ground of his being a lunatic at the time of the marriage; objection overruled.

It did appear that he had a very weak understanding from his infancy & by hard drinking was at times lunatic & did many mad & frantic acts, but no commission of lunacy was taken out, nor was he constantly mad, but only by fits; & it appeared that he married with previous

deliberation & intention, & was married by the curate of the parish who swore that he went through the ceremony with as much propriety as any man could do & there being no evidence of his doing any mad acts about the time of the marriage, I was of opinion he had a sufficient capacity to contract a legal marriage (*per CUR.*).—PARKER *v.* PARKER (1757), 2 Lec, 382; 161 E. R. 377.

**147. — Want of consent.]—**Administration of the effects of a wife refused to the husband on the ground that his marriage has been illegally contracted; nullity of marriage established.

Want of reason must, of course, invalidate a contract & the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from idiocy or lunacy, or from both combined. If the incapacity be such, arising from either or both causes, that the party is incapable of understanding & incapable, from mental imbecility, to take care of his or her own person & property, such an individual cannot dispose of her person & property, by the matrimonial contract, any more than by another contract (SIR JOHN NICHOLL).—BROWNING *v.* REANE (1812), 2 Phillim. 69; 161 E. R. 1080.

*Annotation:—*Reid. Moss *v.* Moss, [1897] P. 263.

**148. — Deaf & dumb person.]—**A woman deaf & dumb from her birth contracted matrimony by licence, a third party making the responses for her, & a child was born. Thirty years afterwards, & after her death, the validity of the marriage was disputed, on the ground of mental incapacity to understand & enter into the contract; but the ct., being satisfied of her competency to understand, & of her fully understanding what she did, refused to direct an issue to try the validity of the marriage.—HARROD *v.* HARROD (1854), 1 K. & J. 4; 23 L. T. O. S. 243; 18 Jur. 853; 2 W. R. 612; 69 E. R. 344.

*Annotations:—*Reid. Moss *v.* Moss, [1897] P. 263. *Mentd.* Beamish *v.* Beamish (1861), 9 H. L. Cas. 274.

**149. — Evidence of diseased mind.]—**Where a guardian *ad litem* had been duly assigned by the registrar to a lunatic, petitioner in a suit for nullity of marriage, the ct. declined during the hearing of the petition to adjourn the case on the application of resp., on the suggestion of petitioner's recovery, & of her desire for the discontinuance of the suit, or to appoint two medical men to examine her, & proceeded to determine the only issue raised by the pleadings, namely, whether petitioner was of sound mind at the time of the celebration of her marriage. In deciding whether a person has sufficient mental capacity to contract a marriage, the question for the ct. is, whether the mind of the contracting party was diseased or not at the time of the contract, & if the evidence establishes that the mind was at the time of entering into the contract diseased, the ct. will not enter into the consideration of the extent of the derangement. The ct. being satisfied by the evidence that petitioner was not of sound mind at the time of the celebration of her marriage with resp., postponed pronouncing its decree, in order to give resp. an opportunity, if so advised, of establishing the fact of petitioner's recovery, & intimated that if satisfied of her recovery, it would not pronounce a decree of nullity except at her instance.—HANCOCK *v.* PEATY (1867), L. R. 1 P. & D. 335; 36 L. J. P. & M. 57; 16 L. T. 182; 15 W. R. 719.

*Annotations:—*Consd. Mordaunt *v.* Mordaunt (1870), L. R. 2 P. & D. 109. *Reid.* Mordaunt *v.* Moncreiffe (1874), L. R. 2 Sc. & Div. 374; Jackson (otherwise Macfarlane) *v.* Jackson (1908), 52 Sol. Jo. 535.



*Sect. 3.—Marriage: Sub-sect. 2, A. (a) i. & ii., (b) & (c), & B.; sub-sects. 3, 4 & 5. Sects. 4 & 5: Sub-sects. 1 & 2.]*

**150. — Party incapable of understanding nature of contract.]**—The burden of showing that resp. was insane at the time of the marriage lies upon the party asserting it, & the ct. has to determine whether resp. was capable of understanding the nature of the contract, & the duties & responsibilities which it creates, & was free from the influence of morbid delusions upon the subject.—*DURHAM v. DURHAM, HUNTER v. EDNEY (OTHERWISE HUNTER), CANNON v. SMALLEY (OTHERWISE CANNON) (1885), 10 P. D. 80; 1 T. L. R. 338.*

*Annotations:—Consd. Jackson v. Jackson, [1908] P. 308; Forster (otherwise Street) v. Forster (1923), 39 T. L. R. 658. Refd. Moss v. Moss, [1897] P. 263.*

**151. — Upon a petition for nullity of marriage on the ground of insanity, the question which the ct. has to determine is not whether resp. was aware that he was going through the ceremony of marriage, but whether he was capable of understanding the nature of the contract he was entering into, free from the influence of morbid delusions on the subject. The ct. has to look at the nature of the alleged unsoundness of mind to see whether it is of a character which might come on suddenly, or whether it is a matter of progressive growth & development, & to ascertain whether resp.'s insanity can be traced back to an early period to such an extent as will justify the ct. in coming to a conclusion that it existed before as well as after the marriage contract was entered into. In pronouncing a decree of nullity the ct. ordered that the child of the union should be given to petitioner.**

The costs of the official solr., as the guardian *ad litem* of resp., a person of unsound mind not so found by inquisition, were ordered to be paid by petitioner, who was given leave to add the same to her own costs of suit as against resp.—*JACKSON v. JACKSON, [1908] P. 308; 77 L. J. P. 147; 24 T. L. R. 674; 52 Sol. Jo. 535.*

**152. — Delusions.]**—On a wife's petition for nullity of marriage on the ground that before & at the time of the ceremony resp. was of unsound mind & incapable of contracting marriage, the ct. found that resp. held the deluded belief that he was an army officer holding a responsible & trusted command, & that he suffered from delusions as to his own *persona*, as to his position in the world, & as to his capacity to perform any of the obligations which he undertook—delusions which rendered his life an unreal thing—& on that finding ct.:—*Held: resp. was mentally incapable of entering into the contract of marriage, & a decree nisi of nullity was pronounced.—FORSTER (OTHERWISE STREET) v. FORSTER (1923), 39 T. L. R. 658.*

**153. Effect of subsequent consent.]**—*ASH'S CASE, No. 141, ante.*

#### ii. On Custody of Lunatic.

**154. Custody not determined by.]**—*ASH'S CASE, No. 141, ante.*

#### (b) Proof of.

**155. Finding of inquisition.]**—Upon the return of the traverse to the inquisition of lunacy, finding, that the party was a lunatic at the time of her marriage & at the time of taking the inquisition, but at that time (the verdict) was not a lunatic, the commission was superseded: but the Lord Chancellor doubted the propriety of such a double issue. No costs to the party taking out a commission of lunacy, which is traversed with success;

however meritorious the case: the property never coming to the possession of the Crown, there is no fund.

It does not appear to me what right the jury had to find that at the marriage she was a lunatic. The inquisition does not state that she was a lunatic at the time of the marriage. There is no such allegation upon it. The issue is ill-joined: for the plea to the inquisition takes up a fact not stated by the inquisition itself (*LORD LOUGHBOROUGH, C.*).—*Ex p. FERNE (1801), 5 Ves. 832; 31 E. R. 882, L. C.*

*Annotations:—Refd. Nicoll v. Morley (1804), 9 Ves. 478; Sherwood v. Sanderson (1815), Coop. G. 108; Re Bridge (1841), Cr. & Ph. 338; Re Loveday, Ex p. Loveday (1852), 1 De G. M. & G. 275.*

**156. —.]**—The finding [of the commission issued to inquire into the alleged lunacy of Lord P.] is a circumstance & a part of the evidence in support of the unsoundness of mind at the time of the marriage, but no more; for this ct. must be satisfied by evidence of its own, that grounds of nullity existed (*SIR JOHN NICHOLL*).—*PORTSMOUTH (COUNTESS) v. PORTSMOUTH (EARL) (1828), 1 Hag. Ecc. 355; 162 E. R. 611.*

*Annotations:—Mentd. Wilkinson v. Wilkinson (1845), 4 Notes of Cases 295; Harrod v. Harrod (1854), 1 K. & J. 4; Mordaunt v. Moncreiffe (1874), L. R. 2 Sc. & Div. 374; Baker v. Baker (1880), 5 P. D. 142; Moss v. Moss, [1897] P. 263.*

**157. Onus on party alleging existence of insanity.]**—*DURHAM v. DURHAM, HUNTER v. EDNEY (OTHERWISE HUNTER), CANNON v. SMALLEY (OTHERWISE CANNON), No. 150, ante.*

#### (c) Proceedings to annul Marriage on Ground of.

**158. Party may plead own incapacity.]**—*TURNER v. MEYERS, No. 143, ante.*

**159. Delay in instituting proceedings — Insufficient proof of acquiescence.]**—Though a person was found lunatic from a period antecedent to a marriage contracted by him, & a son, the issue of that marriage, had enjoyed an estate devised to the lunatic & his children, as a legitimate child, the ct. will not decide against the validity of such marriage without an issue directed to try the fact.

After the general finding of unsoundness the *onus* of proving a lucid interval at the time of the marriage lies on the party who now asserted such lucid interval (*LORD TRURO, C.*).—*ELLIS v. BOWMAN (1851), 17 L. T. O. S. 10, L. C.*

#### B. Marriage during Lucid Interval.

**160. Whether valid.]**—*ASH'S CASE, No. 141, ante.*

**161. —.]**—*TURNER v. MEYERS, No. 143, ante.*

**162. —.]**—*ANON. (1813), cited in 1 Dow, at p. 178; 3 E. R. 664.*

**163. Onus of proof—When general finding of unsoundness.]**—*ELLIS v. BOWMAN, No. 159, ante.*

#### SUB-SECT. 3.—INSANITY IN MATRIMONIAL CAUSES.

*See, generally, HUSBAND & WIFE, Vol. XXVII., pp. 323 et seq.*

**Restitution of conjugal rights—Insanity of wife—Cohabitation unsafe.]**—*See HUSBAND & WIFE, Vol. XXVII., p. 323, No. 3020.*

**Judicial separation—Adultery of lunatic's wife—Committee may maintain suit.]**—*See HUSBAND & WIFE, Vol. XXVII., p. 384, No. 3769.*

**Inference of insanity from petitioner's evidence—Further evidence required.]**—*See HUSBAND & WIFE, Vol. XXVII., p. 323, No. 3022.*

**Wife's uncontrolled passions—No serious**

injury actually inflicted.]—See HUSBAND & WIFE, Vol. XXVII., p. 291, No. 2656.

Divorce—Adultery of lunatic's wife—Committee may maintain suit.]—See HUSBAND & WIFE, Vol. XXVII., p. 384, No. 3767.

— May be decreed against lunatic—Appointment of guardian ad litem.]—See HUSBAND & WIFE, Vol. XXVII., p. 384, No. 3770.

Incapacity to understand act alleged—Intermittent mania.]—See HUSBAND & WIFE, Vol. XXVII., p. 324, No. 3024.

— Delusions.]—See HUSBAND & WIFE, Vol. XXVII., p. 324, No. 3025.

#### SUB-SECT. 4.—DESERTED HUSBAND'S LIABILITY TO MAINTAIN LUNATIC WIFE.

Wife becoming insane after desertion.]—See HUSBAND & WIFE, Vol. XXVII., p. 202, No. 1735.

#### SUB-SECT. 5.—CONSENT TO MARRIAGE.

Consent of court—Where father non compos mentis.]—See HUSBAND & WIFE, Vol. XXVII., p. 57, No. 385; Guardianship of Infants Act, 1925 (c. 45), s. 9.

#### SECT. 4.—COMPROMISE OF PROCEEDINGS.

164. Proceedings before commission.]—Pltf. being confined in a lunatic asylum, & an inquisition under a commission of lunacy being held upon her, & attended by her counsel, before any verdict was given an agreement was signed by her counsel & counsel attending for the promoters of the commission, that pltf. should be released from confinement, that certain arrangements should be made as to property which she claimed, that the title deeds relating thereto, which had been taken from her when she was confined, & now were in the hands of the promoters, should be given up & placed in the hands of H., & that the commission should be superseded. Accordingly, pltf. was released; & the deeds handed over to H. Pltf. then brought detinue against H. for the deeds. An interpleader rule was obtained, on the claim of the promoters, by which the proceedings were stayed, & a feigned issue brought, by pltf. against the promoters, to try whether pltf. was entitled to the deeds notwithstanding the arrangement:—*Held*: (1) on the trial of such issue, it was not necessary that pltf. should prove her title to the deeds, the question being only whether the agreement prevented her from insisting on her title; (2) it was rightly left to the jury, on evidence of the state of pltf.'s mind & health at the time of the agreement being made, to say whether the consent of her counsel was obtained by constraint & without her free will; & the jury having so found, pltf. was entitled to the verdict: & the legality of the restraint, assuming it to have been legal, & the consent of counsel, furnished no conclusive proof that the agreement was not void by duress.—CUMMING v. INCE (1848), 11 Q. B. 112; 17 L. J. Q. B. 105; 10 L. T. O. S. 263; 12 Jur. 331; 116 E. R. 418.

#### SECT. 5.—DISPOSITIONS.

##### SUB-SECT. 1.—IN GENERAL.

See, generally, SETTLEMENTS.

165. Settlement by lunatic.]—A settlement if made by a lunatic, though reasonable, & for the

convenience of the family, ought to be set aside in equity.—CLERK v. CLERK (1700), 2 Vern. 412; 23 E. R. 865.

166. — Subsequent inquisition finding antecedent lunacy.]—RIDLER v. RIDLER (1729), 1 Eq. Cas. Abr. 279; 21 E. R. 1045, L. C.

167. — Deed altering provisions of settlement.]—ELLIOT v. INCE, No. 126, ante.

168. — Not impeachable at expense of estate.]—*Re* GORDON, No. 1668, post.

169. Surrender by lunatic tenant for life.]—A person *non compos*, being tenant for life, with remainder to his first & other sons, remainder over, makes a surrender to him in reversion, before the birth of a son, with intent to destroy the contingent remainder, & dies, leaving issue a son. The surrender is void *ab initio*; & the son, though he claim as remainder-man, & not as heir, may take advantage of it.—THOMPSON v. LEACH (1697), 3 Mod. Rep. 301; Carth. 435; 1 Com. 45; Comb. 468; 1 Eq. Cas. Abr. 278; Holt, K. B. 357; 3 Lev. 285, n.; 1 Ld. Raym. 313; 12 Mod. Rep. 173; 2 Salk. 427, 576, 675; 3 Salk. 300; 87 E. R. 199; *sub nom.* LEACH v. THOMPSON, 1 Show. 308, n.; *affd.*, *sub nom.* LEACH v. THOMPSON, (1698), Show. Parl. Cas. 150, H. L.

*Annotations*:—*Refd.* Burgoigne v. Fox (1738), 1 Atk. 575; Yates v. Boen (1738), 2 Stra. 1104; Zouch d. Abbot & Hallet v. Parsons (1765), 3 Burr. 1794; Daily Telegraph Newspaper Co. v. McLaughlin, [1904] A. C. 776.

170. Voluntary deed—Executed under misapprehension.]—A., being in prison on a charge of felony, in order to avoid a forfeiture of his property in the event of a conviction, executed a voluntary deed, assigning his personal estate to B. his brother, absolutely. A. was tried, found not guilty, on the ground of insanity, & ordered to be imprisoned as a lunatic during Her Majesty's pleasure:—*Held*: the deed being without consideration, & executed by an insane person under a total misapprehension, was inoperative, & the representatives of B. took no interest under it.—MANNING v. GILL (1872), L. R. 13 Eq. 485; 41 L. J. Ch. 736; 26 L. T. 14; 36 J. P. 436; 20 W. R. 357; 12 Cox, C. C. 274.

*Annotation*:—*Mentd.* Hay v. Northcote (1900), 82 L. T. 656.

##### SUB-SECT. 2.—AFTER INQUISITION.

Judicial inquisition as to lunacy, see Part VII., post.

171. Return to sanity must be proved.]—*Ex p.* WRIGHT (1683), 1 Vern. 155; 74 L. J. Ch. 87, n.; 23 E. R. 382.

*Annotation*:—*Consd.* *Re* Walker, [1905] 1 Ch. 160.

172. Validity of deed—Inquisition continuing in force—Execution during lucid interval.]—(1) When a person has been found lunatic by inquisition, so long as the inquisition has not been superseded, but continues in force, he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property. The ct. directing will not recognise such a deed even by directing proceedings to be taken to try the question of its validity or to perpetuate testimony as to the state of the lunatic's mind when it was executed, but will treat the deed as entirely null & void.

(2) The difference between the execution of a deed & the execution of a will by a lunatic so found explained.

(3) As regards the relation of the Crown to lunatics, it may be taken generally that the Crown is the custodian of the property of a lunatic so found, & it may, I think, be said in general terms



**Sect. 5.—Dispositions: Sub-sects. 2 & 3. Sects. 6, 7 & 8: Sub-sect. 1, A.]**

that the property passes out of the control of the lunatic & comes under that of the Crown only in order that the lunatic may have that protection from the Crown to which he is entitled. Therefore, when we have to consider the question whether this deed is void, we cannot dispose of it by saying that that which was the property of the lunatic has ceased to be her property & has become the property of the Crown. But during the whole period of history in which we have legal reports, the Crown has possessed the prerogative (although it was not always defined as it has been later by statute) of dealing with & controlling the property of a lunatic. It is quite sufficient, as it seems to me, to dispose of the present case to say that the Crown has that control (as distinguished from property) of the real & personal estate of a lunatic, because the moment one sees that the committee, as representing the Crown, has the rights & powers mentioned in Lunacy Act, 1890 (c. 5), s. 120, it is perfectly plain that they cannot be effectively exercised by the Crown in the interest & for the benefit of the lunatic, if during the same period some one else is to have the control of the property. In that event there would be a conflict of control which would be entirely inconsistent with the exercise by the committee of those rights of the Crown which have been delegated to him (VAUGHAN WILLIAMS, L.J.).

(4) It is said that if a lunatic is of sufficient mental capacity to do so he can execute a will, & that after his death the will can be proved, if the ct. to which the application for probate is made is of opinion that testator at the time when he executed the will was of testamentary capacity & understood what he was doing. Of that there can be no doubt (VAUGHAN WILLIAMS, L.J.).—*Re WALKER*, [1905] 1 Ch. 160; 74 L. J. Ch. 86; 91 L. T. 713, C. A.

*Annotation:—As to (1) & (3) Consd. Re Marshall, Marshall v. Whateley*, [1920] 1 Ch. 284.

**173. — Appointment of receiver.]—**By his will dated Feb. 14, 1912, testator, who died in 1913, gave his residuary real & personal estate to trustees upon trust to raise a fund of £6,000 & to hold the same upon trust to pay the income to his son during his life or “until he . . . shall assign or charge or affect to assign or charge the said income or some part thereof or until any other event shall happen whereby if the income belonged absolutely to him he would be . . . deprived of the personal enjoyment thereof.” On Dec. 12, 1916, an order was made in lunacy appointing a receiver of the son's estate under Lunacy Act, 1890 (c. 5), s. 116 (1) (d), the whole of his income being allowed for his maintenance. On May 15, 1919, the son executed an equitable charge on his income under testator's will:—*Held*: the order in lunacy appointing a receiver did not operate as a forfeiture because the receiver was the statutory agent of the son to receive the income of the trust fund; &, as the document of May 15, 1919, was executed after the appointment of the receiver in lunacy, it was null & void, & could not therefore work a forfeiture.—*Re MARSHALL, MARSHALL v. WHATELEY*, [1920] 1 Ch. 284; 89 L. J. Ch. 204; 122 L. T. 673; 64 Sol. Jo. 241.

**Acts during lucid interval.]—See Part I., Sect. 3, sub-sect. 2, ante.**

**Contracts during lucid interval.]—See Sect. 2, sub-sect. 1, D., ante.**

**SUB-SECT. 3.—WILLS.**

*See, generally, Sect. 8, post.*

## SECT. 6.—MATTERS OF RECORD.

**174. General rule.]—BEVERLEY'S CASE**, No. 32, *ante*.

**175. Whether binding on lunatic.]—LEWINGS' CASE** (1584), cited 10 Co. Rep. at p. 42 b; 77 E. R. 988; *sub nom.* LEWES' CASE, Win. at p. 106.

*Annotations:—Refd.* Portington's Case (1614), 10 Co. Rep. 35 b; Needler v. Winchester (Bp.) (1615), Hob. 220; Cooper & Edgar's Case (1624), Win. 103.

**176. —.]—BEVERLEY'S CASE**, No. 32, *ante*.

**177. —.]—**A fine levied by an idiot is unavoidable, although his idiocy is apparent; & although after the fine levied, he has been found by inquisition an idiot *a nativitate*. The indentures executed by such idiot are sufficient to direct the uses of the fine.—**MANSFIELD'S CASE** (1614), 12 Co. Rep. 123; 77 E. R. 1399.

*Annotation:—Refd.* *Re Ollerton* (1855), 15 C. B. 796.

**178. — Deaf & dumb person.]—**A deaf & dumb person may levy a fine if he possesses sufficient intelligence.—**ELYOT'S CASE** (1666), Cart. 53; 124 E. R. 820.

**179. — Interested party assisting in transaction.]—FERRES v. FERRES** (1708), 2 Eq. Cas. Abr. 695; 22 E. R. 585, L. C.

**180. — Fine—Insanity after fine levied.]—**One of several deforciantes having become insane, the ct. ordered the fine to pass as to all the other parties, notwithstanding the omission of the name of the lunatic in the proceedings.—**JAMESON v. FLETCHER** (1827), 2 Moo. & P. 265.

*Annotation:—Refd.* Vale, Vouchee (1828), 5 Bing. 176.

**181. — Obtained by fraud.]—**Where a lunatic has levied a fine, his heir-at-law cannot set it aside, on the ground that it was obtained by fraud, & therefore void.—**MURLEY v. SHERREN** (1838), 8 Ad. & El. 754; 1 Per. & Dav. 126; 1 Will. Woll. & H. 678; 8 L. J. Q. B. 152; 112 E. R. 1023; *subsequent proceedings, sub nom.* **MURLEY v. GREENHAM** (1839), 3 Jur. 576.

**182. — Warrant of attorney.]—WENTWORTH v. CHOLMLEY** (1744), cited 3 Atk. at p. 313; 2 Ves. Sen. at p. 403; 26 E. R. 982.

*Annotation:—Refd.* *Ex p. Roberts* (1746), 3 Atk. 308.

**183. — Insanity after execution.]—**Where the vouchee became insane between the time of executing the warrant of attorney & the passing of the recovery, the ct. refused to pass the recovery.—**WALCOTT, VOUCHEE** (1826), 3 Bing. 423; 130 E. R. 575; *sub nom.* —, **DEMANDANT, RUSSELL, TENANT, WALCOTT, VOUCHEE**, 11 Moore, C. P. 307; *sub nom.* **RUSSELL, TENANT, WALLCOTT, VOUCHEE**, 4 L. J. O. S. C. P. 126.

**184. — —.]—**Where one of the vouchees became insane between the time of executing the warrant of attorney & the passing of the recovery, the ct. refused to let it pass as to him, but permitted it as to the other parties.—**VALE, VOUCHEE** (1828), 5 Bing. 176; 130 E. R. 1028; *sub nom.* **EGREMONT (EARL), DEMANDANT, VALE & CROOKE, VOUCHES**, 2 Moo. & P. 264; *sub nom.* *Ex p. CROOKE*, 7 L. J. O. S. C. P. 15, 46.

**185. — —.]—**A party executed a warrant of attorney to secure the re-transfer, upon demand, of stock lent to him; afterwards he became insane, & continued so to this time. A formal demand of the re-transfer was made upon

## PART II. SECT. 6.

**174 i. General rule.]—HUME v. BURTON** (1785), 1 Ridg. Parl. Rep. 204.—**IR.**

him. The ct. refused to allow judgment to be entered up.—**CAPPER v. DANDO** (1835), 2 Ad. & El. 458; 1 Har. & W. 11; 4 Nev. & M. K. B. 335; 4 L. J. K. B. 97; 111 E. R. 177.

*Annotation*:—**Refd.** *Piggot v. Killick* (1835), 1 Har. & W. 518.

### SECT. 7.—TORTS.

*See, generally, TORT.*

**186. General rule—Insanity no defence.**—It is true that a judgment of dissolution may operate as a punishment, but so also may any verdict or judgment in a civil action, whether for a wrong as a libel, or an assault, or to recover landed estate, as in ejectment, or to recover a debt or damages in an action of *assumpsit* or *trover*. Yet, in all or any of these cases, insanity is no defence & no bar to the suit, & no ground for a stay of proceedings. It is enough that deft. has done a wrong, or given a right of action to pltf. for any of the causes above enumerated; in any such case, although after the wrong done, he may become insane, & so incapable of making his defence or instructing an attorney or counsel, a committee or guardian is appointed who conducts the defence, & pltf. enforces his legal right, & proceeds with the suit to verdict & judgment. Indeed, this doctrine was carried to its extreme length by LORD ELDON, who awarded a commission of bkpcy., partaking both of a civil & criminal character, against an insolvent trader, who, after committing an act of bkpcy., had become insane (**KELLY, C.B.**).—**MORDAUNT v. MORDAUNT** (1870), L. R. 2 P. & D. 109; 39 L. J. P. & M. 57; 23 L. T. 85; 18 W. R. 845.

**187. ——— Trespass.**—**WEAVER v. WARD** (1616), Hob. 134; Moore, K. B. 864; 80 E. R. 284.

*Annotations*:—**Consd.** *Stanley v. Powell*, [1891] 1 Q. B. 86. **Refd.** *Scot v. Shepherd* (1773), 3 Wils. 403; *Hall v. Fearnley* (1842), 12 L. J. Q. B. 22. **Mentd.** *Anon.* (1676), 1 Vent. 295; *Bessey v. Olliot* (1682), T. Raym. 467; *Dickenson v. Watson* (1682), T. Jo. 205; *Gibbon v. Pepper* (1695), 2 Salk. 637; *R. v. Kelle* (1696), 1 Ld. Raym. 138; *R. v. Gill* (1719), 1 Stra. 190; *McManus v. Crickett* (1800), 1 East, 106; *Leame v. Bray* (1803), 3 East, 593; *Sharrod v. L. & N. W. Ry.* (1849), 4 Exch. 580.

### SECT. 8.—WILLS.

#### SUB-SECT. 1.—TESTAMENTARY CAPACITY.

##### A. Necessity for.

*See, generally, WILLS.*

**188. General rule.**—The Marquis of W., as was supposed, made his will in writing, & thereby did devise divers manors, lands, & tenements of great value to his reputed sons, & made them exors. Because it appeared by divers witnesses, & by many notorious circumstances, that the Marquis being sick, *et multa proventus senectute*, was not of sane & perfect memory, such as the law requires at the time of the making of the supposed will; for by law it is not sufficient that testator be of memory when he makes his will, to answer familiar & usual questions, but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding &

reason; & that is such a memory which the law calls sane & perfect memory. Upon this matter a suggestion was framed in the name of the now Marquis as son & heir, to have a prohibition, supposing that he was not of sane memory at the time of the making of his will, which matters the now Marquis had pleaded in the Spiritual Ct., in stay of the probate of the will. A prohibition was granted generally by the rule of the whole ct.—**WINCHESTER'S (MARQUESS) CASE** (1598), 8 Co. Rep. 23 a; 77 E. R. 287.

*Annotations*:—**Consd.** *Marsh v. Tyrrell & Harding* (1828), 2 Hag. Ecc. 84; *Goldie v. Murray* (1842), 8 Jur. 608; *Jones v. Godrich* (1845), 5 Moo. P. C. C. 16. **Refd.** *Searle v. Williams* (1618), Hob. 288; *Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549. **Mentd.** *Netter v. Brett* (1635), Cro. Car. 395.

**189. ———.**—**ARTHUR v. BOKENHAM**, No. 257, *post*.

**190. ———.**—Where a bill is brought to prove a will of land, the sanity of testator must be proved; *secus*, in the case of a deed of trust to sell for payment of debts. The ct. never orders a will to be proved *viva voce* at the hearing, as they do a deed.

The proof of a will is attended with more solemnity than that of a deed; the former being supposed to be made when testator is *in extremis*, & therefore in equity it is necessary to prove the sanity, which is all presumed in the case of the latter (**JEKYLL, M.R.**).—**HARRIS v. INGLEDEW** (1730), 3 P. Wms. 91; 2 Eq. Cas. Abr. 768; 24 E. R. 981.

*Annotations*:—**Mentd.** *Heller v. Tarrant* (1791), Cas. temp. Talb. 287, n.; *Spong v. Spong* (1827), 1 Y. & J. 300; *Roberts v. Marchant* (1843), 13 L. J. Ch. 56; *Maxwell v. Maxwell* (1852), 2 De G. M. & G. 705; *Boyse v. Rossborough* (1854), 23 L. J. Ch. 305.

**191. ———.**—When a will is to be established, testator must be proved to be of sound & disposing mind.—**WALLIS v. HODGESON** (1740), 2 Atk. 56; 1 Russ. 527; 26 E. R. 432, L. C.

*Annotations*:—**Expld.** *Hood v. Pim* (1831), 4 Sim. 101. **Refd.** *Abrams v. Winshup* (1826), 1 Russ. 526.

**192. ———.**—**JOHNSON v. BLANE**, No. 279, *post*.

**193. ———.**—(1) A party propounding a will is bound to show that it was executed by testator, & that he was of a sound & disposing mind.

(2) The presumption that every man is sane, until the contrary is proved, is not a presumption of law, but a presumption of fact, or at the most, a mixed presumption of law & fact.

(3) If a will, not irrational on the face of it, is produced before a jury, & the execution of it is proved & no other evidence is offered, the jury should be told to find for the will: & even if some evidence of incompetency be given, yet if it does not shake the jury's belief in the competency, they may find for the will, but not as on a mere presumption of law. But when there is evidence before the jury on both sides, they ought not to affirm the will unless they believe testator was competent; & a judge was held to have misdirected the jury in telling them, in an action of ejectment by the heir-at-law against the devisee, where evidence had been given on both sides as to the competency of testator, that, the execution of the will being proved, the law presumed sanity, & that the heir-at-law must prove the incompetency, & that if upon conflicting evidence the jury were left in doubt, they ought to find for

### PART II. SECT. 7.

**p. General rule — Insanity no defence—Assault.**—A tortfeasor cannot plead incapacity of mind in answer to an action for an assault.—**TAGGARD v. INNES** (1862), 12 C. P. 77.—**CAN.**

**q. ———.**—**Insanity is**

not a defence in an action claiming damages for assault.—**DONAGHY v. BRENNAN** (1901), 19 N. Z. L. R. 289.—**N.Z.**

**.. Misappropriation.**—As a civil action may be brought against the heirs of a public officer in respect of the loss of public moneys

owing to his neglect, default or misappropriation, provided that such action is instituted within a year after his death, *a fortiori* an action lies against the curator of such a defaulter who is still alive but insane.—**COLONIAL SECRETARY v. BREDD'S CURATOR**, [1877] Buch. 1.—**S. AF.**



*Sect. 8.—Wills: Sub-sect. 1, A. & B.]*

the will.—*SUTTON v. SADLER* (1857), 3 C. B. N. S. 87; 26 L. J. C. P. 284; 30 L. T. O. S. 65; 3 Jur. N. S. 1150; 5 W. R. 880; 140 E. R. 671; *subsequent proceedings, sub nom. SUTTON v. DEVONPORT*, 27 L. J. C. P. 54.

*Annotations:—As to (1) Apld. Cleare v. Cleare* (1869), L. R. 1 P. & D. 655. *As to (2) Refd. Elms v. Elms* (1858), 27 L. J. P. & M. 96. *As to (3) Refd. Elms v. Elms* (1858), 27 L. J. P. & M. 96; *Smith v. Tebbitt* (1867), L. R. 1 P. & D. 398. *Generally, Mentd. Abrath v. N. E. Ry.* (1883), 49 L. T. 618.

194. ———.]—*HASTILOW v. STOBIE*, No. 206, *post*.

195. ———.]—*CLEARE v. CLEARE*, No. 282, *post*.

196. ———.]—*BANKS v. GOODFELLOW*, No. 204, *post*.

*B. What Constitutes.*

*See, generally, WILLS.*

What constitutes incapacity, *see* Sub-sect. 2, *post*.

197. **Sound memory.**]—*WINCHESTER'S (MARQUESS) CASE*, No. 188, *ante*.

198. ———.]—**Judgment to discern.**]—*COMBES CASE* (1604), *Moore, K. B.* 759; *Noy*, 101; 72 E. R. 888.

*Annotations:—Refd. Goldie v. Murray* (1842), 6 Jur. 608; *Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549.

199. **Ability to regulate affairs in general—Necessity for free discretion.**]—Although a man have a mind of sufficient soundness & discretion to regulate his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising such discretion in the making his will, he cannot be considered as having such a disposing mind, as will give effect to his will. *Qu.*: what evidence will be sufficient to establish such a case.—*MOUNTAIN v. BENNET* (1787), 1 Cox, Eq. Cas. 353; 29 E. R. 1200.

200. **Sound & disposing mind—As to extent of property & nature of claims.**]—The single inquiry . . . is whether he [testator] was of sound & disposing mind & memory, at the time when he made his will; however deranged he might be before, if he had recovered his reason at that time, he was competent to make his will. . . . A mind & memory competent to dispose of his property may stand thus: having that degree of recollection about him that would enable him to look about the property he had to dispose of, & the persons to whom he wished to dispose of it. If he had a power of summoning up his mind so as to know what his property was, & who those persons were that then were the objects of his bounty, then he was competent to make his will.

If whenever his brother's name occurred, instantly a fit of delirium had seized him . . . he was not competent to make his will; but if his mind remained entire, if he had new raised up prejudices against his brother, though upon improper grounds, yet if they were such prejudices as might reside in a sound mind; it is hard that those prejudices should lead to conclusions unfavourable to his brother; but hard as the case may be, it is better that a thousand hard cases should take place, than that we should remove the landmarks by which man's property is to be decided. . . . It is the history of every week in the year, & the history of almost every family at one time or other, that harsh dispositions have been made, that unreasonable prejudices have taken place, that one child standing equally near in blood has been preferred to another; & if once we get into digressions of that kind, then we

get upon a sea without a rudder, where will you stop, what partiality will be enough to set aside a will, & what partiality will you give way to, & say the will is good? . . . You are to consider whether his mind was entire to make the disposition, not whether the disposition was whimsical, cruel; what none of you retiring to your own bosoms & collecting your own feelings, would have made; but to see whether it was the disposition of this man's mind, exercising the faculties of his mind at a time when in possession of those faculties. If you think, that whenever that topic occurred to him, it totally deranged his mind, & prevented him from judging of who the objects of his bounty should be, according to his own will, then the will cannot stand, & then you will find for deft.; but if you think he was of competent mind to make his will, to exercise his judgment, however that might be disturbed by passions which ought not to be encouraged, then the will ought to stand (*LORD KENYON*).—*GREENWOOD v. GREENWOOD* (1790), 3 Curt. App. 1; 1 Add. 283, n.; cited in 3 Bro. C. C. at p. 13 Ves. at p. 89; 163 E. R. 930.

*Annotations:—Consd. A.-G. v. Parnther* (1792), 3 Bro. C. C. 441; *White v. Wilson* (1806), 13 Ves. 87; *Dew v. Clark* (1826), 3 Add. 79; *Middleton v. Sherburne* (1841), 4 Y. & C. Ex. 358; *Frere v. Peacocke* (1846), 1 Rob. Eccl. 442; *Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549. *Refd. Dew v. Clark* (1822), 1 Add. 279.

201. ———.]—*HARWOOD v. BAKER*, No. 339, *post*.

202. ———.]—Supposing a will made by a person of testamentary capacity, it is not sufficient to avoid it that it is not such a will as a sensible person would make, or that it is harsh, capricious or unjust; nor, on the other hand, is it enough to avoid it on the ground of undue influence, that it was made under the influence of acts of attention & kindness; but the influence or importunity must be such as to deprive testator of the free exercise of his will. The testamentary capacity, however, involves more than the mere fact of recognising familiar persons or objects, & means a sound disposing mind, that is to say, a power of understanding the nature of the property, & the family, & the effect of the will.

It is not sufficient in order to make a will that a man should be able to maintain an ordinary conversation & to answer familiar & easy questions. He must have more mind than suffices for that. . . . He must be able to dispose of his property with understanding & reason. . . . He must be able to understand his position; he must be able to appreciate his property; to form a judgment with respect to the parties whom he chose to benefit by it after his death, & if he has capacity for that it suffices (*CRESSWELL, J.*).—*SEFTON (EARL) v. HOPWOOD* (1855), 1 F. & F. 578.

203. ———.]—On an issue *devisavit vel non*, it appearing that at the time of the will testator was in extreme old age, & in the last stage of bodily infirmity, bedridden, utterly helpless, & dependent on the care of pltf. (sole devisee of the realty), & a nurse (the only legatee), & a physician, an attesting witness, & an intimate friend of the devisee, her own attorney (another witness), having prepared the will, upon instructions elicited by himself from testator by interrogatories, they having a few days before represented him as "quite incapable of managing his own affairs, or taking care of his person"; & it being admitted that two or three days before he was not competent to make the will, yet the jury, being told that if he understood the state of his property, & his family, & the effect of the

will, & if he had free volition, & the will was really in accordance with his intentions, & there being evidence that it was, a verdict in favour of the will was not disturbed.

To constitute a good testamentary disposition, testator must retain a degree of understanding to comprehend what he is doing, to have a volition, or power of choice; so that what he does really be his own doing, & not the doing of anybody else. The faculties, in those two great divisions, of the understanding & the will, must still exist. They have declined from their former comprehensiveness & vigour; they may be, & often are on such occasions, weak, & actually on the point of being extinguished; still, though they may be, as it were, flickering in the socket, yet, if they suffice to show the genuine & last behests of a rational creature, & a free agent, that is a good will in point of law. . . . It is not enough that a testator is able to answer familiar & usual questions. That has always been laid down. He must be able to exercise a competent understanding as to the general nature of the property. As to the state of his family, & as to the general condition & claims of the objects of his bounty; as to the nature of the instrument which he executes, & as to the general nature & general objects of the provisions which it contains; if he can do that, though he may be very feeble & debilitated in understanding, & be at the point of death, it is enough (BYLES, J.).—*SWINFEN v. SWINFEN* (1858), 1 F. & F. 584; *subsequent proceedings* (1859), 27 Beav. 148.

*Annotation*:—*Mentd. Swinfen v. Bacon* (1860), 6 Jur. N. S. 1257.

**204.** ———.]—(1) Partial unsoundness, not affecting the general faculties, & not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will.

(2) It is essential . . . that a testator shall understand the nature of the act & its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend & appreciate the claims to which he ought to give effect; & with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties (COCKBURN, C.J.).

(3) At a trial where the question was as to the testamentary capacity of G. it was proved that at one period of his lifetime he had been confined in a lunatic asylum, & that at the time of making his will he was subject to certain fixed delusions. These delusions, however, could not be connected with any of the dispositions in the will. The judge left it to the jury to say whether, at the time of making his will, testator was capable of having such a knowledge & appreciation of facts, & was so far master of his intentions & free from delusions, as to be able to have a will of his own in the disposition of his property & to act upon it:—*Held*: there was no misdirection.

The pathology of mental disease & the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral & intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be discovered, while the rest are left unimpaired & undisturbed: that while the mind may be overpowered by delusions which utterly demoralise it & unfit it for the perception of the true

nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions, which, though the offspring of mental disease & so far constituting insanity, yet leave the individual in all other respects rational, & capable of transacting the ordinary affairs & fulfilling the duties & obligations incidental to the various relations of life (COCKBURN, C.J.).—*BANKS v. GOODFELLOW* (1870), L. R. 5 Q. B. 549; 39 L. J. Q. B. 237; 22 L. T. 813; *subsequent proceedings* (1871), L. R. 11 Eq. 472.

*Annotations*:—*As to* (1) *Consd. Jenkins v. Morris* (1880), 14 Ch. D. 674. *Refd. Birkin v. Wing* (1890), 63 L. T. 80. *As to* (2) *Refd. Boughton v. Knight* (1873), L. R. 3 P. & D. 64; *Roe v. Nix* (1892), 11 T. L. R. 128. *As to* (3) *Expld. Boughton v. Knight* (1873), L. R. 3 P. & D. 64. *Refd. Murfett v. Smith* (1887), 12 P. D. 116; *Roe v. Nix* (1892), 9 T. L. R. 128.

**205.** ——— *Unimpaired capacity.*]—(1) A sound & disposing mind means a mind of natural capacity, not unduly impaired by old age or enfeebled by illness or tainted by morbid influence. Although delusive ideas & erroneous beliefs may argue mental alienation, they do so not because they are delusive & erroneous, it is in some cases the degree of their divergence from ordinary sense & reason, & in others the mode in which they exhibit themselves, & the forces which they successfully resist for their expulsion, that induce the conclusion of disease. In judging of the sanity of an individual he should be compared in his acts & thoughts with those whom in general temperament & character he resembles. It is not right to compare with an enthusiast, one who in daily life has not shown himself to be of that character or temper, nor in scrutinising his opinions to make such allowances as are found to be necessary in reducing the conception of enthusiasts to the ordinary standard of mankind.

(2) If disease be once shown to exist in the mind of testator, it matters not that the disease be discoverable only on a certain subject, or that on all other subjects the action of the mind is apparently sound, & the conduct even prudent, testator must be pronounced incapable. Further, the same result follows whether or not the particular subjects upon which disease is manifested have any connection with the testamentary disposition before the ct.

(3) The question of insanity is a mixed one, partly within the range of common observation, & partly within the range of special medical experience, & it is the office of the ct. in searching for a conclusion to inform itself of the general results of medical observation, & to make a comparison between the sayings & doings of testator at the time when the disease is alleged to exist.—*SMITH v. TEBBITT* (1867), L. R. 1 P. & D. 398; 36 L. J. P. & M. 97; 16 L. T. 841; 16 W. R. 18.

*Annotations*:—*As to* (1) *Refd. Jenkins v. Morris* (1880), 14 Ch. D. 674. *As to* (2) *Consd. Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549. *As to* (3) *Refd. Boughton v. Knight* (1873), L. R. 3 P. & D. 64.

**206.** *Knowledge & approval of contents of will.*]

—(1) It is essential to the validity of a will that at the time of its execution testator should know & approve of its contents.

(2) However much men have been in the habit of yielding to the pressure & opinions of others in disposing of their property, I suppose no case ever yet to have occurred in which a man in possession of his full faculties handed over the making of his will to another, & was content to execute it without so much as the curiosity even to know



*Sect. 8.—Wills: Sub-sect. 1, B.; sub-sect. 2, A., B. & C.]*

what it contained. But still the question remains whether a will so made, if duly executed, would be good in law; & I am constrained to come to the conclusion that it would not. . . . There are also certain consequences which must follow from holding such a will good; & the most important of these is, that it would no longer be necessary to show that a testator was, in the old language of the law, of "sound mind, memory, & understanding." These words have been time out of mind held to mean sound disposing mind, & to import sufficient capacity to deal with & appreciate the various dispositions of property to which testator was about to affix his signature. But if the mental act of disposing can be delegated to another, & a blind confidence in his dispositions all that is required in a testator, the "sound disposing mind" is a needless requisition (SIR J. P. WILDE).—*HASTILOW v. STOBIE* (1865), L. R. 1 P. & D. 64; 35 L. J. P. & M. 18; 13 L. T. 473; 11 Jur. N. S. 1039; 14 W. R. 211.

*Annotation:—As to (2) Reifd. Cleare v. Cleare* (1869), L. R. 1 P. & D. 655.

207. —.—.]—*CLEARE v. CLEARE*, No. 282, *post*.

208. Degree of mental soundness.]—*BOUGHTON v. KNIGHT*, No. 234, *post*.

## SUB-SECT. 2.—TESTAMENTARY INCAPACITY.

### A. In General.

209. Depends on particular circumstances.]—Criteria by which to test & ascertain whether natural or innate eccentricity has exceeded the bounds of legal testamentary capacity.

In all such cases it is absolutely & essentially necessary to look to the peculiar circumstances of each individual case; & to judge from the whole character of the person, whose mental capacity is the subject of inquiry; what was the state & condition of the mind of that individual; not only with respect to the immediate time at which a will is executed, but at the intermediate stages of his life. . . . The same acts which would constitute insanity in one eccentric individual, might not do so in another; for the reason that the minds & habits of the two persons might be differently constituted (SIR H. JENNER FUST).—*MUDWAY v. CROFT* (1843), 3 Curt. 671; 2 Notes of Cases, 438; 1 L. T. O. S. 479; 7 Jur. 979; 163 E. R. 863.

210. Unreasonable prejudice.]—*GREENWOOD v. GREENWOOD*, No. 200, *ante*.

211. Occasional incapacity—Violent nervous attacks.]—(1) Where testator is far advanced in years, & where occasional incapacity from violent nervous attacks is admitted, the mere opinion of witnesses of little weight.

(2) This [old age] raises some doubt of capacity, but only so far as to excite the vigilance of the ct.; for the law allows a person at any age to make a will, provided he retains the disposing faculties of his mind. Age is an uncertain criterion of mental powers (SIR JOHN NICHOLL).

PART II. SECT. 8, SUB-SECT. 2.—A. t. *Paranoia*.]—A person suffering from the form of insanity known as monomania or paranoia, he wrongly suspecting & holding his own family in aversion, lacks testamentary capacity to make a will leaving the bulk of his estate to religious uses, depriving his wife of any benefit thereunder & making inadequate provision for his infant

children.—*Re McDONALD ESTATE* (N. S.) (1914), 14 E. L. R. 109; 15 D. L. R. 558.—CAN.

a. *Physical weakness*.]—*Held*: mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of a debt by a testator.—*EMES v. EMES* (1865), 11 Gr. 325.—CAN.

(3) Another fact . . . is the occasional incapacity of deceased. . . . This circumstance, however, bears upon the case in two opposite directions; it renders in the first place, the capacity at least fluctuating, & imposes on the party setting up these instruments the obligation of proving that at other times deceased was capable, & that these instruments were made during that capacity; but on the other hand, if these attacks produced only a temporary incapacity . . . these occasional attacks account for the opinions of many of the persons who only saw the deceased occasionally (SIR JOHN NICHOLL).—*KINLESIDE v. HARRISON* (1818), 2 Phillim. 449; 161 E. R. 1196.

*Annotation:—Mentd. Stultz v. Schoeffle* (1852), 20 L. T. O. S. 183.

212. Weakness of mind & forgetfulness.]—*TUFNELL v. CONSTABLE*, No. 346, *post*.

213. Partial unsoundness—When not affecting testamentary disposition.]—*BANKS v. GOODFELLOW*, No. 204, *ante*.

### B. Deaf and Dumb Persons.

214. Communication by signs & motions—Necessity for affidavit—As to giving of instructions.]—Where a testator, who was deaf & dumb, made his will by communicating his testamentary instructions to an acquaintance by signs & motions, who prepared a will in conformity with such instructions, which was afterwards duly executed by testator, the ct. required an affidavit from the drawer of the will, stating the nature of the signs & motions by which the instructions were communicated to him, & ultimately refused to grant probate on motion.—*In the Goods of OWSTON* (1862), 2 Sw. & Tr. 461; 31 L. J. P. M. & A. 177; 6 L. T. 368; 26 J. P. 728; 10 W. R. 410; 164 E. R. 1075.

*Annotation:—Consd. In the Goods of Geale* (1864), 3 Sw. & Tr. 431.

215. —.— As to approval of will.]—Where probate was sought of the will of a testator who was deaf, dumb, & illiterate, the ct. required evidence on affidavit of the signs by which testator had signified that he understood & approved of the provisions of the will, before making the grant.—*In the Goods of GEALE* (1864), 3 Sw. & Tr. 431; 4 New Rep. 349; 33 L. J. P. M. & A. 125; 28 J. P. 630; 12 W. R. 1027; 164 E. R. 1342.

### C. Delusions.

Delusions defined, *see* Part I., Sect. 1, *ante*.

216. General rule.]—(1) The mere existence of a delusion in the mind of a person making a disposition or contract is not sufficient to avoid it, even though the delusion is connected with the subject-matter of such disposition or contract; it is a question for the jury whether the delusion affected the disposition or contract.

(2) A lessor at the time when he made a lease of a farm laboured under the delusion that it was impregnated with sulphur. On an issue directed as to the capacity of the lessor to make the lease, rational letters by the lessor relating to the lease were put in evidence. The judge did not tell the jury that the letters did not displace the effect of

## PART II. SECT. 8, SUB-SECT. 2.—C.

216 i. *General rule*.]—*SIVEWRIGHT v. SIVEWRIGHT'S TRUSTEES*, [1919] 2 S. L. T. 261; [1920] S. C. (H. L.) 63.—SCOT.

216 ii. —.—.]—The burden of proving unsoundness of mind on the part of a testator, who made a will rational on the face of it, lies on the person who

the delusion, but directed them that it was a practical question whether the lessor was so insane as to be incompetent to dispose of his property though believed to be full of sulphur. The jury found that the lease was valid. On a motion for a new trial:—*Held*: there was no misdirection.

(3) I hold it to be now settled law, & that until the contrary shall have been decided by the House of Lords, it must be considered that the mere existence of a delusion is not sufficient to deprive a person of testamentary capacity (HALL, V.-C.).—JENKINS v. MORRIS (1880), 14 Ch. D. 674; 42 L. T. 817, C.A.

*Annotation*:—As to (1) *Refd.* Imperial Loan Co. v. Stone (1892), 61 L. J. Q. B. 449.

**217. Pretended delusions—For purpose of deception.**—Where testator is not shown to be subject to frenzy, or fatuity, it is necessary, for the purpose of establishing his insanity, to show that, upon some particular subject, he was under delusion as to the facts within his own observation & that he actually believed in the existence of facts which a rational man, from the use of his senses, under the same circumstances, would have known not to exist; & a gross exaggeration of slight circumstances may amount to insane delusion, as falling within the above proposition of delusion as to facts. But a testator is not to be considered insane from entertaining any opinions, however unfounded or absurd: as where he speaks of his kept mistress, who had died before him, as having been a person of “deep religious feeling.” Nor from a pretended belief in non-existing facts, assumed for the purpose of deception: as, where testator had, in Oct. 1832, acknowledged a child by his second wife to be his child, & yet in a codicil to his will, dated in the same year, disowned any daughter born of his second wife; the ct. thinking that testator never really believed that such child was illegitimate, but that he only threw doubts on her legitimacy for sinister purposes. Applt. though unsuccessful, under the circumstances given his costs of the suit in the ct. below, though not the costs of appeal.—DITCHBURN v. FEARN (1842), 6 Jur. 201, P. C.

**218. Continuous delusions.**—(1) Moral insanity, or the perversion of the moral feelings, not accompanied with insane delusion, which is the legal test of insanity, is insufficient to invalidate a will.

Because a man does not duly appreciate the acts or feelings which generally influence mankind, that, therefore, he is to be considered mad, & unfit to make a disposition of his property, is not the law of this country. I am of opinion that perversion of moral feeling does not constitute unsoundness of mind, so as to render an act performed *per se* invalid (SIR H. JENNER FUST).

(2) Wherever there is delusion existing at the time of the execution of the act, whatever it may be, the act will be invalid as a civil act, provided the delusion is continued permanently fixed on the mind, whether it has any relation to the particular act to be considered or not (SIR H. JENNER FUST).—FRERE v. PEACOCKE (1846), 1 Rob. Eccl. 442; 163 E. R. 1095; *sub nom.* FREER v. PEACOCKE, 11 Jur. 247.

*Annotation*:—Generally, *Mentd.* Davies v. Gregory (1815), L. R. 3 P. & D. 28.

Impeaches it on the ground of unsoundness of mind. The existence of insane delusions affords evidence of such unsoundness of mind, but to be insane a delusion must be persistent, & existing only in the imagination of the patient & such as no rational person

can conceive that the patient when sane would have believed.—RAPSON v. PUTTERKILL, [1913] App. D. 417.—S. AF.

b. — Mere existence of delusion not sufficient.]—A testamentary writing

**219. — As to particular subject.**—WARING v. WARING, No. 10, *ante*.

**220. — — — — —]**—SMITH v. TEBBITT, No. 205, *ante*.

**221. — Distinguished from delirium.**—BENNET v. MANCHESTER (DUKE), No. 369, *post*.

**222. — — — — —]**—DIMES v. DIMES, No. 368, *post*.

**223. Delusions affecting will—As to particular person.**—GREENWOOD v. GREENWOOD, No. 200, *ante*.

**224. — — — — —]**—DEW v. CLARK & CLARK, No. 7, *ante*.

**225. — — — — —]**—Testator, having made his will in June, 1844, in the following month executed a codicil, greatly reducing the interest given by the will to a niece, D., only next of kin, under an impression that she had wilfully occasioned the death of his sister, during the interval, & made an attempt upon his own life, in order to get possession of the property left her by the will; & subsequently made two other codicils under a continuance of that impression:—*Held*: deceased laboured under an insane delusion *quoad* D., & the codicils having been made under such delusion, were invalid.—FOWLIS v. DAVIDSON (1848), 6 Notes of Cases, 461.

**226. — Superstitious terror.**—A bill in equity will lie to set aside a will made under the influence of superstitious terrors.

I can easily conceive a case of a man of very strong mind being under the influence of such a superstitious terror or delusion, as that he might think it necessary to his salvation that he should give all his money to his priest or confessor. If that was clearly established, I am by no means prepared to say that it would not be a very sufficient ground; & were I the judge directing the jury upon the subject, I should say that if they found it to be such a degree of delusion as to deprive the man of the exercise of his free judgment in what he was doing, it would be sufficient to destroy the will (LORD ABINGER, C.B.).—MIDDLETON v. SHERBURNE (1841), 4 Y. & C. Ex. 358; 10 L. J. Ex. Eq. 75; *on appeal, sub nom.* SHERBURNE v. MIDDLETON (1842), 9 Cl. & Fin. 72, H. L.

*Annotations*:—*Mentd.* Lancashire v. Lancashire (1846), 9 Beav. 259; Boyse v. Rossborough (1857), 6 H. L. Cas. 1.

**227. — As to particular subject.**—DITCHBURN v. FEARN, No. 217, *ante*.

**228. — Though considerable business capacity.**—(1) A man may be capable of transacting business of a complicated & important kind, involving the exercise of considerable powers of intellect, & yet may be subject to delusions so as to be unfit to make a will.

(2) But if the delusions under which a man labours are such that they could not reasonably be supposed to have affected the dispositions made by his will, the will would be valid.

(3) The burden of proving capacity to make a will rests upon those who propound the will, & *a fortiori*, when it appears that testator was subject to delusions. It must be shown by those who set up the will that there is no reasonable connection between the delusions & the testamentary dispositions.—SMEE v. SMEE (1879), 5 P. D. 84; 49 L. J. P. 8; 44 J. P. 220; 28 W. R. 703.

*Annotations*:—As to (2) *Refd.* Jenkins v. Morris (1880), 14 Ch. D. 674; Birkin v. Wing (1890), 63 L. T. 80.

in itself reasonable, will not be deprived of effect merely on the ground that the writer was at the time subject to an insane delusion, from which he never recovered.—BAILLANTYNE v. EVANS (1886), 13 R. (Ct. of Sess.) 652; 23 Sc. L. R. 449.—SCOT.



*Sect. 8.—Wills: Sub-sect. 2, C., D., E., F., G. & H.; sub-sect. 3, A.]*

**229. —As to religious duty.]**—In an action for reduction of a will pursuers averred that testator was "subject to insane delusions," & that "he believed that he had a special & imperative duty to further the cause of total abstinence & to oppose the Church of Rome by devoting his pecuniary resources to these objects, in consequence of commands which he conceived he had received from the Deity by direct communications on various occasions." That these insane delusions dominated his mind & overmastered his judgment to such an extent as to render him incapable of making reasonable & proper settlement of his means & estate, or of taking a rational view of the matters to be considered in making a will:—*Held*: a relevant case for trial was averred.—*HOPE v. CAMPBELL*, [1899] A. C. 1, II. L.

**230. Delusions not affecting will.]**—*FRERE v. PEACOCKE*, No. 218, *ante*.

**231. —.]**—B., a captain in the army, & having an appointment at Chatham, was attacked with illness in the beginning of Aug. 1857, which affected his mind. In the course of a fortnight he became better, & went on a visit to friends at Lewes, with whom he remained till the last week in Sept., & apparently conducted himself quite rationally. About a fortnight before he left Lewes he received, after conference with & the approbation of the incumbent of the parish, the communion for the first time. He returned to Chatham on Sept. 29. On Sept. 30 he wrote a testamentary paper, which was executed by him, & attested by two brother officers on Oct. 1. He had immediately on his return to Chatham shown symptoms of returning or reviving mental disease, which specially took the form of an uncontrollable idea that he must be eternally damned for having received the communion unworthily. A few days after the date of the will he was pronounced insane by a medical board, & died in Sept. 1858, in a lunatic asylum:—*Held*: if a will, rational on the face of it, is shown to have been executed & attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding. But if there are circumstances which counterbalance that presumption, the decree of the ct. must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that testator was of sound mind when he executed it; though the will propounded was sensible on the face of it & contained no trace of any reference to or connection with testator's then subject of delusion, yet, as the production of an unsound mind, it was not entitled to probate.—*SYMES v. GREEN* (1859), 1 Sw. & Tr. 401; 28 L. J. P. & M. 83; 33 L. T. O. S. 168; 5 Jur. N. S. 742; 164 E. R. 785.

**232. —.]**—*SMITH v. TEBBITT*, No. 205, *ante*.

**233. —.]**—*BANKS v. GOODFELLOW*, No. 204, *ante*.

**234. —.]**—A man, moved by capricious, frivolous, mean, or even bad motives, may disinherit wholly or partially his children, & leave his property to strangers. He may take an unduly harsh view of the character & conduct of his children, but there is a limit beyond which it will cease to be a question of harsh unreasonable judgment, & then the repulsion which a parent exhibits to his child must be held to proceed from

some mental defect. If such repulsion, amounting to a delusion as to character, is shown to have existed previous to the execution of his will, it will be for the party setting up that document to establish that it was inoperative when the will was made, & the jury, in determining whether or not the delusion was operative, will have regard to the contents of the will & the circumstances surrounding the execution of it.

In contemplation of law the expression "sound mind" does not mean a perfectly balanced mind. The question of mental soundness is one of degree. In considering it large allowance must be made for the difference of individual character; but in every case the lightest degree of mental soundness is required in order to constitute capacity to make a testamentary disposition.—*BOUGHTON v. KNIGHT* (1873), L. R. 3 P. & D. 64; 42 L. J. P. & M. 25; 28 L. T. 562; 37 J. P. 598.

*Annotations*:—*Consd.* *Roe v. Nix* (1892), 9 T. L. R. 128. *Refd.* *Jenkins v. Morris* (1880), 14 Ch. D. 674; *Birkin v. Wing* (1890), 63 L. T. 80. *Mentd.* *Twist v. Tye*, [1902] P. 92; *In the Estate of Plant*, *Wild v. Plant*, [1926] P. 139.

**235. —.]**—*SMEE v. SMEE*, No. 228, *ante*.

**236. —.]**—*MURFET v. SMITH* (1887), 12 P. D. 116; 57 L. T. 498; 51 J. P. 374, D. C.

*Annotation*:—*Mentd.* *Taplin v. Taplin* (1888), 13 P. D. 100.

**237. What is to be considered—Temperament & character.]**—*SMITH v. TEBBITT*, No. 205, *ante*.

**238. —Contents of will & circumstances of execution.]**—*BOUGHTON v. KNIGHT*, No. 234, *ante*.

#### *D. Drunkenness.*

**239. Habitual drunkenness—Testator not under influence at time of making will.]**—A case of insanity alleged to defeat a will. Testator proved to have been not, properly, a madman; but an habitual drunkard, who, under the excitement of liquor, acted in all respects, very like a madman:—*Held*: testator had not been under the excitement of liquor, & consequently, not insane, at the time of making his will; & the will itself, consequently, established.—*AYREY v. HILL* (1824), 2 Add. 206; 162 E. R. 269.

**240. —.]**—(1) On an issue *devisavit vel non*, the will being impeached on the ground that testator's mind was impaired by drinking, & was under undue influence on the part of the devisee or his family:—*Held*: though he was proved to have been addicted to drinking, & to have had delirium tremens a few days before the alleged will, the question was whether he was sane & sensible, & able to understand the nature & contents of the will at the time when it was executed.

(2) Although it was drawn by a son of the devisee, an old friend, & at his house:—*Held*: if testator had really requested him to do it, & it was his voluntary & spontaneous act, not under constraint, free from force or fraud, from imposition or importunity, there was no undue influence, & the will was valid.—*HANDLEY v. STACEY* (1858), 1 F. & F. 574.

**241. Excessive drinking—When testatrix otherwise capable.]**—(1) The will (executed eight years before death) of a woman, who, though guilty of excessive drinking & great extravagancies, managed her own property, received her dividends, did various acts of business, corresponded rationally with her friends, & was not shown to be under any delusion, cannot be set aside on the ground of insanity.

(2) Though such will, in total exclusion of

distant next of kin (with whom she had quarrelled), be in the handwriting of, & executed at the office of her attorney (one of the exors. & residuary legatees to a great amount, he & his family having also very large legacies) & the attesting witnesses speak to a bare execution; documents in her own handwriting, showing both capacity & knowledge of contents, though not mentioning the residue, will supply the additional proof required by such circumstance.—*WHEELER & BATSFORD v. ALDERSON* (1831), 3 Hag. Ecc. 574; 162 E. R. 1268.

*Annotation*:—*As to* (2) *Reid*. *Wright v. Doe d. Tatham* (1838), 4 Bing. N. C. 489.

**242. Delirium tremens—Will destroyed in fit—Whether amounting to revocation.**—Testator in a fit of delirium tremens destroyed a duly executed will. The ct. granted probate [of a copy of the will], but doubted whether if he had confirmed the act of destruction when he was in a condition of sanity, it would not have amounted to a revocation.—*BRUNT v. BRUNT* (1873), L. R. 3 P. & D. 37; 28 L. T. 368; 37 J. P. 312; 21 W. R. 392.

#### E. Eccentricity.

**243. Mere eccentricity not sufficient.**—(1) A will of 1822, bearing marks of eccentricity pronounced for, in the absence of adminicular proof of unsoundness.

(2) Application to admit evidence taken in a former cause refused.

(3) General presumption of law in favour of soundness.—*WELLESLEY v. VERE* (1841), 2 Curt. 917; 1 Notes of Cases, 240; 163 E. R. 630.

**244.** —.—.]—*MUDWAY v. CROFT*, No. 209, *ante*.

**245.** —.—.]—*FRERE v. PEACOCKE* (1846), 1 Rob. Eccl. 442; 163 E. R. 1095; *sub nom.* *FRER v. PEACOCKE*, 11 Jur. 247.

*Annotation*:—*Mentd.* *Davies v. Gregory* (1873), L. R. 3 P. & D. 28.

**246.** —.—.]—Testamentary capacity is not disproved by evidence of testator's merely eccentric acts & conduct.—*PILKINGTON v. GRAY*, [1899] A. C. 401; 68 L. J. P. C. 63, P. C.

#### F. Foolishness.

**247. Mere foolishness not sufficient—Will sounding to folly—General conduct to be considered.**—The ct. will not, at once, reject an allegation propounding a will, which sounds to folly, when facts are pleaded, showing that deceased, up to his death, conducted himself, in the ordinary concerns of life, as a sane man.—*ARBERY v. ASHE* (1828), 1 Hag. Ecc. 214; 162 E. R. 562.

**248.** —.—.]—A., a native of England, but who had lived long in the East, & was familiar with Eastern habits & superstitions, & professed his belief in the Mahommedan religion, died in England leaving a will, which, after various legacies, gave the residue to the poor of Constantinople, & also towards erecting a cenotaph in that city, inscribed with his name, & bearing a light perpetually burning therein. The Pre-rogative Ct. having, chiefly on the ground of this extraordinary residuary bequest, which sounded to folly, & partly on parol evidence of the wild & extravagant language of testator, pronounced him to be of unsound mind when the will was made:—*Held*: as the insanity attributed to

deceased was not monomania, but a general mental derangement, & as the proper mode of testing the allegation was to review the life, habits, & opinions of testator, on such a review there was nothing absurd or irrational in the bequest, or anything in his conduct at the date of the will indicating derangement; & therefore the will was admitted to probate.—*AUSTEN v. GRAHAM* (1854), 8 Moo. P. C. C. 493; 1 Ecc. & Ad. 357; 24 L. T. O. S. 37; 14 E. R. 188, P. C. *Annotation*:—*Mentd.* *Davis v. Gregory & Francis* (1873), 42 L. J. P. & M. 33.

**249.** —.—.]—**Testator mentally capable.**—*SEFTON (EARL) v. HOPWOOD*, No. 202, *ante*.

**250.** —.—.]—**Foolish legacy.**—A foolish legacy, evincing egregious vanity on the part of a testator, unless supported by evidence as to general conduct, affords no proof of incapacity.—*HOBART v. MERRYFIELD* (1844), 2 L. T. O. S. 518.

#### G. Moral Perversion.

**251. Not sufficient—When not accompanied with delusions.**—*FRERE v. PEACOCKE*, No. 218, *ante*.

**252.** —.—.]—**Harshness & injustice.**—*SEFTON (EARL) v. HOPWOOD*, No. 202, *ante*.

#### H. Old Age.

**253. Mere old age not sufficient.**—*KINLESIDE v. HARRISON*, No. 211, *ante*.

**254.** —.—.]—**Though accompanied by defective memory & neglect of person—Previous derangements of mind.**—A defective memory, a confused mind, neglect of person, & peculiarity of manner & conversation combined, do not amount to testamentary incapacity even on the part of a very old & infirm woman, who had been deranged for some months many years before, & the will of such person is held valid.—*BENYON v. BENYON* (1844), 2 L. T. O. S. 477.

**255.** —.—.]—**Though last stage of boldly infirmity—Where mental understanding.**—*SWINFEN v. SWINFEN*, No. 203, *ante*.

**256. Doubtful capacity—Will prepared by residuary legatee.**—The will of an aged person of doubtful capacity prepared by a solr., who was appointed an exor. & one of the residuary legatees, pronounced against.—*DURLING & PARKER v. LOVELAND* (1839), 2 Curt. 225; 163 E. R. 393.

*Annotation*:—*Reid*. *Scouler v. Plowright* (1856), 10 Moo. P. C. C. 441.

### SUB-SECT. 3.—EFFECT OF INCAPACITY.

#### A. Incapacity at Time of Execution.

**257. Disposition void—Though subsequent recovery.**—If a man be *non compos* & not in his right senses at the time of making his will, though he afterwards, never so long before his death, becomes a man of understanding, & sound judgment & memory, yet the will is a void will & will by no means be made good; because he wanted the disposing power at the time of disposition which was the time of making his will (*TREVOR, C.J.*).—*ARTHUR v. BOKENHAM* (1708), as reported in 11 Mod. Rep. 148; Fitz-G. 233; 88 E. R. 957.

*Annotations*:—*Mentd.* *Sparrow v. Harcastle* (1754), Amb. 224; *Brydges v. Chandos* (1794), 2 Ves. 417; *Cave v. Holford* (1798), 3 Ves. 650.

#### PART II. SECT. 8, SUB-SECT. 2.—E.

**243 i. Mere eccentricity not sufficient.**—*Re HAZEN'S WILL* (1876), 3 Pug. 329.—CAN.

#### PART II. SECT. 8, SUB-SECT. 3.—A.

**257 i. Disposition void—Though subsequent recovery.**—*PUBLIC TRUSTEE v. PRISK* (1896), 14 N. Z. L. R. 306.—N.Z.



Sect. 8.—Wills: Sub-sect. 3, A., B., C. & D.; sub-

**258. — Whether intestacy decreed.]**—A party having died insane, leaving a will, which upon the face of it exhibited marks of insanity, the ct. granted administration of the effects of deceased as dead intestate, but directed the will to be deposited in the registry.—*In the Goods of BOURGET* (1837), 1 Curt. 591; 163 E. R. 207.

*Annotation:—Folld. Perry v. Dyke, In the Goods of Jaques* (1858), 1 Sw. & Tr. 12.

**259. — —.]**—Testator while of unsound mind, & being dependent on his relatives, & wholly without property, made a will disposing of large sums of money, which was not propounded:—*Held*: administration, as in case of intestacy, might be granted to his sister as attorney for his widow, who was in Australia, & the oath of the administratrix should be that as far as she knew & believed deceased left no will.—*In the Goods of RICH*, [1892] P. 143; 61 L. J. P. 94; *previous proceedings* (1891), 65 L. T. 352.

**260. — —.]**—In absence of explanation by attesting witnesses.]—A will executed by a person in a state of utter incapacity, not propounded, Motion for administration as in an intestacy, refused in the absence of full explanation by attesting witnesses.—*WILLIAMS v. WILLIAMS* (1841), 1 Notes of Cases 129; *subsequent proceedings* (1843), 2 Notes of Cases 390.

**261. — —.]**—In absence of party propounding will.]—E. made a will, whilst of unsound mind, in favour of some charitable institution. The only party interested to support it being cited to propound it, or show cause why it should not be treated as void, did not appear. On an affidavit of the medical attendant of deceased as to his testamentary incapacity, administration was granted to one of his next of kin, as in an intestacy.—*PERRY v. DYKE, In the Goods of JAQUES* (1858), 1 Sw. & Tr. 12; 27 L. J. P. & M. 7; 30 L. T. O. S. 310; 6 W. R. 275; 164 E. R. 606.

**262. — Whether probate granted of former disposition.]**—*KETTLEWELL v. RANDALL* (1844), 3 Notes of Cases 72.

**263. — —.]**—Testator having duly executed a will, subsequently made another betraying on the face of it insanity. The exors. of the former will took out a decree calling on all persons interested in the latter paper to propound it, with an intimation that, on not appearing, the ct. would decree probate of the former will. The persons cited executed proxies declining to propound the latter paper & consenting to probate being granted of the former:—*Held*: the exors. of the former paper were entitled to probate in common form.—*PALMER & BROWN v. DENT* (1850), 2 Rob. Eccl. 284; 7 Notes of Cases 555; 163 E. R. 1319.

*Annotation:—Mentd. Morton v. Thorpe* (1863), 32 L. J. P. M. & A. 174.

**264. — Onus of proof.]**—*DYCE SOMBRE v. TROUP*, No. 414, *post*.

#### B. Incapacity arising Subsequent to Execution.

**265. Disposition not affected.]**—*FORSE v. HEMBLING*, No. 372, *post*.

**266. —.]**—Evidence of a testatrix being of unsound mind shortly after the execution of her will, not a sufficient ground for granting a new trial, to try the validity of the will.—*WARN v. SWIFT* (1832), 1 L. J. Ch. 203.

**267. — Specific bequest of chattels—Effect of subsequent recovery—Application of Lunacy Act, 1890 (c. 5), s. 123.]**—*Re PALMER, THOMAS v. MARSH*, [1911] W. N. 171.

**268. Testatrix originally eccentric — Subsequently developing delusions—Large benefit to stranger.]**—*WARING v. WARING*, No. 10, *ante*.

**269. Missing will—Admission to probate of contents.]**—(1) The presumption that a will which was in a testator's custody up to the time of his death, & cannot be found after his death, was destroyed by him *animo revocandi*, does not apply to a case where testator became insane after the execution & continued insane until his death.

(2) In such a case the burden of showing that the will was destroyed whilst testator was of sound mind lies on the party setting up the revocation.

(3) In the absence of evidence as to the date of the destruction, the contents of the will are entitled to probate.—*SPRIGGE v. SPRIGGE* (1868), L. R. 1 P. & D. 608; 38 L. J. P. & M. 4; 19 L. T. 462; 33 J. P. 104; 17 W. R. 80.

*Annotations:—As to (1) Rejd. Allan v. Morrison*, [1900] A. C. 604. *As to (2) Rejd. Benson v. Benson* (1870), L. R. 2 P. & D. 172.

**270. — —.]**—After making her will, a testatrix became of unsound mind, & was confined in a lunatic asylum. The will was seen after the date of the removal to the asylum, but was missing after the death of testatrix. With the consent of the Master in Lunacy & of the receiver of deceased's property appointed under Lunacy Act, 1890 (c. 5), the ct. granted probate of the draft of the will made by testatrix to her next of kin.—*In the Goods of CRANDON* (1901), 84 L. T. 330; 17 T. L. R. 341.

#### C. Effect of Admission to Probate.

**271. Whether trusts administered.]**—Where the will of a lunatic had been admitted to probate, the ct., upon the petition of the extrix., ordered a fund in ct., belonging to the lunatic's estate, to be transferred to trustees to be approved by the comr., & to be held by them upon the trusts of the will, although such will was made after the time from which testator had been found by inquisition to have been of unsound mind.—*Re GARDEN* (1844), 13 L. J. Ch. 439; 3 L. T. O. S. 258, L. C.

**272. Conclusiveness of sentence.]**—*Re HARDCASTLE* (1844), 3 L. T. O. S. 197, 237, L. C.

**273. Probate not revoked.]**—A codicil made when testator was labouring under mental incapacity had been proved together with a will. These facts were brought to the notice of the ct., but it refused to revoke the probate.—*DRUMMOND v. KNIGHT* (1849), 13 L. T. O. S. 263; 13 Jur. 502.

#### D. Effect on Revocation.

*See Sub-sect. 8, post.*

#### SUB-SECT. 4.—PROOF OF CAPACITY OR INCAPACITY.

##### A. Presumptions.

Presumptions & proof of state of mind generally, *see Part III., post*.

**274. Presumption of capacity—When execution in presence of witnesses.]**—*CHAMBERS & YATMAN v. QUEEN'S PROCTOR*, No. 363, *post*.

#### PART II. SECT. 8, SUB-SECT. 3.—B.

**265 i. Disposition not affected.]**—*MILLER v. MILLER* (1877), 25 Gr. 224.—*CAN.*

**265 ii. —.]**—A testatrix having duly made a will became insane, & while in that condition erased her signature to it:—*Held*: the will

should be admitted to probate.—*Re ODENDAAL* (1899), 10 S. C. 271.—*S. AF.*

**275. — In absence of evidence to contrary.]—**This was a suit respecting the will of P. His two surviving sisters, supposing he had died intestate, took out administration; but in April, 1842, a will was discovered, dated in 1792. Deceased had been insane for many years, & it was pleaded that he became so previous to the date of the will, in consequence of a *coup de soleil* whilst on service. No evidence of this fact, however, could be obtained; & the will being attested by three witnesses (since deceased) whose death, character, & handwriting were satisfactorily proved:—*Held*: the ct. had no option or discretion, & was bound to pronounce in favour of the will.—*TURNER v. PENNY* (1843), 1 L. T. O. S. 412; *subsequent proceedings* (1844), 8 Jur. 934.

*Annotation*:—*Mentd.* *Frere v. Peacocke* (1843), 7 Jur. 998.

**276. — —.]—***SUTTON v. SADLER*, No. 193, *ante*.

**277. — —.]—***SYMES v. GREEN*, No. 231, *ante*.

**278. — —.]—**A will partially defaced by a testator, whilst of unsound mind, is to be pronounced for, as it existed in its integral state, that being ascertained; if a testator of impeached sanity do some act with relation to his will, whose state of mind, at the time of doing which, there is nothing to evidence, *aliunde*; his rationality at such time, or the contrary, is to be inferred from that of his act.—*SCRUBY & FINCH v. FORDHAM* (1822), 1 Add. 74; 162 E. R. 27.

*Annotation*:—*Mentd.* *Andrew v. Motley* (1862), 12 C. B. N. S. 514.

**279. Presumption of incapacity—When evidence of previous insanity.]—**The will of an aged spinster, who had laboured under delusions, but in the opinion of her medical attendant had recovered therefrom, containing a probable disposition, & made under circumstances which did not infer incapacity, pronounced against for want of sufficient evidence to discharge the *onus* of proof.—*JOHNSON v. BLANE* (1848), 6 Notes of Cases 442.

**280. — —.]—***SYMES v. GREEN*, No. 231, *ante*.

Burden of proof, *see* Sub-sect. 4, B., *post*.

#### B. Burden of Proof.

##### (a) Execution of Will.

*See, generally*, Part III., Sect. 4, *post*.

**281. General rule—On party propounding will.]—***SUTTON v. SADLER*, No. 193, *ante*.

**282. — —.]—**That testator knew & approved of the contents of a will propounded is part of the burden of proof assumed by the person who propounds it, & consequently, the next of kin who oppose a will may cross-examine the witnesses produced in its support on that matter, as well as upon the capacity of testator, or the execution of the will, without exposing themselves to costs, provided they give the notice required by the rules.

In all cases, whether through the medium of a presumption unrebutted, or of positive evidence to that end, the party who puts forward a document as the will of a testator, must establish the fact that testator was competent to make a will when he executed it. This competency forms part

of the proposition that a will was made. For if there is no competency, no testable capacity, there can be no will. I am of opinion that testator's knowledge of the contents of his alleged will stands upon the like footing. That he knew & approved of the contents is a proposition implied in the assertion that a will was made by him (*LORD PENZANCE*).—*CLEARE v. CLEARE* (1869), L. R. 1 P. & D. 655; 38 L. J. P. & M. 81; 20 L. T. 497; 17 W. R. 687.

*Annotations*:—*Mentd.* *Harrington v. Bowyer* (1871), 41 L. J. P. & M. 17; *Leigh v. Green*, [1892] P. 17.

**283. — —.]—***SMEE v. SMEE*, No. 228, *ante*.

**284. When previous insanity proved—On party alleging lucid interval.]—***CARTWRIGHT v. CARTWRIGHT*, No. 395, *post*.

**285. — —.]—**Wherever previous insanity is proved, the burden of proof is shifted, & it lies on those who set up the will to adduce satisfactory proof of sanity at the time the act was done. It is scarcely possible indeed to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval; but the law recognises acts done during such an interval as valid, & the law must not be defeated by any overstrained demands of the proof of the fact (*SIR JOHN NICHOLL*).—*WHITE v. DRIVER* (1809), 1 Phillim. 84; 161 E. R. 922.

*Annotation*:—*Refd.* *Chambers & Yatman v. Queen's Proctor* (1840), 2 Curt. 415.

**286. — —.]—**Occasional incapacity.]—*KINLESIDE v. HARRISON*, No. 211, *ante*.

**287. — —.]—***WARING v. WARING*, No. 10, *ante*.

**288. — —.]—***BANNATYNE v. BANNATYNE*, No. 361, *post*.

**289. — —.]—**On party alleging recovery.]—*PRINSEP & EAST INDIA CO. v. DYCE SOMBRE*, No. 431, *post*.

**290. — —.]—**On party alleging absence of particular delusion.]—*PRINSEP & EAST INDIA CO. v. DYCE SOMBRE*, No. 431, *post*.

**291. — —.]—***BOUGHTON v. KNIGHT*, No. 234, *ante*.

**292. — —.]—**On party alleging delusion not affecting will.]—*SMEE v. SMEE*, No. 228, *ante*.

##### (b) Revocation.

**293. On party alleging revocation—Will found mutilated.]—**A., having duly executed her will, subsequently became insane. Shortly before her death, it was discovered that the will had been mutilated by her; but it was proved to have been in her custody for a short time subsequent as well as prior to her insanity:—*Held*: there being satisfactory evidence of the due execution of the will, the *onus* of showing that it had been mutilated by testatrix when of sound mind was upon the party alleging its revocation.—*HARRIS v. BERRALL* (1858), 1 Sw. & Tr. 153; 7 W. R. 19; 164 E. R. 671.

*Annotations*:—*Apprvd.* *Sprigge v. Sprigge* (1868), L. R. 1 P. & D. 608; *Benson v. Benson* (1870), L. R. 2 P. & D. 172. *Refd.* *Allan v. Morrison*, [1900] A. C. 604.

**294. — —.]—**After the due execution of a will has been proved, the burden of proving that it was revoked lies upon those who set up the revocation, & in the absence of evidence, revocation will not be presumed.

#### PART II. SECT. 8, SUB-SECT. 4.— B. (a).

**281. General rule—On party propounding will.]—***Re MAXWELL'S ESTATE* (1875), 1 R. & C. 229.—*CAN.*

c. Proof of incapacity — Onus on

*party impeaching.]—*A party assuming to prove insanity in order to set aside a will is required to do so by clear & satisfactory proofs. The burden of proof rests upon the party who attempts to invalidate what purports to be a legal act.—*Re BROOKLEBANK'S WILL* (1856), 4 Nfld. L. R. 88.—*NFLD.*

d. — —.]—The burden of proving unsoundness of mind on the part of a testator, who made a will rational on the face of it, lies on the person who impeaches it on the ground of unsoundness of mind.—*RAPSON v. PUTTERKILL*, [1913] App. D. 417.—*S. AF.*



*Sect. 8.—Wills: Sub-sect. 4, B. (b), C. & D.  
(b) & (c).]*

In many cases it has happened that a will in a testator's custody has been found, after his death, obliterated in such a way as to amount to a revocation if he was of sane mind when he did it, & there has been no evidence whether it was done before or after he became insane. Does the ct., in the absence of proof, presume that it was done before he became insane, when it would amount to a revocation, or when he became insane, when it would not amount to a revocation? The answer is, that the ct. always refuses to presume one way or the other, but holds that the party who alleges that it was done at a time when it would amount to a revocation must prove his allegation, & in the absence of proof the revocation falls to the ground (LORD PENZANCE).—BENSON *v.* BENSON (1870), L. R. 2 P. & D. 172; 40 L. J. P. & M. 1; 23 L. T. 709; 34 J. P. 807; 19 W. R. 190.

**295. — Will not forthcoming—Ordinary presumption not applicable.]—**SPRIGGE *v.* SPRIGGE, No. 269, *ante*.

**296. — —.]—**Where a testator has his last will in his possession, & afterwards becomes insane, & the will is not forthcoming after his death, the *onus* is on those who allege revocation to satisfy the ct. that testator destroyed his will while of unsound mind.—*In the Estate of TAYLOR, NATIONAL & PROVINCIAL & UNION BANK OF ENGLAND v. TAYLOR* (1919), 64 Sol. Jo. 148.

*C. Evidence of Capacity.*

*See, generally, Sect. 6, post.*

**297. Retaining previous intentions.]—**HUDSON'S CASE (1682), Skin. 79; 90 E. R. 38.

**298. —.]—**ANON. (*circa* 1790), cited in 1 Dow. at p. 178; 3 E. R. 664.

*Annotation:—*Consd. M'Adam *v.* Walker (1813), 1 Dow. 148.

**299. —.]—**COGHLAN *v.* COGHLAN (*circa* 1790), cited in 1 Phillim. at p. 120; 19 Ves. at p. 508; 34 E. R. 605.

*Annotations:—*Consd. Bootle *v.* Blundell (1815), 19 Ves. 494. *Refd.* A.-G. *v.* Parnter (1792), 3 Bro. C. C. 441; Cartwright *v.* Cartwright (1793), 1 Phillim. 90.

**300. — Mere recollection not sufficient—Intention vaguely expressed.]—**BENNET *v.* MANCHESTER (DUKE), No. 369, *post*.

**301. —.]—**DIMES *v.* DIMES, No. 368, *post*.

**302. Ability to converse.]—**HUDSON'S CASE (1682), Skin. 79; 90 E. R. 38.

**303. —.]—**COGHLAN *v.* COGHLAN (*circa* 1790), cited in 1 Phillim. at p. 120; 19 Ves. at p. 508; 34 E. R. 605.

*Annotations:—*Refd. A.-G. *v.* Parnter (1792), 3 Bro. C. C. 441; Cartwright *v.* Cartwright (1793), 1 Phillim. 90; Bootle *v.* Blundell (1815), 19 Ves. 494.

**304. Reasonableness of act.]—**ANON. (*circa* 1790), cited in 1 Dow. at p. 178; 3 E. R. 664.

*Annotation:—*Consd. M'Adam *v.* Walker (1813), 1 Dow. 148.

**305. —.]—**CLARKE *v.* LEAR & SCARWELL (1791), cited in 1 Phillim. at p. 119; 161 E. R. 933.

*Annotation:—*Consd. Cartwright *v.* Cartwright (1793), 1 Phillim. 90.

**306. —.]—**CARTWRIGHT *v.* CARTWRIGHT, No. 395, *post*.

**307. —.]—**(1) Neither am I able to decide upon the objection with respect to the insanity of testator. For, admitting that by the coroner's verdict he must be taken to have been insane at the time of the act committed, in consequence of which he died, it does not follow that he continued insane during the whole interval from the commission of that act to his death, or that he was so at the time of making his will.

(2) There are cases of wills being established,

which were made during the intervals of delirium, because they have contained internal evidence of their being reasonable & such as a man in his senses may be supposed to have made (LORD ELDON, C.).—LEVY *v.* LINDO (1817), 3 Mer. 81; 36 E. R. 32, L. C.

*Annotation:—*Mentd. Wells *v.* Maxwell (No. 1) (1863), 32 Beav. 408.

**308. —.]—**A party deceased, having made a will, who was afterwards found to be of unsound mind from a date anterior to that of the will; the ct. refused upon affidavit & consent of parties, on motion, to decree such party to be dead intestate, there being nothing on the face of the will sounding to folly.—*In the Goods of WATTS* (1837), 1 Curt. 594; 163 E. R. 208.

*Annotation:—*Refd. *In the Goods of Morton* (1863), 2 New Rep. 249.

**309. —.]—**SUTTON *v.* SADLER, No. 193, *ante*.

**310. —.]—**P., who for many years had been afflicted with habitual insanity, accompanied with intermissions, executed a will when confined in a lunatic asylum. The instructions for it were designed & written by himself without assistance, & the will made a natural & equitable distribution of his property. Probate of the will was opposed by the next of kin on the ground of testator being of unsound mind at the time of its execution. The exors. contended that it was executed by him in a lucid interval. The jury having found a verdict for the exors., probate of the will was decreed:—*Held*: (1) where a person afflicted with habitual insanity, with intermissions, makes a will, the fact that the will is a rational one & made in a rational manner, though not conclusive, is strong evidence of its having been made in a lucid interval; (2) where a person is labouring under an insane delusion, his sanity is to be tested by directing his attention to the subject matter of such delusion; but where a person is afflicted with habitual insanity unaccompanied with delusions, his sanity is to be tested by his answers to questions, his apparent recollection of past transactions, & his reasoning justly with regard to them, & with regard to the conduct of individuals.—NICHOLS & FREEMAN *v.* BINNS (1858), 1 Sw. & Tr. 239; 32 L. T. O. S. 50; 164 E. R. 710.

**311. Subsequent papers of testator.]—**BOOTLE *v.* BLUNDELL, No. 353, *post*.

**312. Probability of disposition—Degree of supplementary evidence required—Where mental aberration established.]—**Where mental aberration is proved to have shown itself in the alleged testator, the degree of evidence necessary to substantiate any testamentary act depends greatly on the character of the act itself. If it purports to give effect only to probable intentions, its validity may be established by comparatively slight evidence. But evidence, very different in kind, & much weightier in degree, is requisite to the support of an act, which purports to contain dispositions contrary to testator's probable intentions, or savouring, in any degree, of folly or frenzy. What then are the features, & what is the character, of the testamentary act, set up in the present case? It is precisely such a disposition as natural affection would dictate. Testator bequeaths by it his whole property, in equitable proportions, to his wife & children. If, in truth, the mother of these children were not his lawful wife, this rather increases than repels, the presumption in favour of the act. In addition to natural affection, it rendered some measure of the sort absolutely incumbent on deceased, in point of moral duty; as his intestacy in that case would have left this mother & her children wholly

## PART II.—CIVIL CAPACITY.

destitute, & unprovided for (SIR JOHN NICHOLL).—*EVANS v. KNIGHT & MOORE* (1822), 1 Add. 229; 162 E. R. 80; *previous proceedings* (1820), 3 Phillim. 413; (1822), 1 Add. 138.

*Annotations*:—**Mentd.** *Trevanion v. Trevanion* (1837), 1 Curt. 486; *Beale v. Beale* (1874), L. R. 3 P. & D. 179; *Leigh v. Green*, [1892] P. 17.

**313.** —.]—Probability of disposition is of very little weight to negative forgery, though material to prove capacity, volition, & the absence of fraudulent imposition.—*RUTHERFORD v. MAULE* (1832), 4 Hag. Ecc. 213; 162 E. R. 1424.

*Annotation*:—**Mentd.** *Wood v. Goodlake* (1839), 2 Curt. 82.

**314. Sane conduct**—Though will sound to folly.]—*ARBERRY v. ASHE*, No. 247, *ante*.

**315.** — On occasion of accidental visit.]—*BANNATYNE v. BANNATYNE*, No. 361, *post*.

**316. Ability to do formal business**—Whether sufficient to rebut presumption of incapacity—Where evidence of insanity before & after act.]—Where deceased was admitted to have been insane before the execution of two asserted wills, & where there was evidence of delusion & other *indica* of derangement existing shortly before, as well as subsequent to the acts, proof of calmness, & of his doing formal matters of business, under the sanction of his family, are not sufficient to rebut the presumption against the papers.—*GROOM v. THOMAS* (1829), 2 Hag. Ecc. 433; 162 E. R. 914.

*Annotations*:—**Consd.** *Mudway v. Croft* (1843), 2 Notes of Cases, 438; *Sutton v. Sadler* (1857), 3 C. B. N. S. 87. **Refd.** *Borlase v. Borlase* (1845), 4 Notes of Cases, 106.

**317. Handwriting of deceased — Will.**] — *CHAMBERS & YATMAN v. QUEEN'S PROCTOR*, No. 363, *post*.

**318.** — Documents showing knowledge of contents of will—Where evidence of bare execution.]—*WHEELER & BATSFORD v. ALDERSON*, No. 241, *ante*.

### D. Evidence of Incapacity.

#### (a) In General.

*See, generally*, Part III., Sect. 5, *post*.

**319. Must apply to particular date.**]—*WHITE v. WILSON*, No. 410, *post*.

**320. Effect of contradictory evidence—Inference of fluctuating capacity.**]—(1) When the opinions of persons apparently intending to depose fairly are contradictory as to capacity, particularly if facts show deceased was occasionally capable, the ct. will infer a fluctuating capacity.

(2) The will of a person in such a state, of which probate was taken out four months after deceased's death & not called in for two years & a half, pronounced for; there being satisfactory evidence of instructions, & of capacity, at the time of the *factum*; the disposition contained being consistent with his affections, & its variation from a will, executed before his mind became impaired, being accounted for by a change of circumstances.—*WILLIAMS v. GOUDE* (1828), 1 Hag. Ecc. 577; 162 E. R. 682.

*Annotations*:—*As to* (2) **Refd.** *Browning v. Budd* (1848), 6 Moo. P. C. C. 430. **Generally, Mentd.** *Harrison v. Harrison* (1846), 1 Rob. Ecc. 406; *Stultz v. Schoefle* (1852), 20 L. T. O. S. 183.

**321. Bequest to strangers—Exclusion of own relations.**]—(1) A will, regularly executed, bequeathing the property of deceased to strangers in blood, to the exclusion of his relations, pronounced against, notwithstanding conflicting medical evidence, on the ground of insanity.

(2) However eccentric deceased may have been, yet, if his conduct does not amount to insanity, mere eccentricity, however great, cannot prevail against a will fairly executed by him (SIR HERBERT JENNER).

(3) Eccentricity & insanity operate differently in different minds; their marks & characters are distinct in different persons; but one thing is clear, that where there is delusion & perversion of mind, there is insanity & unsoundness of mind (SIR HERBERT JENNER).—*GODDARD v. VERE* (1838), 4 Notes of Cases, Supp. ix.; *subsequent proceedings, sub nom. WELLESLEY v. VERE* (1841), 2 Curt. 917.

**322.** —.]—*WARING v. WARING*, No. 10, *ante*.

#### Disposition contrary to previous intentions.]

—*See* Sub-sect. 4, D. (c), *post*.

**323. Peculiar conduct of testator.**] — *BANNATYNE v. BANNATYNE*, No. 361, *post*.

**324. Exclusion from social functions.**] — *BANNATYNE v. BANNATYNE*, No. 361, *post*.

**325. Inability to transact business.**]—*BANNATYNE v. BANNATYNE*, No. 361, *post*.

**326. Inability to dress himself.**]—*BANNATYNE v. BANNATYNE*, No. 361, *post*.

**327. Care of keeper—Though residing at home.**] — *BANNATYNE v. BANNATYNE*, No. 361, *post*.

#### (b) Insanity Disclosed on Face of Will.

*See* Sub-sect. 3, A., *ante*.

**Disposition sounding to folly.**]—*See* Sub-sect. 2, F., *ante*.

#### (c) Dispositions Contrary to Previous Intentions.

**328. Disposition to stranger.**]—*CLARKE v. LEAR & SCARWELL* (1791), cited in 1 Phillim. at p. 119; 161 E. R. 933.

*Annotation*:—**Consd.** *Cartwright v. Cartwright* (1793), 1 Phillim. 90.

**329.** — Where testator's mind only slightly impaired.]—A will made by an unmarried testator, of weakened capacity, largely benefiting a stranger in blood, in whose care he had placed himself, to the prejudice of his next of kin, & contrary to his intention expressed in a prior will, the evidence as to capacity & influence being conflicting, & that of the drawer of the will being open to suspicion, pronounced for, the sentence of the ct. below being thereby affirmed since. The result of evidence against the will failed to show the mind of testator greatly impaired, & testator was not concealed from society, & not in such a state as to be made an instrument of fraud:—*Held*: whatever might appear suspicious or mysterious in the first instance, was upon closer inspection, sufficiently cleared away.—*DEARE v. ELWYN* (1842), 1 Notes of Cases 342, P. C.

*Annotation*:—**Mentd.** *Stone v. Stone* (1843), 7 Jur. 1140.

**330. Dispossession of eldest son—All circumstances to be considered.**]—Probate refused to a codicil signed & executed.

The question is, whether deceased was in possession of a sound & disposing memory at the time of making this codicil, sufficiently so, to effect the almost entire subversion of his solemn will, executed only four days before, & to leave his eldest son for the present destitute, or at best dependent on his mother during her life. The presumption of law is strongly in favour of the executed will; the ct. must consider whether the capacity was adequate to the subsequent act: the proof of the capacity must depend upon the nature of the act; & all circumstances must be taken together, to ascertain the real testamentary intentions (SIR JOHN NICHOLL).—*BROUNCKER v. BROUNCKER* (1812), 2 Phillim. 57; 161 E. R. 1077.

**331. Disposition contrary to probable intentions—Where mental aberration established.**]—*EVANS v. KNIGHT & MOORE*, No. 312, *ante*.

**332. Disposition irreconcilable with character—Where testator in state of extreme weakness—**



*Sect. 8.—Wills: Sub-sect. 4, D. (c), (d) & (e), & E.; sub-sect. 5.]*

**Will prepared by persons taking benefit.]**—The clearest & most consistent evidence of capacity, & volition, are required to support a codicil conveying bequests of such extent as to be irreconcilable with the character of deceased, & with her intentions as proved by her affections, & former testamentary dispositions; deceased being, at the time, within ten days of her death, & in a state of extreme weakness & debility; all her confidential friends excluded, or absent, & those only about her who are benefited under, or engaged in, the preparation or execution of the instrument.—*BRYDGES v. KING* (1828), 1 Hag. Ecc. 256; 162 E. R. 576.

**333. Testator of fluctuating capacity.]**—The asserted will of a person of fluctuating capacity (totally abandoning the principles of a former disposition, made before deceased's faculties were impaired, & long adhered to) pronounced against; & the exor., the person principally benefited who, among other things indicative of fraud, had himself given the instructions, & whose son, a minor, alone spoke to the execution, condemned in costs.—*DODGE v. MEECH* (1828), 1 Hag. Ecc. 612; 162 E. R. 694.

**334. — Where variation accounted for—Change of circumstances.]**—*WILLIAMS v. GOUDE*, No. 320, *ante*.

**335. Disposition obtained by husband—Where testatrix in state of weakness.]**—When the will of a married woman, obtained while she was in an extremely weak state nine days before death, by the active agency of the husband, the sole exor. & universal legatee, wholly departed from a former will deliberately made a few months before, the presumption is strong against the act.—*MYNN v. ROBINSON* (1828), 2 Hag. Ecc. 169; 162 E. R. 823.  
*Annotation:—Mentd.* The Lochlibo (1850), 14 Jur. 792.

**336. Effect of subsequent codicil—Former disposition reaffirmed.]**—Testator having, ten years before his death when in perfect health, executed a will & subsequently a codicil conformable to his ascertained affections, & two & a half years before his death, after a paralytic stroke producing at least great bodily infirmity, having executed a second codicil materially departing from those instruments, & six months before his death, a third codicil revoking the second & reverting to the former disposition, probate of the will, first & third codicils granted, there being no satisfactory proof of a change in his affections, & the evidence of volition & capacity being at least as strong in support of the third as of the second codicil.—*KING v. FARLEY* (1828), 1 Hag. Ecc. 502, 162 E. R. 659.

**337. Disposition obtained without instructions—By son of aged testator.]**—Where the execution of a codicil was clandestinely, & without previous instructions, obtained from a testator of eighty, only one month before death, by the son, the person solely benefited, & his associates, the disposition being contrary to the repeated former acts of deceased, the clearest proof of capacity & free agency is necessary. Codicil pronounced against.—*MACKENZIE v. HANDASYDE* (1829), 2 Hag. Ecc. 211; 162 E. R. 838.

**338. — Adopted by testator.]**—A will need not originate with a testator, nor need proof be given of the commencement of such a transaction, provided it be proved that a testator completely understood, adopted & sanctioned the disposition proposed to him, & that the instrument itself embodied such disposition.

A will, opposed on the ground of alleged incapacity, fraud, & conspiracy, & revoking a former will & codicils (which gave the residue between a sister by the half blood & a stranger in blood) made shortly before, but under circumstances not rendering a departure improbable, pronounced for with costs; though the instructions for such latter will were not proved to have originated with deceased; though two, out of three, of the attesting witnesses were sons of the respective exors., considerably benefited by the will, & one of which, & three other principal, witnesses were children of a niece by the whole blood, the wife of one of the exors., which niece & a sister were also largely benefited, & were immediately about deceased; the credit of the witnesses not being shaken, & the will being sufficiently proved to have been adopted by deceased, a free & capable testator.—*CONSTABLE v. TUFNELL* (1833), 4 Hag. Ecc. 465; 162 E. R. 1516; *affd. sub nom.* *TUFNELL v. CONSTABLE* (1835), 3 Knapp, 122, P. C.

*Annotations:—Mentd.* *Lockwood v. Lockwood* (1839), 2 Curt. 281; *Broadbent v. Hughes* (1860), 29 L. J. P. M. & A. 134.

**339. Disposition to wife excluding blood relation—Testator's capacity impaired.]**—(1) A will executed by a testator on his death-bed in favour of his wife, to the exclusion of other members of his family, testator being of a weakened & impaired capacity at the time of the *factum*, from disease affecting the brain, which produced torpor, & rendered his mind incapable of exertion unless roused, pronounced against: the disposition in the will being a total departure from, & contrary to, testator's previously expressed intentions.

(2) To constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of the property, & the nature of the claims of others, whom by his will he is excluding from participation in that property.—*HARWOOD v. BAKER* (1840), 3 Moo. P. C. C. 282; 13 E. R. 117, P. C.

*Annotations:—As to (1) Consd.* *Bennet v. Manchester* (1854), 23 L. T. O. S. 331; *Sutton v. Sadler* (1857), 3 C. B. N. S. 87; *Hampson v. Guy* (1891), 64 L. T. 778. *As to (2) Apld.* *Sutton v. Sadler* (1857), 3 C. B. N. S. 87. *Expld.* *Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549. *Refd.* *Goldie v. Murray* (1842), 6 Jur. 608.

#### (d) Lack of Instructions.

**340. Codicil prepared by strangers.]**—*BRYDGES v. KING*, No. 332, *ante*.

**341. Codicil prepared by beneficiary.]**—Mere evidence of execution of a will & codicil by a person of weak & inert mind, appointing his attorney & agent sole exor. & almost universal legatee of a large property, is insufficient, without proof of instructions by deceased; instructions for the will being given to the solr., who prepared & attested it, by & in the handwriting of the exor.'s father (also deceased's co-agent & attorney); the codicil being prepared exclusively for his own benefit by the exor., in whose house deceased was living apart from his family; & other circumstances strongly inferring fraud & circumvention.—*INGRAM v. WYATT* (1828), 1 Hag. Ecc. 384; 162 E. R. 621; *on appeal, sub nom.* *WYATT v. INGRAM* (1831), 3 Hag. Ecc. 466.

*Annotations:—Refd.* *Hindson v. Weatherill* (1854), 5 De G. M. & G. 301. *Mentd.* *Ingram v. Wyatt* (1832), 1 L. J. Ch. 135; *Barry v. Butlin* (1838), 2 Moo. P. C. C. 480; *Cockcraft v. Rawles* (1845), 4 Notes of Cases, 237; *Waters v. Waters* (1848), 2 De G. & Sm. 591; *Hastilow v. Stobie* (1865), L. R. 1 P. & D. 64; *Fulton v. Andrew* (1875), L. R. 7 H. L. 448; *Hampson v. Guy* (1891), 64 L. T. 778.

**342. Instructions given by father of beneficiary.]**—INGRAM v. WYATT, No. 341, *ante*.

**343. Execution obtained by beneficiary—Without previous instructions.]**—MACKENZIE v. HANDASIDE, No. 337, *ante*.

**344. ———.]**—A codicil prepared by a solr., appointing him a joint exor., with a legacy of £500, which was read over to testator, who was blind, & at the time of the execution of fluctuating capacity, in the presence of the attesting witnesses pronounced against; there being no direct evidence that it was prepared in consequence of instructions from testator, or satisfactory proof, that at the time of the execution, he was cognisant of its contents, & in a condition to exercise, & did exercise, thought, judgment & reflection respecting the act he was doing.—DUFUR v. CROFT (1840), 3 Moo. P. C. C. 136; 13 E. R. 59.

**345. Effect of ratification—Though testator found lunatic.]**—(1) The sanity of a testatrix established, although a commission *de lunatico inquirendo* had held her to be incapable from a period antecedent to the execution of the will.

(2) Where a testator is in his senses, the will is read over to & approved by him, instructions are not necessary.—RODD v. LEWIS (1755), 2 Lee, 176; 161 E. R. 304.

**346. ———.]**—(1) Although the instructions for a will may not have originated with a testator, yet his subsequent approval of them is sufficient to render his will valid.

(2) Weakness of mind & forgetfulness are not sufficient to invalidate a will, if it is proved that the mind of testator was, when called to exertion, capable of attention & application.—TUFNELL v. CONSTABLE (1835), 3 Knapp, 122; 12 E. R. 595, P. C.; *affg.* S. C. *sub nom.* CONSTABLE v. TUFNELL (1833), 4 Hag. Ecc. 465.

*Annotations:—Generally, Mentd.* Lockwood v. Lockwood (1839), 2 Curt. 281; Broadbent v. Hughes (1860), 29 L. J. P. M. & A. 134.

**347. ———.]**—An inofficious will, prepared from instructions given to the drawer by the party almost solely benefited, & who was in nowise related to testator, pronounced valid, on proof of capacity of testator, & of the will having been read over to him.—WRENCH v. MURRAY (1843), 3 Curt. 623; 1 L. T. O. S. 412; 7 Jur. 705; 163 E. R. 846.

(e) Findings of Authorities.

See Part III., Sect. 5, sub-sect. 2, *post*.

E. Witnesses.

**348. Attesting witnesses—Whether all to be examined.]**—BOOTLE v. BLUNDELL, No. 353, *post*.

**349. ———.]**—In the case of a bill filed by an heir-at-law to set aside a will, on the ground of incompetency, the ct. directed an issue *devisavit vel non* to try the validity of the will:—*Held*: it was no ground for a new trial that the devisee did not call all the subscribing witnesses.—TATHAM v. WRIGHT (1831), 2 Russ. & M. 1; 39 E. R. 295; *sub nom.* WRIGHT v. TATHAM, 9 L. J. O. S. Ch. 265.

*Annotations:—Mentd.* McGregor v. Topham (1844), 3 Hare, 488; Boyse v. Rossborough (1857), 6 H. L. Cas. 1; Thellusson v. Rendlesham (1859), 7 H. L. Cas. 429; Tredegar v. Windus (1875), L. R. 19 Eq. 607.

**350. ——— Competency to prove execution.]**—HUDSON'S CASE (1682), Skin. 79; 90 E. R. 38.

**351. ——— Whether competent to prove insanity.]**—DIGG'S CASE (*circa* 1680), cited in Skin. at p. 79; 90 E. R. 38.

**352. ———.]**—Specific performance of a contract concerning land not decreed on the signature of an agent without authority. The question as to his authority, denied by the answer, & by his deposition, stating his declaration to the contrary at the time of execution, to be determined by an issue: the evidence of a witness, impeaching the instrument he has attested, as a witness to a will, denying the sanity of the devisor, etc., being admissible; but to be received with the most anxious jealousy.—HOWARD v. BRAITHWAITE (1812), 1 Ves. & B. 202; 35 E. R. 79.

**353. ———.]**—(1) On the trial of an *devisavit vel non*, all the subscribing witnesses must be examined, except in cases of necessity, as death, insanity, or absence abroad, or the heir waives his right.

(2) Witness impeaching his own act, to be received with the most scrupulous jealousy.

(3) Subsequent papers, though evidence of competence of a testator, regarded with considerable jealousy; as he is not permitted to prove his own sanity. Inference, that if not then conscious of his competence at the previous time, he would have re-executed the will.—BOOTLE v. BLUNDELL (1815), 19 Ves. 494; Coop. G. 136; 1 Mer. 193; 34 E. R. 600.

*Annotations:—Generally, Mentd.* Gittins v. Steele (1818), 1 Swan. 24; Pulley v. Hilton (1823), 12 Price, 625; Tatham v. Wright (1831), 2 Russ. & M. 1; Slaney v. Wade (1836), 7 Sim. 595; Collis v. Robins (1847), 1 De G. & Sm. 131; Cunningham v. Murray (1847), 1 De G. & Sm. 366; Boughton v. Boughton, Boughton v. James (1848), 1 H. L. Cas. 406; Waters v. Waters (1848), 2 De G. & Sm. 591; McGregor v. Topham (1850), 3 H. L. Cas. 132; Paterson v. Scott (1852), 1 De G. M. & G. 531; Plenty v. West (1852), 16 Beav. 173; Boys v. Bradley (1853), 4 De G. M. & G. 58; Key v. Key (1853), 4 De G. M. & G. 73; Boyse v. Rossborough (1854), 3 De G. M. & G. 817; Smith v. Smith (1861), 3 Giff. 263; Mellish v. Vallins (1862), 2 John. & H. 194; Vernon v. Manvers (1862), 31 Beav. 623; Eno v. Tatham (1863), 4 Giff. 181; Gilbertson v. Gilbertson (1865), 34 Beav. 354; Hensman v. Fryer (1867), 3 Ch. App. 420; Allan v. Gott (1872), 7 Ch. App. 439; Metcalfe v. Hutchinson (1875), 1 Ch. D. 591; Re Simpson, *Ex p.* Morgan (1876), 34 L. T. 329; Howard v. Dryland (1877), 38 L. T. 24; Patching v. Barnett (1880), 49 L. J. Ch. 665; Kilford v. Blaney (1885), 31 Ch. D. 56.

**354. Opinion of—Of little weight.]**—KINLESIDE v. HARRISON, No. 211, *ante*.

**Action for perpetuating testimony.]**—See EVIDENCE, Vol. XXII., p. 614, Nos. 6791, 6792.

SUB-SECT. 5.—LUCID INTERVALS.

Lucid intervals generally, *see*, Part. I., Sect. 3, *ante*.

Proof that will made during lucid interval, *see* Sub-sect. 4, C., *ante*.

Onus of proof that will made during lucid interval, *see* Sub-sect. 4, B. (a), *ante*.

**355. General rule—Disposition valid.]**—COGHLAN v. COGHLAN (*circa* 1790), cited in 1 Phillim. at p. 120; 19 Ves. at p. 508; 34 E. R. 605.

*Annotations:—Refd.* A.-G. v. Parnter (1792), 3 Bro. C. C. 441; Cartwright v. Cartwright (1793), 1 Phillim. 90; Bootle v. Blundell (1815), 19 Ves. 494.

**356. ———.]**—CARTWRIGHT v. CARTWRIGHT, No. 395, *post*.

**357. ———.]**—HALL v. WARREN, No. 69, *ante*.

D. L. R. 494; 18 Alta. L. R. 6.—CAN.

PART II. SECT. 8, SUB-SECT. 5.

**355 i. General rule — Disposition valid.]**—The right of a lunatic to dispose of his property by will during a

lucid interval is not affected by a judicial declaration of incapacity & the restraints consequent thereon.—MONTICELLO STATE BANK v. BAILLIE (Alta.), [1922] 2 W. W. R. 894; 66

355 ii. ———.]—NISBET'S TRUSTEES v. NISBET (1871), 9 Macph. (Ct. of Sess.) 937; 43 Sc. Jur. 530.—SCOT.



*Sect. 8.—Wills: Sub-sects. 5, 6, 7 & 8.]*

**358.** ———.]—WHITE v. DRIVER, No. 285, *ante*.

**359.** ———.]—Though lunatic so found.]—LEVY v. LINDO, No. 307, *ante*.

**360.** ———.]—Pending the lunacy, & while the commission was in full force, a will was made. That fact does not of necessity show that the will is not a good will; it is very possible that there may have been a period during which the lunatic was competent to make a will, & that such a will, though the commission existed, may be a valid will . . . there is, unquestionably, the strongest presumption arising from the fact of there being a commission existing at the time, but still it is a presumption, & capable of being rebutted (LORD COTTENHAM, C.).—COOKE v. CHOLMONDELEY (1849), 2 Mac. & G. 18; 2 H. & Tw. 162; 14 Jur. 117; 42 E. R. 8; *sub nom.* COOKE v. TURNER, COOKE v. CHOLMONDELEY, 19 L. J. Ch. 81; 14 L. T. O. S. 413, L. C.

**361.** ———.]—Where evidence of business capacity.]—(1) Testator, who had been in confinement as a lunatic between the years 1815 & 1817, executed his will in 1820. He was again placed in confinement in 1822. In Nov. 1838, a commission in the nature of a writ *de lunatico inquirendo* was issued, & testator was found, in Jan. 1839, a lunatic without any lucid interval from Aug. 1, 1815. Will pronounced for. Difference between imbecility or idiotcy & delusion, in respect of acts of business, observed upon. The witnesses against the will deposed to a case of idiotcy.

I admit that from that verdict a presumption arises against the validity of the will in question, but I am of opinion that in endeavouring to measure the strength of that presumption I am bound to look to all the circumstances attending the inquisition, though not to the evidence then given (DR. LUSHINGTON).

(2) I am of opinion that the verdict of the jury is sufficient to rebut the ordinary presumption in favour of the will, & to require the party propounding it to prove that a lucid interval did take place when the will was executed; by "lucid interval" I mean that testator was of sound mind at that time. I use the expression—lucid interval—only by reason that there was preceding & succeeding unsoundness of mind. I say, I think, a presumption is raised by the verdict against the validity of this will; nevertheless I am of opinion that the facts already stated greatly diminish the strength of that presumption, making it much less strong than if there had been an issue, raised & contested, as to the existence of lucid intervals (DR. LUSHINGTON).

(3) It is notorious that the sane demeanour of a patient on the occasion of an accidental visit is no proof, or, at least, no satisfactory proof, of soundness of mind (DR. LUSHINGTON).

(4) It is alleged that deceased walked about, in a stooping position with his hands dangling before him, muttering unintelligible & idiotic noises—that boys in the street hooted him as an idiot—that he did not go into company or appear with the family when any one was present—that he did not transact any business—did not order his own clothes or dress himself—and that in 1819, & for a year after, he was, though residing with his mother, under the care of a keeper. Such was the state of things after 1822; but the question is, was such the state before that year? If deceased was in 1820 in the condition alleged, I must pronounce against the will, for such a state is inconsistent

with the rational dispatch of any act of business requiring thought, judgment, & reflection (DR. LUSHINGTON).

(5) The case presented against the will is that of idiotcy, or imbecility, the characteristic of which is permanence with very little, or no, variation. To meet such a case, & to show that such a state did not exist at any given period, proof of acts of business is very important evidence. Many acts of business may possibly be done by a lunatic, & the lunacy itself not detected; but it is scarcely possible to predicate the same of an idiot, or imbecile person (DR. LUSHINGTON).—BANNATYNE v. BANNATYNE (1852), 2 Rob. Eccl. 472; 16 Jur. 864; 163 E. R. 1383.

**362.** ———.]—Deceased was found a lunatic by inquisition in 1869. She suffered from delusions under which she became violent & even dangerous. Her disorder was an obsessional insanity, but her obsessions were recognised by herself as morbid & did not prevent her from taking an intelligent interest in general topics. She kept up a correspondence with her relatives & friends, & in other respects was a shrewd, clever woman, & her memory was excellent. In 1905 a will was drawn up on the instructions of deceased, & executed by her & attested by three doctors who were prepared to certify that she was perfectly intelligent & capable at the time. The ct. granted probate of the will.—*In the Estate of WALKER, WATSON v. TREASURY SOLICITOR* (1912), 28 T. L. R. 466.

**363.** ———.]—(1) The will, dated & executed on Nov. 15, 1839, of a testator who was labouring under certain delusions on the three previous days to its execution, & who destroyed himself on the day following (Nov. 16) while under temporary insanity, pronounced for, & the costs of the Queen's Proctor, who opposed the will on behalf of the Crown, refused.

It is admitted that, in this case as in others, the presumption of law is in favour of sanity, particularly where the will is in the handwriting of the deceased, & executed in the presence of witnesses; & then it is incumbent on the party alleging the insanity to establish that state of mind (SIR HERBERT JENNER).

(2) If there had been a delusion previously existing, there was a lucid interval, & I have no hesitation in pronouncing for the validity of the paper (SIR HERBERT JENNER).—CHAMBERS & YATMAN v. QUEEN'S PROCTOR (1840), 2 Curt. 415; 163 E. R. 457.

*Annotations:—Generally.* Rejd. Mudway v. Croft (1843), 2 Notes of Cases, 438. Mentd. Young v. Richards (1840), 2 Curt. 371.

**364.** ———.]—PRINSEP & EAST INDIA CO. v. DYCE SOMBRE, No. 431, *post*.

**365.** ———.]—NICHOLS & FREEMAN v. BINNS, No. 310, *ante*.

**366.** ———.]—*Re WALKER*, No. 172, *ante*.

**367.** Where will in accordance with former intentions.]—COGHLAN v. COGHLAN (*circa* 1790), cited in 1 Phillim. at p. 120; 19 Ves. at p. 508; 161 E. R. 933.

*Annotations:—Consd.* Cartwright v. Cartwright (1793), 1 Phillim. 90. Rejd. A.-G. v. Parnter (1792), 3 Bro. C. C. 441; Bootle v. Blundell (1815), 19 Ves. 494.

**368.** ———.]—(1) The difference, in a question of fluctuating capacity & partial recovery, between unsoundness of mind partaking of the nature of mental derangement, manifesting itself in insane delusions; from unsoundness of mind caused by fever, which produces delirium, observed upon.

In a case where from bodily indisposition testator's mind fluctuated, & at times produced

an excitement which while it lasted amounted to unsoundness of mind, a will & codicil made in accordance with the intentions of deceased expressed in a former testamentary instrument & of his declarations & the state of his affection; pronounced for, the fact of a lucid interval at the time of execution being established.

(2) Where the circumstances of the case are so doubtful as to require that a will should be established by legal proof, the party objecting to the legality ought not to be subjected to costs for instituting such an inquiry; but after a full inquiry & the will established in the ct. below, the Judicial Committee held that there was no sufficient ground to justify the appeal, & decreed costs against applt.—*DIMES v. DIMES* (1856), 10 Moo. P. C. C. 422; 14 E. R. 550, P. C.

**369. When instructions given during lucid interval—Will of complicated nature.]—**(1) Where a person much depressed by illness, but with his mind calm & clear, gives instructions for a will of a complicated nature, such a will would not be set aside, although on executing it the next day testator could not have given those complicated instructions, or even fully understood them.

(2) But at a time when the mind is incapable of forming an intention, or arriving at it as a new idea, the mere recollection of an intention vaguely expressed in conversation two months before, is not sufficient proof of capacity.

(3) As to testamentary capacity, there is a wide distinction between two species of delusions, namely, such as are the rooted delusions of insanity, & those which are only the temporary delusions of delirium.—*BENNET v. MANCHESTER (DUKE)* (1854), 23 L. T. O. S. 331; 2 W. R. 644.

*Annotation:—Mentd. Roberts v. Kerslake* (1854), 2 W. R. 635.

#### SUB-SECT. 6.—UNDUE INFLUENCE AND FRAUD.

**Undue influence & fraud as affecting wills generally.]—**See EXECUTORS, Vol. XXIII., p. 126, Nos. 1244 *et seq.*; & WILLS.

**Undue influence—As affecting contracts.]—**See CONTRACT, Vol. XII., p. 98, Nos. 611 *et seq.*

**—As affecting conveyances.]—**See FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., p. 253, Nos. 802 *et seq.*

**—As affecting gifts.]—**See GIFTS, Vol. XXV., p. 523, No. 164.

**Fraud — As affecting conveyances.] —**See FRAUDULENT & VOIDABLE CONVEYANCES, Vol. XXV., pp. 149 *et seq.*

#### SUB-SECT. 7.—PARTIAL VALIDITY.

**370. Whether part will be established.]—**Part of a will established, & part held not to be entitled to probate.

If capacity be partly impeached, a part of it may be invalidated (SIR JOHN NICHOLL).—*BILLINGHURST v. VICKERS* (1810), 1 Phillim. 187; 161 E. R. 956.

*Annotations:—Refd. Ingram v. Wyatt* (1828), 1 Hag. Ecc. 384; *Chambers v. Wood* (1843), 2 Notes of Cases, 481; *Allen v. M'Pherson* (1847), 1 H. L. Cas. 191. *Mentd. Barry v. Butlin* (1838), 1 Curt. 637; *Fulton v. Andrew* (1875), L. R. 7 H. L. 448.

**371. —.]—**Part of a will established, & part held not to be entitled to probate.—*WOOD v. WOOD* (1811), 1 Phillim. 357; 161 E. R. 1010.

*Annotation:—Refd. Sikes v. Snaith* (1816), 2 Phillim. 351.

#### SUB-SECT. 8.—REVOCATION.

**372. Necessity for capacity at time of revocation—No power to revoke during insanity.]—**(1) If a man of sound memory makes his will, & afterwards becomes *non compos mentis*; in that case until the time of his death, after that he became of nonsane memory, he cannot countermand his will, & yet the disability or imperfection of nonsane memory, was not any countermand of it.

(2) When a man of sound memory makes his will, & afterwards by the visitation of God becomes of unsound memory (as every man for the most part before his death is), God forbid that this act of God should be in law a revocation of his will, which he made when he was of good & perfect memory.—*FORSE v. HEMBLING* (1588), 4 Co. Rep. 60 b; 76 E. R. 1022; *sub nom. ANON.*, 1 And. 181; Gouldsb. 109.

*Annotations:—Refd. Hodsdon v. Lloyd* (1789), 2 Bro. C. C. 534. *Mentd. Manby v. Scot* (1663), 1 Keb. 482; *Hitchins v. Basset* (1688), 1 Show. 537; *Brunker v. Cook* (1707), 11 Mod. Rep. 121; *Scammell v. Wilkinson* (1802), 2 East, 552.

**373. — Sound state of mind—As for execution of will.]—**The same sound state of mind is required for a revocation as for the execution of a will.—*DIXON v. DIXON* (1886), 2 T. L. R. 402.

**374. — Effect of subsequent ratification.]—**(1) The official solr., if appointed guardian *ad litem* to a lunatic deft. in a probate suit, has no greater rights & is in no better position than any other solr. appearing for a party in a probate suit, except that he will probably be allowed, out of the estate, costs properly incurred in the conduct of the defence.

(2) The wife of a testator, in a fit of anger, at a time when her husband was in a state of hopeless intoxication, tore up his will on account of certain language which he had used towards her. The pieces of the torn will were afterwards pasted together, & the will was complete, with the exception of three or four words. The husband treated the act of his wife in the light of a joke & subsequently referred to his will as being still in existence:—*Held*: at the moment when the will was torn, testator had no mental capacity to authorise such an act, & the tearing up did not amount to a revocation. The intention to revoke must be manifested at the time of destruction, & no subsequent ratification is of any effect.—*GILL v. GILL*, [1909] P. 157; 78 L. J. P. 60; 100 L. T. 861; 25 T. L. R. 400; 53 Sol. Jo. 359.

*Annotation:—Refd. Re Booth, Booth v. Booth*, [1926] P. 118.

**375. Effect of incapacity—Admission to probate—Will cancelled.]—**A will cancelled by a testatrix, with the intention of making a new will, admitted to probate on evidence of incapacity.—*In the Goods of SMITH* (1842), 1 Notes of Cases, 313.

**376. — — Attempted destruction.]—**The evidence is quite sufficient to satisfy my mind that this codicil was torn when deceased was insane, & as his incapacity at the time nullifies the attempted destruction of the paper, it is entitled to probate (SIR H. JENNER FUST).—*COVENTRY v. WILLIAMS* (1844), 2 L. T. O. S. 517; *subsequent proceedings*, 3 Curt. 787.

**377. — — —.]—**SCRUBY & FINCH v. FORDHAM, No. 278, *ante*.

**378. — Admission to probate of draft—Will destroyed.]—**Testator having duly executed his will, became afterwards of unsound mind; & while in that state destroyed it. Having partially recovered, he expressed regret, & gave directions for the preparation of another will to the same



Sect. 8.—*Wills: Sub-sects. 8 & 9. Sects. 9 & 10. Part III. Sects. 1 & 2.*

effect. Before this was prepared, he destroyed himself. Probate granted of the unexecuted draft of the original will.—*In the Goods of DOWNER* (1853), 1 Ecc. & Ad. 106; 23 L. T. O. S. 11; 18 Jur. 66; 164 E. R. 61.

379. — — — — —.]—BRUNT v. BRUNT, No. 242, *ante*.

380. — — — — — Presumption of revocation not applicable—Will missing.]—SPRIGGE v. SPRIGGE, No. 269, *ante*.

381. — — — — — Will mutilated.]—BENSON v. BENSON, No. 294, *ante*.

Burden of proof.]—See Sub-sect. 4, B. (b), *ante*.

SUB-SECT. 9.—EFFECT OF LUNACY ON DEVISEE. See WILLS.

#### SECT. 9.—COMPETENCY AS WITNESS.

Lunatics.]—See EVIDENCE, Vol. XXII., p. 389, Nos. 3990–3995.

Deaf & dumb persons.]—See EVIDENCE, Vol. XXII., pp. 388, 389, Nos. 3981–3989.

Depositions of lunatic.]—See CRIMINAL LAW, Vol. XIV., p. 281, No. 2934.

#### SECT. 10.—DOMICIL.

See CONFLICT OF LAWS, Vol. XI., p. 332, Nos. 209, 210.

## Part III.—Presumptions and Proof of State of Mind.

### SECT. 1.—IN GENERAL.

382. Mental capacity—Question for court—Independently of medical evidence.]—The question of mental capacity is one for the ct. before which the matter comes, & not for the doctors, & the ct. cannot be relieved by medical testimony of obligation to form an independent opinion on the technical aspect.—RICHMOND v. RICHMOND (1914), 111 L. T. 273; 58 Sol. Jo. 784.

383. What must be considered—Collateral circumstances.]—(1) In support of an action brought in 1808 to reduce certain deeds executed by M. between 1782 & 1799, upon the ground of the insanity of M. the grantor; parole evidence given that he was quite deranged from 1781 till his death in 1804; the evidence applying to his insanity generally, & not to the particular moments when the deeds were executed. This evidence encountered by parole evidence of his general sanity during the same period; & this latter evidence corroborated by notes or receipts written by M. having reference to the contents of the deeds; & showing that he understood their nature & effect; & also by the deeds themselves, which were rational in his circumstances; corroborated also by the circumstances that the deeds were attested by witnesses of unimpeached credit, & that M. had been in 1784 served heir, & infert in the subjects conveyed by the deeds, & had then sold part of the lands, & mortgaged the remainder, etc., these transactions proceeding on the supposition of his sanity, & remaining unchallenged:—*Held*: the deeds were good.

(2) Delay in challenging the deeds a material circumstance.

Another principle which we may safely lay down is this: if property has been disposed of twenty or thirty years before, formally, & with the concurrence & assistance of individuals of good character; & if that disposition is not quarrelled with as speedily as may be, & only challenged when the parties best acquainted with the whole circumstances of the transaction are dead & gone, it is dangerous to set aside that disposition, at the distance of twenty or thirty years, upon a ground so fallible as human memory, & testimony as to the state of the person making

that disposition at other moments, without at all applying to the moment when he executes the deed (LORD ELDON, C.).

(3) It must be taken that the persons who prepared & witnessed, & were parties to the deeds, would, if alive, have sworn to the sanity of M. at the time when the deeds were executed.

The persons who prepared these deeds, & who were parties & witnesses to them, were dead when this process commenced; & we must take it that they would have sworn that he was competent: for we have no right on this general testimony to assume the contrary (LORD REDESDALE).—TOWART v. SELLARS (1817), 5 Dow. 231; 3 E. R. 1312, H. L.

Annotation:—As to (3) *Refd.* Tatham v. Wright (1831), 2 Russ. & M. 1.

384. — — — Lapse of time—Between execution of deeds & allegation of insanity.]—TOWART v. SELLARS, No. 383, *ante*.

385. — — — General conduct.]—(1) Though the finding of a person's insanity, by inquisition upon a commission of lunacy, is not binding on third parties, still it destroys the natural presumption in favour of sanity, & casts the burden of proving the person's sanity on the party alleging it.

(2) After a bill to foreclose, the mtgor. was found lunatic by inquisition, at a date overreaching the mtge. deed. At the hearing, an issue was directed as to his sanity at the date of the mtge.

(3) As to the difficulties in ascertaining a man's sanity, & the proper tests to be employed.

A man may be subject to some delusions, & one of the means . . . of judging whether these apparent indications ought to be relied upon as proving a general unsoundness of mind, is by a comparison of the alleged acts of insanity with other acts of the same person & the general course of his life; so that, on questions of insanity, a great deal more is to be taken into consideration than the particular acts of imputed insanity. When a man's ways & general course of life are such as to indicate sanity & a knowledge of his affairs, proof of one or more particular acts, though very strange in themselves & though affording some grounds for imputing insanity, would not be sufficient proof to show that all his acts were done

### PART III. SECT. 1.

• Question for court—Independently of medical evidence.]—On an application to appoint a guardian ad

litem to a person alleged to be of unsound mind, not so found by inquisition, it is not sufficient evidence of the lunacy that deponents swear that the

person is of unsound mind, or that they believe him to be so; such facts should be shown as will enable the ct. to judge for itself.—MCINTYRE v.

under the delusion of insanity. On the other hand when a man is thought by various persons to have been insane at a particular period, & to have so continued ever since, proof of one or more acts done afterwards apparently in the manner of a man of sound mind would not, if unaccompanied by other proof & the application of some test or inquiry, prove that the acts done were done under circumstances free from delusion, or what is quite as much of importance, free from the influence to which persons acting under insane delusions are confessedly liable (LORD LANGDALE, M.R.).—*SNOOK v. WATTS* (1848), 11 Beav. 105; 12 L. T. O. S. 1; 12 Jur. 444; 50 E. R. 757.

*Annotations*:—As to (1) *Reid*. *Jacobs v. Richards, Jacobs v. Porter* (1854), 18 Beav. 300. As to (2) *Consd.* *Campbell v. Hooper* (1855), 3 Sm. & G. 153.

**386.** — Previous habits.]—AUSTEN *v. GRAHAM*, No. 248, *ante*.

**387.** — Result of medical observation—Together with sayings & doings.]—SMITH *v. TEBBITT*, No. 205, *ante*.

**388.** Test of sanity—Delusion distinguished from habitual insanity.]—NICHOLS & FREEMAN *v. BINNS*, No. 310, *ante*.

## SECT. 2.—DEGREE OF SANITY OR INSANITY TO BE PROVED.

**389.** To establish lucid interval—Necessity for great caution.]—WHITE *v. DRIVER*, No. 285, *ante*.

**390.** To rebut presumption of continuance of insanity—Whether ability to do formal business sufficient.]—GROOM *v. THOMAS*, No. 316, *ante*.

**391.** To set aside a will—Incapacity in ordinary affairs.]—BALL *v. MANNIN*, No. 82, *ante*.

**392.** To establish recovery—Absence of delusions.]—Insanity having once existed in the shape of delusions, the absence of those delusions is the test of restoration; & where the evidence fails to show that this test has been applied, although deceased may have been apparently of sound mind, the testamentary papers propounded may be pronounced against on the grounds of failure of proof.—GRIMANI *v. DRAPER* (1848), 6 Notes of Cases, 418; 12 Jur. 924.

*Annotation*:—*Folld.* *Johnson v. Blane* (1848), 6 Notes of Cases, 442.

**393.** To establish incapacity of an executor—Eccentricity not sufficient.]—(1) Two persons were named co-exors.; one of them sought to obtain the probate exclusive of the other, by reason of his alleged mental incapacity:—*Held*: his incapacity for the office was not sufficiently proved.

As to the evidence of incapacity he might not possess a strong energetic mind; he might be liable to imposition & indisposed to exertion, & therefore it might be desirable that some one should be appointed exor. with him, some one who was conversant with the management of the mineral property of deceased, & more competent than he was to turn it to the best advantage. Several affidavits have been made in order to show his incapacity; but all that I can discover from them is that a former schoolfellow of his speaks as to his eccentricity of mind, & that he was reserved in his manner, & inclined to literary pursuits: that is the utmost approach towards incapacity. There may be some foundation for the suspicion

that he might be liable to imposition, & therefore it might be desirable, as deceased seemed to think, that some one should be joined with him in the exorship. The utmost proved was, that it was desirable that some one should be joined with him in the execution of the office. Affidavits also had been made in favour of his capacity, which, though not proving a high degree of capacity, were still sufficient to satisfy the mind of the ct. that he was capable of discharging the duties of an exor. in conjunction with another (SIR H. JENNER FUST).

(2) The *onus probandi* lies on those who impeach capacity; where, however, incapacity has been proved, the *onus* is shifted upon those who set up capacity (SIR H. JENNER FUST).—EVANS *v. TYLER* (1849), 2 Rob. Eccl. 128; 7 Notes of Cases, 296; 14 L. T. O. S. 450; 14 Jur. 47; 163 E. R. 1266.

**394.** To dissolve partnership—Inability to conduct business according to articles.]—Motion for an interim injunction to restrain a partner who six months previously, being temporarily of unsound mind, had attempted to commit suicide, from interfering in the partnership affairs, refused, the evidence not showing, that, at the time of the motion, he was incompetent to conduct the business of the partnership according to the partnership articles. A motion in a cross suit to restrain debts. in such cross suit from prosecuting the partner who had been insane from transacting the business of the partnership as a partner thereof, granted. The circumstances, that the conduct & state of mind of the partner in question were such as at once to destroy the confidence of the other partners, & to induce customers to withdraw their custom from the firm, & that the malady under which he laboured might as easily have led him to attempt the life of one of his partners:—*Held*: not to promise sufficient ground for granting the first motion.

Examination of the authorities on this subject. They establish these propositions: (a) actual insanity of a partner is not in itself a dissolution of the partnership, but there must be a decree for dissolution; (b) such a decree, notwithstanding actual insanity proved to have existed before the filing of the bill, will not be made in a disputed case without a further inquiry, whether, at the time when the relief is sought, the party is in such a state of mind as to be able to conduct the business of the firm with the others members, according to the articles of partnership, & *semble*, the affirmative of this issue would then lie with the party who had been of unsound mind; (c) insanity existing when the relief is sought, is good ground for dissolution.—ANON. (1856), 2 K. & J. 441; 69 E. R. 855; *sub nom.* OGILVY *v. GREGORY*, GREGORY *v. OGILVY*, 4 W. R. 221.

*Annotations*:—*Reid.* *Jones v. Lloyd* (1874), L. R. 18 Eq. 265; *Helmore v. Smith* (1887), 35 Ch. D. 436; *J. v. S.*, [1894] 3 Ch. 72.

To avoid a will.]—See Part II., Sect. 8, sub-sect. 2, *ante*.

On an inquisition.]—See Part VII., Sect. 2, sub-sect. 2, B.; Part VII., Sect. 3, sub-sect. 7, B., *post*.

To supersede a commission.]—See Part VII., Sect. 4, sub-sect. 8, D., *post*.

In criminal cases.]—See CRIMINAL LAW, Vol. XIV., p. 56, Nos. 229–231.

KINGSLEY (*circa* 1861), 1 Ch. Ch. 281.—CAN.

f. —.] — NAGESHWAR PROSAD SINGH *v. RUDRA PROKASH SINGH* (1904), I. L. R. 31 Cal. 210,—

## PART III. SECT. 2.

g. To justify detention in asylum.]—The fact that a man is afflicted with insane delusions is not itself enough to justify his detention in an asylum, but

he should be so detained if his being at large must involve danger either to himself or other members of the community.—*Re KING* (1916), 35 W. L. R. 132; 11 W. W. R. 132.—CAN.



## SECT. 3.—PRESUMPTIONS.

## SUB-SECT. 1.—PRESUMPTION OF SANITY.

**Presumption as regards wills.]—**See Part II., Sect. 8, sub-sect. 4, A., *ante*.

**Presumption in criminal cases.]—**See CRIMINAL LAW, Vol. XIV., p. 56, Nos. 219–222.

**395. General rule.]—**(1) If you can establish that the party afflicted habitually by a malady of the mind has intermissions, & if there was an intermission of the disorder at the time of the act, that being proved is sufficient, & the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof & of presumption, for, until proof of habitual insanity is made, the presumption is that the party agent like all human creatures was rational (SIR WILLIAM WYNNE).

(2) But where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it; that is the law; so that in all these cases the question is whether, admitting habitual insanity, there was a lucid interval or not to do the act (SIR WILLIAM WYNNE).

(3) Now I think the strongest & best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, & if it can be proved & established that it is a rational act rationally done the whole case is proved (SIR WILLIAM WYNNE).—CARTWRIGHT v. CARTWRIGHT (1793), 1 Phillim. 90; 161 E. R. 923.

*Annotations:—*As to (1) **Consd.** *Mudway v. Croft* (1843), 2 Notes of Cases, 438. **Refd.** *Prinsep & East India Co. v. Dyce Sombre* (1856), 10 Moo. P. C. C. 232. *As to* (3) **Expld.** *Chambers & Yatman v. Queen's Proctor* (1840), 2 Curt. 415. **Consd.** *Bannatyne v. Bannatyne* (1852), 2 Rob. Eccl. 472; *Banks v. Goodfellow* (1870), L. R. 5 Q. B. 549. **Refd.** *In the Goods of Watts* (1837), 1 Curt. 594; *Mudway v. Croft* (1843), 2 Notes of Cases, 438.

**396. —.]—**STEED v. CALLEY, No. 411, *post*.

**397. —.]—**WELLESLEY v. VERE, No. 243, *ante*.

**398. —.]—**DYCE SOMBRE v. TROUP, No. 414, *post*.

**399. — Whether presumption of law or fact.]—**SUTTON v. SADLER, No. 193, *ante*.

**400. Execution of deed.]—**HARRIS v. INGLEDEW, No. 190, *ante*.

**401. Deaf, dumb, & blind person—Personal petition for payment out—Funds in court.]—**A deaf, dumb, & blind person petitioned for payment to herself of £7,000 carried to her separate account:—**Held:** she might be a petitioner without a next friend; but the ct. declined, without special reasons assigned, to make an order for payment of more than the income for her benefit.—*Re BIDDULPH'S TRUSTS, Re POOLE'S TRUSTS* (1852), 5 De G. & Sm. 469; 64 E. R. 1202.

**402. Compromise of litigation.]—**To prove that a fraud was concealed within Real Property Limitation Act, 1833 (c. 27), s. 26, which enacts that the right of a person to recover land of which he has been deprived by a concealed fraud, shall first accrue, at & not before the time at which such fraud should or might with reasonable diligence be discovered, it is not sufficient to show that he was in such an imbecile & uncultivated

condition of mind that it was scarcely possible, though the alleged fraud was by an open act, that he should have discovered the fraud, if the condition of his mind was not that of actual lunacy; for the ct. cannot possibly estimate for this purpose the chance which the state of mind & education of a man may afford of his making such discovery, & is, therefore, compelled to assume that every one not actually a lunatic is competent to judge of & to obtain advice concerning his rights, & to assert them if necessary. Therefore a suit cannot be maintained to set aside a compromise of an action to recover large estates made eighty years before, upon the ground that the compromise was a fraud upon pltf. in the action, & that he was a man of such dull intellect that, though cognisant of all the facts, it was necessarily a concealed fraud as to him.—*MANBY v. BEWICKE* (1857), 3 K. & J. 342; 29 L. T. O. S. 276; 69 E. R. 1140.

## SUB-SECT. 2.—PRESUMPTION OF INSANITY.

**When lunatic so found by inquisition.]—**See Sect. 5, sub-sect. 2, A., *post*.

## SUB-SECT. 3.—PRESUMPTION AS TO CONTINUANCE OF INSANITY.

**403. Insanity immediately before act.]—**HADFIELD'S CASE (1800), 1 Collinson on Idiots, Lunatics, etc., 480; 27 State Tr. 1281.

*Annotations:—***Refd.** *R. v. Oxford* (1840), 9 C. & P. 525; *R. v. Hill* (1851), 4 New Sess. Cas. 613. **Mentd.** *Clift v. Schwabe* (1846), 7 L. T. O. S. 342; *Waring v. Waring* (1848), 6 Notes of Cases, 388; *R. v. Burton* (1863), 3 F. & F. 772; *Yarrow v. Yarrow* (1892), 8 T. L. R. 215.

**404. Evidence of delusions.]—**GROOM v. THOMAS, No. 316, *ante*.

**405. —.]—**WARING v. WARING, No. 10, *ante*.

**406. —.]—**GRIMANI v. DRAPER, No. 392, *How rebutted.]—*See No. 316, *ante*.

## SUB-SECT. 4.—PRESUMPTION OF FUTURE RECOVERY.

**407. General rule.]—**(1) Not a reasonable maxim that the next of kin to whom the land may descend shall not be guardians in socage.

(2) A lunatic is never to be looked upon as irrecoverable. The lunatic's comfort is to be regarded, & not the benefit of his administrators or next of kin.

I found this order made for the commitment of the custody of the estate to D., & of the person to J., whom I take to be a nominal person for D., & that the person of the lunatic has in fact been all along with D.; & that such allowance has been made to the judge for the maintenance of the lunatic & management of the estate, is beyond dispute. It is his benefit & comfort I am to take care of where no creditor complains, & not to heap up wealth for the benefit of his administrators, or next of kin. Therefore I will not lessen the allowance nor alter the committee of the person; besides, nobody can tell who will be the lunatic's

## PART III. SECT. 3, SUB-SECT. 1.

**400 i. Execution of deed.]—**The ct. will not direct an issue on an allegation by a deft. or resp. that a person, when he executed a deed, was insane, without any evidence in support of it; as the presumption is in favour of sanity, more especially when there is *prima facie* evidence of sanity, e.g., acting on

the deed for a number of years.—*LONG v. LONG* (1854), 4 I. Ch. R. 106; 7 Ir. Jur. 81.—**IR.**

**400 ii. —.]—**Where the grantor of a holograph deed bearing a certain date was proved to have become insane at a period subsequent thereto & died insane there is no legal presumption that the deed was executed during

insanity.—*WADDEL v. WADDEL'S TRUSTEES* (1845), 7 Dunl. (Ct. of Sess.) 605, 1017; 17 Sc. Jur. 542.—**SCOT.**

## PART III. SECT. 3, SUB-SECT. 3.

**h. General rule.]—**Insanity once established is presumed to continue.—*HARPER v. CAMERON* (1893), 2 B. C. R. 365.—**CAN.**

next of kin at his death, for he may live to bury all the next of kin that are so now (LORD MACCLESFIELD, C.).—DORMER'S CASE (1724), 2 P. Wms. 262 ; 2 Eq. Cas. Abr. 581 ; 24 E. R. 723, L. C.

*Annotation* :—As to (2) **Reid**. *Smith v. A.-G.* (1777), *Rom.*  
54.

408. —.]—*Re* HINDE, *Ex p.* WHITBREAD, No. 978, *post.*

**SECT. 4.—BURDEN OF PROOF.**

**SUB-SECT. 1.—IN GENERAL.**

**In case of marriage.]—**See Part II., Sect. 3, sub-sect. 2, A. (b), *ante*.

**In case of a will.**—See Part II., Sect. 8, subsect. 4, B., *ante*.

409. On party alleging insanity—General rule.]  
—A.-G. v. PARNTHER, No. 420, *post*.

410. ———.]—(1) Insanity having been once established, proof of recovery is upon the party.

(2) Otherwise the insanity must be established, by proof applying to the particular date.—*WHITE v. WILSON* (1806), 13 Ves. 87; 33 E. R. 227, L. C.

*Annotations:—Generally, Mentd. Wilson v. Beddard (1841), 12 Sim. 28; Waters v. Waters (1848), 2 De G. & Sm. 591; McGregor v. Topham (1850), 3 H. L. Cas. 132; Roberts v. Kerslake (1855), 3 W. R. 616.*

411. — — —.]—(1) Generally speaking the law presumes sanity, & if it be not impeached no evidence is required to support it.

(2) Where sanity is impeached, & the evidence is conflicting, the question is not whether the facts adduced in support of it are not in general indications of sanity, but whether they are inconsistent with or sufficiently explanatory of the indications of insanity produced on the other side, on which undoubtedly the *onus* lies.—STEED *v.* CALLEY (1836), 1 Keen, 620; 48 E. R. 446.

412. — — —.]—CHAMBERS & YATMAN v.  
QUEEN'S PROCTOR, No. 363, *ante*.

413. — —.]—EVANS v. TYLER, No. 393,  
*ante.*

414. — — —.]—(1) The *onus probandi* must, in the first case, lie upon the party setting up the insanity, since every person must be presumed to be of sound mind till the contrary is shown.

(2) When once the existence of that insanity has been established, the *onus probandi* is shifted; then it is necessary that the party setting up the recovery from that insanity should satisfy the ct. by distinct proof that their averments are well founded.

(3) Where the existence of insane delusion is once proved, it is incumbent on the party propounding a testamentary paper to satisfy the ct. that the delusion had entirely ceased to exist: though there may be nothing on the face of the testamentary disposition to connect it directly with the delusion.—DYCE SOMBRE *v.* TROUP (1856), Dea. & Sw. 22; 26 L. T. O. S. 288; 164 E. R. 489; *on appeal, sub nom.* PRINSEP & EAST INDIA Co. *v.* DYCE SOMBRE (1856), 10 Moo. P. C. C. 232, P. C.

*Annotations:—As to (3) Reisd. Swinfen v. Swinfen (1859), 1 Sw. & Tr. 283; Hampson v. Guy (1891), 64 L. T. 778. Generally, Mentd. Troup v. East India Co., Dyce Sombre*

**PART III. SECT. 4, SUB-SECT. 1.**  
**409 i. On party alleging insanity—**  
*General rule.*—In legal proceedings the *onus* of establishing defective mentality lies upon the person relying upon it, & such an issue should be distinctly raised on the pleadings.—**PHEASANT v. WARNE, [1922] App. D. 481.—S. AF.**

**PART III. SECT. 4, SUB-SECT. 2.—B.**  
**420 i. *On party alleging lucid interval.***

**v. East India Co. (1858), 7 Moo. Ind. App. 104; *In the Goods of Crippen* (1911), 80 L. J. P. 47; *Bird v. Keep*, [1918] 2 K. B. 692.**

415. — In case of a deed.]—JACOBS *v.* RICHARDS, JACOBS *v.* PORTER, No. 94, *ante*.

**416. — In case of a contract.]—IMPERIAL  
LOAN Co. v. STONE, No. 57, ante.**

**SUB-SECT. 2.—WHEN INSANITY ESTABLISHED.**

### A. In General.

**417. General rule.]—SNOOK v. WATTS, No. 385, ante.**

418. —.]—EVANS v. TYLER, No. 393, *ante*.

419. ———.]—ANON. (1856), No. 394, *ante*.

### B. To Prove Lucid Interval.

*See, generally, Part I., Sect. 3, ante.*

420. On party alleging lucid interval.]—If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement; if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alleging such lucid interval, who must show sanity & competence at the period when the act was done, & to which the lucid interval refers; & it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong & as demonstrative of such fact as where the object of the proof is to establish derangement. The evidence in such a case, applying to stated intervals, ought to go to the state & habit of the person, & not to the accidental interview of any individual, or to the degree of self-possession in any particular act (LORD THURLOW, C.).—A.-G. v. PARNTHER (1792), 3 Bro. C. C. 441; 29 E. R. 632, L. C.

**Annotations:—***Consd.* Cartwright v. Cartwright (1793), 1 Phillim. 90; White v. Wilson (1806), 13 Ves. 87; Prinsep & East India Co. v. Dyce Sombre (1856), 10 Moo. P. C. C. 232; Sutton v. Sadler (1857), 3 C. B. N. S. 87. **Refd.** Hall v. Warren (1804), 9 Ves. 605; *Ex p.* Holyland (1805), 11 Ves. 10; Groom v. Thomas (1829), 2 Hag. Eco. 433; Banks v. Goodfellow (1870), L. R. 5 Q. B. 549. **Mentd.** A.-G. v. Magdalen College, Oxford (1854), 18 Beav. 223; Jacobs v. Richards, Jacobs v. Porter (1854), 18 Beav. 300; *Re* Lawrence, Lawrence v. Lawrence, [1916] W. N. 205.

**In case of wills.]—***See* Part II., Sect. 8, sub-sect. 4, B., *ante*.

### C. To Prove Recovery.

**421. On party alleging recovery.]—WHITE v. WILSON, No. 410, ante.**

422. —.] — DYCE SOMBRE v. TROUP, No. 414, *ante*.

**SECT. 5.—EVIDENCE OF INSANITY.**

SUB-SECT. 1.—IN GENERAL.

**423. Particular acts.]**—A party may give proofs of particular acts under a general allegation of weakness of mind.—*BRUNELL v. WADE* (1742), 1 Coop. temp. Cott. 541 ; 47 E. R. 991, L. C.

execution during a lucid interval.—  
HOOPER v. NUNN (1912), 22 O. W. R.  
28; 3 O. W. N. 1223; 3 D. L. R. 503.  
—CAN.

**PART III. SECT. 5, SUB-SECT. 1.**

**1. Affidavit in partition suit.] —** Unsoundness of mind of deft. in a partition suit was proved by affidavits. — **MASTERS v. MASTERS (1903), 2 N. B. Eq. Rep. 486 ; 23 C. L. T. 266. — CAN.**

—Where insanity of a permanent nature is proved, the *onus* of proof is shifted on to the person claiming that there was a lucid interval.—*Re DOULL'S ESTATE* (1881), 7 V. L. R. 70.—**AUS.**

**k. — In case of deed.] —** Where the grantor under a deed is shown to have been afflicted with a continuous type of insanity for some time prior to the date of the deed the *onus* is on those upholding the deed to prove its



*Sect. 5.—Evidence of insanity: Sub-sects. 1 & 2, A. (a) & (b), & B. Sect. 6.]*

**424.** ———.]—In an issue on *non compos mentis*, you may give particular acts of madness in evidence, & not general only that he is insane.—*CLARKE v. PERIAM* (1742), 2 Atk. 333; 9 Mod. Rep. 340, 26 E. R. 603; *sub nom.* *CLARK v. PERIAM*, *PERIAM v. CLARK*, 1 Coop. temp. Cott. 541, L. C.

**425.** ———.]—*SNOOK v. WATTS*, No. 385, *ante*.

**426. Affidavit of lunatic of own insanity.]—**Decree *pro confesso* not opened without a strong ground; therefore not upon a general affidavit of derangement by the party himself. Evidence more satisfactory, & extending to the whole period, being required.—*KNIGHT v. YOUNG* (1813), 2 Ves. & B. 184; 35 E. R. 289, L. C.

*Annotations:—Mentd.* *Walker v. Bell* (1816), 2 Madd. 21; *Goldsmith v. Goldsmith* (1846), 5 Hare, 123.

**427. Extraordinary conduct—Absence of delusions.]—***Re WINDHAM*, No. 684, *post*.

**428. Affidavit verifying medical certificate.]—**When an application is made, under Fines & Recoveries Act, 1833 (c. 74), to dispense with a husband's concurrence to his wife's deed on the ground of his incapacity to execute by reason of lunacy, such lunacy & incapacity must be shown by an affidavit of a medical man, & it is not enough to produce an affidavit verifying a medical certificate.—*Re REEVES* (1876), 24 W. R. 848.

**In case of wills.]—**See Part II., Sect. 8, subsect. 4, D., *ante*.

#### SUB-SECT. 2.—FINDINGS OF AUTHORITIES.

##### A. Judicial Inquisition—Presumption of Insanity. (a) In General.

Presumptions generally, see Sect. 3, *ante*.

Judicial inquisition generally, see Part VII., *post*.

**429. Where inquisition not superseded—As to marriage.]—***TURNER v. MEYERS*, No. 143, *ante*.

**430. ——— As to execution of will.]—***COOKE v. CHOLMONDELEY*, No. 360, *ante*.

**431. ———.]—**(1) The presumption of law is, that the verdict of a jury under a commission of lunacy, that the party, the subject of the commission, is of unsound mind, is well founded, & if the commission remained unsuperseded, that the party continued a lunatic at his death. Such presumption, however, may be rebutted & displaced by positive proof of entire recovery, or possession of a lucid interval, when a testamentary instrument was executed.

(2) The *onus probandi* lies upon a party setting up a will, made during the subsistence of a commission of lunacy, to establish the affirmation of complete or partial recovery of the lunatic at the time of giving instructions for & executing the will.

(3) Insane delusions are of two kinds: first, the belief in things impossible; & second, the belief in things possible, but so improbable under the surrounding circumstances, that no person of sound mind would give them credit.

Testator, against whom a commission of lunacy

was subsisting, made a will & codicil, the instructions for which were rational & the testamentary papers properly executed. Such instruments pronounced against, the evidence showing that deceased had been instructed to conceal the continued existence of the delusions he still entertained, & that he acted under restraint; the evidence of his partial or perfect recovery at the time of giving instructions & execution, being inconclusive & unsatisfactory.—*PRINSEP & EAST INDIA CO. v. DYCE SOMBRE* (1856), 10 Moo. P. C. C. 232; 14 E. R. 480; *sub nom.* *EAST INDIA CO. & PRINSEP v. DYCE SOMBRE*, 4 W. R. 714, P. C.; *varying S. C. sub nom.* *DYCE SOMBRE v. TROUP*, Dea. & Sw. 22.

*Annotations:—As to* (1) *Reid. In the Goods of Crippen* (1911), 80 L. J. P. 47. *Generally, Reid. Swinfen v. Swinfen* (1859), 1 Sw. & Tr. 283; *Hampson v. Guy* (1891), 64 L. T. 778. *Mentd.* *Troup v. East India Co.*, *Dyce Sombre v. East India Co.* (1857), 7 Moo. Ind. App. 104; *Bird v. Keep*, [1918] 2 K. B. 692.

**432. As to anterior act—Execution of deed.]—***FRANK v. MAINWARING*, No. 443, *post*.

**433. ———.]—***SNOOK v. WATTS*, No. 385, *ante*.

**434. ———.]—***ELLIOT v. INCE*, No. 126, *ante*.

**435. ——— Execution of will.]—***BANNATYNE v. BANNATYNE*, No. 361, *ante*.

##### (b) Not Conclusive Evidence.

Judicial inquisition generally, see Part VII., *post*.

**436. As to anterior act—Purchase.]—**An inquisition of lunacy is always admitted to be read, but is not conclusive evidence, for you may traverse it. Where, before an inquisition of lunacy, a person who was found a lunatic, has made a purchase with the approbation of his only son, the ct. will not change the disposition that has been made of this sum of money, but the purchase will stand.

An inquisition is not conclusive evidence, for it may be denied & traversed. Nay, it is not conclusive to the point of time in which it is found, much less is it to a retrospect. There have been many instances wherein juries have found a man a lunatic for many years before the inquisition, & notwithstanding that evidence has been given to another jury upon trials to controvert such former inquisition, & the jury have found him not to be a lunatic (*LORD HARDWICKE, C.*).—*SERGESON v. SEALEY* (1742), 2 Atk. 412; 9 Mod. Rep. 370; 26 E. R. 648, L. C.

*Annotations:—Appld.* *Re Walden, Ex p. Bradbury* (1839), 4 Deac. 202. *Consd.* *Price v. Berrington* (1851), 3 Mac. & G. 486; *Elliot v. Ince* (1857), 7 De G. M. & G. 475. *Reid.* *Oxenden v. Compton* (1793), 4 Bro. C. C. 231; *Jacobs v. Richards* (1854), 23 L. J. Ch. 557; *Hill v. Clifford*, *Clifford v. Timms*, *Clifford v. Phillips*, [1907] 2 Ch. 236. *Mentd.* *Revel v. Watkinson* (1748), Belt's Sup. 66; *Amesbury v. Brown* (1750), 1 Ves. Sen. 477; *Moodie v. Reid* (1816), 1 Madd. 516; *Burges v. Mawbey* (1823), Turn. & R. 167; *Cole v. Stutely* (1842), 6 Jur. 314; *Bird v. Keep*, [1918] 2 K. B. 692; *York Glass Co. v. Jubb* (1925), 134 L. T. 36.

**437. Execution of will.]—***RODD v. LEWIS*, No. 345, *ante*.

**438. ———.]—***In the Goods of WATTS*, No. 308, *ante*.

**439. ———.]—***COOKE v. CHOLMONDELEY*, No. 360, *ante*.

#### PART III. SECT. 5, SUB-SECT. 2.— A. (a).

*m. General rule.]—*The effect of an adjudication under Lunatic Act that a person is a lunatic is to raise a presumption that he continued to be of unsound mind until the contrary is shown.—*AMANCHI SESHAMMA v.*

*AMANCHI PADMANABAH RAO* (1916), 1 L. R. 40 Mad. 660.—IND.

*n. ———.]—*An order declaring an alleged lunatic to be of unsound mind is not a judgment *in rem*, but operates while in force so as to create a rebuttable presumption that he is a lunatic.—*PRINSELOO'S CURATORS v. CRAFTORD*,

[1905] T. S. 669.—S. AF.

#### PART III. SECT. 5, SUB-SECT. 2.— A. (b).

*o. As to subsequent act — During absence from asylum—Execution of deed.]—**Re KING* (1887), 9 N. S. W. L. R. (Eq.) 1.—AUS.

440. ———.]—PRINSEP & EAST INDIA CO. v. DYCE SOMBRE, No. 431, *ante*.

Presumptions as to wills generally, see Part II., Sect. 8, sub-sect. 4, A., *ante*.

441. ——— Marriage.]—PORTSMOUTH (COUNTESS) v. PORTSMOUTH (EARL), No. 156, *ante*.

442. ——— Power of attorney.]—Inquisition of lunacy not conclusive evidence of the precise period at which the lunacy commenced.

A. grants B. a power of attorney, dated July 4, 1834; in 1837 A. is found by inquisition to have been lunatic from July 1, 1834:—*Held*: the power of attorney was valid notwithstanding.—*Re* WALDEN, *Ex p.* BRADBURY (1839), 4 Deac. 202; Mont. & Ch. 625; 9 L. J. Bcy. 7; 3 Jur. 1108, Ct. of R.

443. ——— Execution of deed.]—On a bill to set aside deeds & recoveries, on the ground of the lunacy of the party at the time he executed them:—*Held*: the finding of the jury on an inquisition, which over-reached that period, afforded a presumption that he was then insane; but there being some evidence that after the time when the lunacy was stated to have commenced, the party was not of unsound mind, an issue was directed to inquire, whether he was of unsound mind at the time of executing the deeds, etc.—FRANK v. MAINWARING (1839), 2 Beav. 115; 48 E. R. 1123; *subsequent proceedings* (1841), 4 Beav. 37.

*Annotations*:—*Reid*. Snook v. Watts (1848), 11 Beav. 105; Jacobs v. Richards, Jacobs v. Porter (1854), 18 Beav. 300; Elliott v. Ince (1857), 30 L. T. O. S. 92.

444. ———.]—SNOOK v. WATTS, No. 385, *ante*.

445. ———.]—ELLIOT v. INCE, No. 126, *ante*.

446. ———.]—Fits of mania extending for twenty years anterior to, & down, to the year in which deeds were executed by a man found some years afterwards by commission *de lunatico* to have been all along insane:—*Held*: not an answer to a *prima facie* case on an issue as to his sanity at the time of executing the deeds.—FERGUSON v. BORRETT (1859), 1 F. & F. 613, N. P.

447. ——— After long interval.]—It would, in my opinion, be very dangerous to allow a deed executed by a married woman, who was certified at the time to be of competent understanding, to be treated as null & void merely because a jury more than nine years afterwards found that her insanity dated from a period prior to its execution (LORD HERSCHELL).—GRUTTEN v. FOXWELL, FOXWELL v. VAN GRUTTEN, [1897] A. C. 658; 66 L. J. Q. B. 745; 77 L. T. 170; 46 W. R. 426, H. L.

*Annotations*:—*Consd.* Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips, [1907] 2 Ch. 236. *Mentd.* *Re* Adams & Perry's Contract, [1899] 1 Ch. 554; Pelham-Clinton v. Newcastle, [1902] 1 Ch. 34; *Re* Buckton, Buckton v. Buckton, [1907] 2 Ch. 406; *Re* Simcoe, Vowler-Simcoe v. Vowler, [1913] 1 Ch. 552; *Re* Lawrence, Lawrence v. Lawrence, [1915] 1 Ch. 129; *Re* Hobbs, Hobbs v. Hobbs, [1917] 1 Ch. 569; *Re* Hussey & Green's Contract, *Re* Hussey, Hussey v. Simper, [1921] 1 Ch. 566.

448. ——— Contract for sale—After long interval.]—PRICE v. BERRINGTON, No. 47, *ante*.

449. As to commencement of lunacy.]—*Re* WALDEN, *Ex p.* BRADBURY, No. 442, *ante*.

450. As between third parties.]—There are two classes of judgments *in rem*, one of which is conclusive against all the world, & the other of which is not conclusive, though admissible, in any other proceedings. . . . A familiar instance of the second is an inquisition in lunacy, which has always been allowed to be read in a subsequent suit between third parties as evidence of the lunacy, though it is not conclusive & may be traversed (COZENS-HARDY, M.R.).—HILL v.

CLIFFORD, CLIFFORD v. TIMMS, CLIFFORD v. PHILLIPS, [1907] 2 Ch. 236; 76 L. J. Ch. 627; 97 L. T. 266; 23 T. L. R. 601, C. A.; *on appeal*, [1908] A. C. 12, 15, H. L.

*Annotations*:—*Mentd.* Bird v. Keep (1918), 118 L. T. 633; Law v. Chartered Institute of Patent Agents, [1919] 2 Ch. 276.

#### B. Other Authorities.

451. Finding of coroner's inquest—As to previous insanity.]—*Qu.*: whether the coroner's inquest may be given in evidence.

If this be read [coroner's inquest] it will have very little weight, for it only finds him lunatic *eo instante*, 31st, which is no conclusive evidence that he was so on the 29th (*per* CUR.).—JONES v. WHITE (1717), 1 Stra. 68; 93 E. R. 389.

*Annotation*:—*Mentd.* In the Estate of Crippen, [1911] P. 108.

452. Reports of Chancery visitors—After death of lunatic.]—In an action to obtain probate of the will of a lunatic so found by inquisition two of her next of kin opposed probate on the ground of her insanity at the date of the will. The chairman of the Board of Chancery Visitors was examined on behalf of defts., & admitted that the reports made by himself & his colleagues were still in existence, but refused to produce them on the ground that he was precluded by Lunacy Act, 1890 (c. 5), s. 186, from making them public:—*Held*: the reports must be treated as non-existent, & no order could be made for their production.—ROE v. NIX, [1893] P. 55; 62 L. J. P. 36; 68 L. T. 26; 9 T. L. R. 128; 1 R. 472.

*Annotation*:—*Mentd.* Brown v. Penn (1895), 12 T. L. R. 46.

453. Order of Master in Lunacy—Whether effective in colonial court.]—An order of a Master in Lunacy in England under Lunacy Act, 1890 (c. 5), s. 116, reciting that deft. was in the opinion of the master a person of unsound mind, though not so found by inquisition, and authorising his wife to defend the action, is admissible as *prima facie* evidence, & if uncontradicted ought to be regarded as sufficient evidence to justify an order under Ceylon Civil Procedure Code (c. 12), s. 87.—HARVEY v. R., [1901] A. C. 601; 70 L. J. P. C. 107; 84 L. T. 849; 17 T. L. R. 601, P. C.

*Annotation*:—*Reid*. Hill v. Clifford, Clifford v. Timms Clifford v. Phillips, [1907] 2 Ch. 236.

#### SECT. 6.—EVIDENCE OF SANITY.

454. Written reply of deaf & dumb person—To questions by judge.]—A party born deaf & dumb, attaining twenty-one, applied for possession of her real estate, & to have an assignment of her chattel estate, LORD HARDWICKE, C., having put questions to the party in writing, & she having given sensible answers thereto in writing, same was ordered.—DICKENSON v. BLISSET (1754), 1 Dick. 268; 21 E. R. 271, L. C.

455. Attestation—Presumption as to evidence of deceased witnesses.]—TOWART v. SELLARS, No. 383, *ante*.

456. Documents written by alleged lunatic—Having reference to act in question—Notes & receipts.]—TOWART v. SELLARS, No. 383, *ante*.

457. ——— Showing knowledge of will.]—WHEELER & BATSFORD v. ALDERSON, No. 241, *ante*.

458. ———.]—JENKINS v. MORRIS, No. 216, *ante*.

459. Acts of business.]—WHEELER & BATSFORD v. ALDERSON, No. 241, *ante*.

460. ——— Idlcy.]—BANNATYNE v. BANNATYNE, No. 361, *ante*.



**Sect. 6.—Evidence of sanity. Sect. 7: Sub-sects. 1 & 2. Parts IV. & V. Sect. 1.]**

**461. Particular acts—Where partial insanity established.]—**SNOOK *v.* WATTS, No. 385, *ante*.

**In case of wills.]—**See Part II., Sect. 8, sub-sect. 4, *C.*, *ante*.

## SECT. 7.—ADMISSIBILITY OF EVIDENCE.

### SUB-SECT. 1.—IN GENERAL.

See, generally, EVIDENCE, Vol. XXII., pp. 53 *et seq.*

**462. Findings of authorities—Coroner's inquest.]—**JONES *v.* WHITE, No. 451, *ante*.

**463. — Inquisition of lunacy.]—**SERGESON *v.* SEALEY, No. 436, *ante*.

**464. — — Where defence of insanity set up—Inquisition finding antecedent insanity.]—**Where to an action against exors. on the bond of their testator, they plead *non est factum*, & set up lunacy as a defence at the trial, an inquisition taken under a commission of lunacy against testator after the execution of the bond, finding that he had been a lunatic from a day antecedent to that, without any lucid interval, is admissible evidence.—FAULDER *v.* SILK (1811), 3 Camp. 126, N. P.

**Annotations:—**Reid. Towart *v.* Sellars (1817), 5 Dow, 231; Hill *v.* Clifford, Clifford *v.* Timms, Clifford *v.* Phillips, [1907] 2 Ch. 236; Bird *v.* Keep, [1918] 2 K. B. 692.

**465. — — In action between third parties.]—**HILL *v.* CLIFFORD, CLIFFORD *v.* TIMMS, CLIFFORD *v.* PHILLIPS, No. 450, *ante*.

**466. — Report by examiners—After examination in private.]—**Re B— (1891), No. 689, *post*.

**467. — Order of master in lunacy.]—**HARVEY *v.* R., No. 453, *ante*.

**468. Family weakness—Insanity of sister.]—**On a question whether a person was sane at the time of her executing a certain deed, witnesses cannot be asked whether the sister of the party be not insane.—DOE *d.* MATHER *v.* WHITEFOOT (1838), 8 C. & P. 270, N. P.

**— In criminal cases.]—**See CRIMINAL LAW, Vol. XIV., p. 62, No. 278.

**469. Letters written to lunatic.]—**In an issue on the sanity of a testator, who made his will in 1825, the devisee offered in evidence the following letters of deceased persons, which were found open, & addressed to testator, with other papers bearing his indorsements, in a cupboard under his book case in his private room; a letter dated in 1784 from testator's cousin with whom he was proved to be in correspondence in 1787; a letter dated in 1786 from M. who desired testator to direct his attorney to propose terms of agreement with A. or W.; this letter was indorsed by testator's attorney, long since deceased; & a letter dated 1799 from the curate of testator's parish:—**Held:** they were not admissible in evidence.—WRIGHT *v.* DOE *d.* TATHAM (1838), 4 Bing. N. C. 489; 5 Cl. & Fin. 670; 6 Scott, 58; 7 L. J. Ex. 340, 2 Jur. 461; 132 E. R. 877, H. L.; *affg.* (1837), 7 Ad. & El. 313, Ex. Ch.

**Annotations:—**Mentd. Marston *v.* Roe (1837), 2 Nev. & P. K. B. 504; R. *v.* O'Connell (1844), 5 State Tr. N. S.

### PART III. SECT. 7, SUB-SECT. 1.

**p. Family weakness.]—****Held:** in a proof of insanity, it is not competent to examine witnesses with regard to the insanity of the relations of the party alleged to be insane.—WALKER *v.* M'ADAM (1806), 13 Fac. Col. 548.—SCOT.

### PART III. SECT. 7, SUB-SECT. 2.

**q. Opinion of medical witness —**

**When required.]—**Circumstances calculated to induce the mental condition of insanity at the time of the commission of an offence may always be admitted to evidence the probability of such affection. Some foundation for probability must be laid by other evidence, *e.g.*, medical testimony, that there was a diseased mental condition.—R. *v.* HAWKES (1915), 32 W. L. R. 720; 9 W. W. R. 445; 25 D. L. R. 631; 9 Alta. L. R. 182.—CAN.

1, 684; Cleave *v.* Jones (1852), 7 Exch. 421; Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429; Heath *v.* Crealock (1874), 23 W. R. 95; Tredegar *v.* Windus (1875), L. R. 19 Eq. 407.

**470. Evidence in former cause—As to anterior insanity.]—**WELLESLEY *v.* VERE, No. 243, *ante*.

**471. Subsequent conduct—To avoid a deed.]—**In an action for money had & received, brought by the administratrix of an intestate to recover the consideration money for an annuity deed, alleged to have been executed by him when of unsound mind:—**Held:** his acts & conduct after the execution of the deed in question, which must be taken *prima facie* to have been duly executed, could not be given in evidence by pltf. for the purpose of avoiding that instrument.

A man's acts, after he has executed a solemn deed, cannot be given in evidence with the view of avoiding that deed (POLLOCK, C.B.).—MOULTON *v.* CAMEROUX (1846), 8 L. T. O. S. 278, N. P.; *subsequent proceedings, sub nom.* MOLTON *v.* CAMROUX (1849), 4 Exch. 17, Ex. Ch.

**472. Solicitor's accounts—To prove origin of instructions.]—**MARTIN *v.* JOHNSTON, No. 475, *post*.

**473. Decree of sanity.]—**MACKINTOSH *v.* SMITH & LOWE, No. 1870, *post*.

### SUB-SECT. 2.—MEDICAL EVIDENCE.

Medical evidence generally, see EVIDENCE, Vol. XXII., p. 509, Nos. 5406–5431.

**474. Opinion of medical witness—Founded on evidence at trial.]—**On an issue as to the state of mind of a testator, a medical man conversant with cases of insanity cannot be asked his opinion as to the insanity of testator, founded upon the evidence given at the trial in his hearing.—DOE *d.* BAINBRIGGE *v.* BAINBRIGGE (1850), 16 L. T. O. S. 245; 4 Cox, C. C. 454, N. P.

**475. — Medical attendant at asylum.]—**(1) The question being as to the sanity of testator, evidence of surviving medical attendant on a lunatic asylum in which she resided at the time of the making of the will, received, to show that she was sane, & that her continuance in the asylum was voluntary.

(2) A written declaration signed by the witness & deceased medical attendant, certifying testatrix's sanity on the day of the date of the will, not admitted, because the examination was not made in an official visit, & so the certificate was not an official act.

(3) But after the lapse of thirty years, presumed that visits required by statute were duly paid by the medical attendants, & that the examinations were properly conducted.

(4) General evidence of their opinion as to the sanity of testatrix formed on those visits admitted, although the scope of their official duty was rather as to hygiene, than as to sanity. (5) A book having been allowed to be referred to by pltf.'s counsel on cross-examination, being the accounts of the solrs. employed to prepare the will, entries therein allowed to be referred to by both parties,

**r. — Whether conclusive.]—**The ct. is not bound to accept the opinion of expert witnesses as to the insanity of a certain person when it is opposed to testimony of observers who have come into daily contact with the person in question.—CRABBE *v.* SHIELDS (B. C.), [1925] 2 W. W. R. 701; 3 D. L. R. 1069.—CAN.

**t. — —.]—**In questions of insanity, the inferences to be drawn

for the purpose of proving from whom the instructions to prepare the will really emanated.—**MARTIN v. JOHNSTON** (1858), 1 F. & F. 122, N. P.

**476. — Who gave certificate of insanity.]—**On a plea of insanity at the time of making a contract, the opinion of the medical men who gave certificates on which deft. was confined as insane, at or about the time, is only evidence for the jury,

who must judge of the grounds on which it was formed.—**LOVATT v. TRIBE** (1862), 3 F. & F. 9, N. P.

**477. Medical certificate — When examination not on official visit.]—****MARTIN v. JOHNSTON**, No. 475, *ante*.

**In criminal cases.]—**See **CRIMINAL LAW**, Vol. XIV., p. 63, Nos. 280–285, 288.

## Part IV.—The Crown as Parens Patriæ.

**478. Protection of lunatics by Crown.]—**The King has the custody of an idiot not in respect of any seignior, but *jure protectionis suæ regis*, because his subject is not able to govern himself, nor the lands or tenements which he has (*per CUR.*).—**TOURSON'S CASE** (1610), 8 Co. Rep. 170 a; 77 E. R. 730.

**479. —.]—**The Crown has another jurisdiction & that is as *pater patriæ*, as a father over his children. The king has a right to take care of infants, lunatics, & idiots, that cannot take care of themselves (*per CUR.*).—**SHAFTSBURY (EARL) v. SHAFTSBURY** (1725), Gilb. Ch. 172; 25 E. R. 121; *sub nom.* **EYRE v. SHAFTSBURY (COUNTESS)**, 2 P. Wms. 103; 2 Eq. Cas. Abr. 710, 755.

**Annotations:—****Expld.** **A.-G. v. Magdalen College, Oxford** (1854), 18 Beav. 223. **Mentd.** **Raymond's Case** (1734), Cas. temp. Talb. 58; **Pomfret v. Windsor** (1752), 2 Ves.

Sen. 472; **Mansell v. Mansell** (1757), Wilm. 36; **A.-G. v. Downing** (1767), Wilm. 1; **R. v. Green** (1781), 3 Doug. K. B. 36; **De Manneville v. De Manneville** (1804), 10 Ves. 52; **Re Long Wellesley** (1831), 2 State Tr. N. S. 911; **A.-G. v. Brodie** (1846), 11 Jur. 137; **Bell v. Holtby** (1873), L. R. 15 Eq. 178.

**480. —.]—**In respect of lunatics, idiots, & infants the king is bound to take care of them. . . . The Crown acts by way of analogy to the care & prudence of the natural parent (**LORD HARDWICKE, C.**).—**SMITH v. SMITH** (1745), 3 Atk. 304; 26 E. R. 977, L. C.

**481. —.]—****Re WINDHAM**, No. 684, *post*.

**482. —.]—****SCOTT v. SCOTT**, No. 681, *post*.

**483. — Delegation to Lord Chancellor.]—****Ex p. GRIMSTONE**, No. 542, *post*.

**484. Custody of lunatic's property in the Crown — Delegation to committee.]—****Re WALKER**, No. 172, *ante*.

## Part V.—Jurisdiction of Chancery Division of High Court of Justice.

### SECT. 1.—IN GENERAL.

**485. No jurisdiction by reason of lunacy.]—**(1) A suit instituted by a next friend on behalf of a person of unsound mind, not so found by inquisition, becomes absolutely paralysed by a change in the status of pltf. If he becomes of sound mind there is no pretext for the continued intervention of the next friend; if he is found a lunatic by inquisition, & is thus placed under the protection of the Crown, the suit should be continued only with the sanction of the Ct. in Lunacy.

(2) Orders of the Ct. of Ch. obtained by a solr. who has officially instituted such a suit give him no protection, & he will have to pay the costs of unnecessary inquiries made under such orders. But if, on the person of unsound mind being found lunatic by inquisition, the solr. can satisfy the Ct. in Lunacy that he has acted *bond fide* for the benefit of the lunatic, that Ct. will reimburse him out of the lunatic's estate.

(3) Every proceeding taken in the suit after

the inquisition, whether or not a committee has been appointed, is irregular & void & a contempt of the Ct. in Lunacy. A suit on behalf of a trader who had become deranged, for an account against his agent & manager, & the appointment of a receiver of his stock-in-trade, etc., was instituted by solrs. who had occasionally acted for the pltf., but were not his ordinary family solrs. A receiver was appointed in the suit with the concurrence of the family solr., who consented upon the understanding that no further steps should be taken without notice to him. The suit was proceeded with without such notice. A decree directing accounts & inquiries was obtained, the accounts were taken, the chief clerk made his certificate, & an order on further consideration was obtained directing taxation & payment of the costs of suit, which were paid out of pltf.'s estate. Meanwhile, previously to the last mentioned order, pltf. was found a lunatic by inquisition, but no committee was appointed until after the said order. The

from general peculiarities in the manner, speech, behaviour & letters of the alleged lunatic should be drawn by the jury for themselves, & they should not be guided by the opinions formed by medical witnesses.—**MORRISON v. MACLEAN'S TRUSTEES** (1862), 24 Dunl. (Ct. of Sess.) 625; 34 So. Jur. 311; *affd.* (1865), 3 Macph. (Ct. of Sess.) 42, H. L.—**SCOT**.

### PART IV.

**478 i. Protection of lunatics by Crown.] — Held:** the Crown as the *parens patriæ* is entitled, by its in-

herent prerogative, to the custody of all insane persons, for the purpose of protecting the community.—**R. v. MARTIN** (1854), 2 N. S. R. (James) 322.—**CAN**.

**484 i. Custody of lunatic's property in the Crown—Delegation to committee.]—****ELY'S (LORD) CASE** (1764), 1 Ridg. Parl. Rep. 515.—**IR**.

**484 ii. —.]—**The care of the person & property of a lunatic, is a trust reposed in the King, who discharges it by bailiff; which bailiff is appointed by the person holding the great seal, by virtue of a warrant from

the Crown.—**Re FITZGERALD** (1805), 2 Sch. & Lef. 432.—**IR**.

### PART V. SECT. 1.

**a. Enforcement of orders in lunacy — Variation of orders of predecessor.]—**The Lord Chancellor for the time being entrusted with jurisdiction in lunacy matters may vary or discharge the orders therein of his predecessors.—**Re LAWLER, Ex p. WALSH** (1874), 8 I. R. Eq. 506.—**IR**.

**b. Lunacy & Chancery jurisdiction distinguished.]—**The authority of the



**Sect. 1.—In general. Sects. 2 & 3: Sub-sects. 1**

committee with the sanction of the Master in Lunacy presented a petition for the purpose of setting aside as invalid the proceedings in the suit subsequent to the finding in lunacy:—*Held*: all proceedings after the appointment of the receiver were unauthorised & improper, & all after the finding on the inquisition were irregular & void, & the solrs. of the next friend were liable to refund the costs so paid out of the lunatic's estate under the orders so irregularly obtained & to pay the costs of the petition.

The law of the Ct. of Ch. undoubtedly is that in certain cases where there is a person of unsound mind, not found so by inquisition, & therefore incapable of invoking the protection of the Ct., that protection may be in proper cases, & if & so far as may be necessary & proper, invoked on his behalf by any person as his next friend. But every person so constituting himself officially the guardian, committee, & protector of a person of unsound mind does so entirely at his own risk, & he must be prepared to vindicate the necessity & propriety of the proceedings if they are called in question. . . . Unsoundness of mind gives the Ct. of Ch. no jurisdiction whatever . . . & is not by reason of the incompetency, but notwithstanding the incompetency, that the Ct. of Ch. entertains the proceedings . . . the Ct. can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind (SIR W. M. JAMES, L.J.).—*BEALL v. SMITH* (1873), 9 Ch. App. 85; 43 L. J. Ch. 245; 29 L. T. 625; 38 J. P. 72; 22 W. R. 121, L. JJ.

*Annotations*:—*As to* (1) *Consd.* *Porter v. Porter* (1888), 37 Ch. D. 420; *Farnham v. Milward*, [1895] 2 Ch. 730. *Refd.* *Halfhide v. Robinson* (1874), 30 L. T. 216; *Jones v. Lloyd* (1874), L. R. 18 Eq. 265; *Howell v. Lewis* (1891), 61 L. J. Ch. 89; *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666. *As to* (2) & (3) *Consd.* *Re Armstrong*, [1896] 1 Ch. 536.

**486. Enforcement of orders in lunacy.**—*Re MERRALL, GREENER v. MERRALL*, No. 977, *post*.

**Exercise of Chancery jurisdiction—In aid of lunacy jurisdiction.**—*See* Nos. 530-534, *post*.

**SECT. 2.—AS TO PERSON.**

**487. Jurisdiction to appoint guardian—Lunatic not so found.**—*WILKINSON v. WILKINSON*, No. 145, *ante*.

**488.** — — —.]—The Ch. Div. has jurisdiction to give directions as to the guardianship & maintenance of a person of unsound mind not so found, but will not exercise it unless the property is small & proceedings are not intended to be taken in Lunacy.

With regard to the question, what amount of property was small enough to justify the exercise of the jurisdiction, the Legislature had provided an index in the provision of Lunacy Regulation Act, 1862 (c. 86), s. 12, fixing £1,000 of capital or £50 of annual income as the "small amount" (JESSEL, M.R.).—*VANE v. VANE, VANE v. VANE* (1876), 2 Ch. D. 124; 45 L. J. Ch. 381; 34 L. T. 613; 24 W. R. 602.

*Annotations*:—*Apld.* *Bligh v. O'Connell* (1878), 38 L. T. 217. *Consd.* *Re Bligh* (1879), 49 L. J. Ch. 56; *Re Edwards*

(1879), 10 Ch. D. 605. *Expld.* *Re Brandon's Trusts* (1879), 13 Ch. D. 773; *Re Grimmett's Trusts* (1887), 56 L. J. Ch. 419; *Re Silva's Trusts* (1888), 57 L. J. Ch. 281. *Mentd.* *Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94.

**489.** — — —.]—*BLIGH v. O'CONNELL*, No. 519, *post*.

**490.** — — —.]—Although the Ch. Div. has power, in the administration of the trusts of the property of a person of unsound mind not so found, to give directions for his maintenance, it has no jurisdiction to appoint a guardian of his person.—*Re BLIGH* (1879), 12 Ch. D. 364; 49 L. J. Ch. 56; 41 L. T. 570; 27 W. R. 876, C. A.

**491.** — — —.]—Although the Ch. Div. has power in the case of a fund in ct. belonging to a person of unsound mind not so found by inquisition to give directions for his maintenance, it has no jurisdiction to appoint a guardian of his person.—*Re BRANDON'S TRUSTS* (1879), 13 Ch. D. 773; 41 L. T. 755.

*Annotations*:—*Expld.* *Re Grimmett's Trusts* (1887), 56 L. J. Ch. 419. *Refd.* *Re Silva's Trusts* (1888), 57 L. J. Ch. 281.

**492.** — — —.]—**When jurisdiction exercised—Proceedings in lunacy not intended to be taken—Property small.**—*VANE v. VANE, VANE v. VANE*, No. 488, *ante*.

**493.** — — —.]—*BLIGH v. O'CONNELL*, No. 519, *post*.

**494. Jurisdiction over infant ward—Not affected by lunacy.**—The Vice-Chancellor of the County Palatine of Lancaster having declined to give directions as to whether an infant ward of ct. who was alleged to have become of unsound mind should or should not be kept at a lunatic asylum, on the ground that the ct. had no jurisdiction to inquire whether he was of unsound mind or not:—*Held*: the jurisdiction of the ct. over its infant ward was not taken away by any physical or mental disability to which the infant might be subject, & such directions ought to be given as to his treatment as the ct. considered to be most for his benefit.

It would be very inconvenient if it was; for if no person took proceedings in lunacy the infant would be left without any protection at all. Moreover, I am not aware that I ever heard of a petition in lunacy against an infant. Is there any authority in support of the view that unsoundness of mind takes away the jurisdiction which exists, on the ground of infancy? (JAMES, L.J.).—*Re EDWARDS* (1879), 10 Ch. D. 605; 27 W. R. 611; *sub nom.* *Re EDWARDS, M'NEILE v. CHAMBERS*, 48 L. J. Ch. 233; 40 L. T. 113, C. A.

**SECT. 3.—AS TO PROPERTY.****SUB-SECT. 1.—IN GENERAL.**

**495. To order payment out of estate—In discharge of judgment debt—Though payment authorised by order in lunacy.**—The committee of a lunatic is personally responsible in that character to no jurisdiction but the Great Seal. Therefore, where a committee had neglected to comply with an order in lunacy, authorising him to make certain payments out of the lunatic's estate, in discharge of a liability which had been established against the lunatic in a suit at the Rolls; an order pronounced by the Master of the Rolls on a petition in the cause that the payments be made "by the lunatic or the committee" on or before

Chancellor in matters of lunacy, is not derived from his jurisdiction as judge in the Ct. of Ch. The King might, by his sign manual, commit into any other hands the care of lunatics, as well as to the Chancellor. But when

such an authority is committed to the Chancellor all the powers of his ct. as Chancellor become applicable to the discharge of his duty as the King's comr. in matters of lunacy.—*SMITH v. CREAGH* (1826), Batt. 384, 408.—*IR.*

c. *Jurisdiction of Chancellor to order detention in asylum—Criminal lunatic—Expiration of term of imprisonment.*—*Re M'DERMOTT* (1843), 3 Dr. & War. 480; 2 Con. & Law. 293.—*IR.*

a given day, was discharged, on the ground that the application ought to have been made in the lunacy, & that the Master of the Rolls had no jurisdiction to entertain it.—*AMES v. PARKINSON* (1847), 2 Ph. 388 ; 41 E. R. 992, L. C.

**496. Property within control of Court of Chancery.]—**A fund producing upwards of £200 a year, belonging to A., a person of unsound mind, though not so found by inquisition, was paid into ct. under the Trustee Relief Act. A petition to the Master of the Rolls for the application of the income towards his maintenance was refused.—*Re IRBY* (1853), 17 Beav. 334 ; 51 E. R. 1063.

**497. ———.]—***Re MACFARLANE*, No. 1019, *post*.

**498. Application of purchase-money—Satisfaction of prior charge—Payment of money under lunacy order.]—**A purchaser under an order in lunacy paid his purchase-money, in the manner directed by the Lords Comrs. in Lunacy, disregarding a charge of pltf. & a suit to enforce it, of which he had notice. The amount was principally applied to payment of the costs of the receiver in lunacy relating to the sale, etc. Upon a bill by pltf. to make the purchaser liable for not seeing to the due application of the purchase-money, the Master of the Rolls, considering himself bound by the order in lunacy, & as having no jurisdiction to alter it, retained the bill, with liberty to pltf. to apply in lunacy for the discharge or variation of the order.—*NORRIS v. STUART (LORD)* (1852), 16 Beav. 359 ; 51 E. R. 817 ; *sub nom.* *MORRIS v. STUART*, 20 L. T. O. S. 216 ; 1 W. R. 94.

**499. To appoint persons to convey trust property—Infant & lunatic trustee.]—**(1) A. gave all his real & personal estate & effects of what nature or kind soever, to C. upon trust to pay to his wife for her life the rents of his real estate & the interest on all sums due to him on mtges., bond, note or other security, & after her death to get in all debts owing to him on any security, & pay the same over to other persons. C. died intestate, leaving E. his eldest son & heir-at-law, a person of unsound mind & an infant :—*Held* : the legal estate in the mtged. property passed to C., & he was a trustee & persons were appointed to convey the property comprised in the mtges. to the purchasers thereof, under Trustee Act, 1850 (c. 60), ss. 3, 20.

(2) It is not necessary to resort to the jurisdiction in Lunacy for such an order, but it may be made in the jurisdiction in Ch.—*Re ARROWSMITH'S TRUSTS, Re THOMPSON* (1858), 27 L. J. Ch. 704 ; 31 L. T. O. S. 243 ; 4 Jur. N. S. 1123 ; 6 W. R. 642, L.JJ.

*Annotations :—As to (2) Rejd. Re Edwards, M'Neile v. Chambers* (1879), 48 L. J. Ch. 233 ; *Re M.*, [1899] 1 Ch. 79.

**500. ——— Lunatic trustee not so found.]—**Where the legal estate in land sold under the order of the ct. is vested in a person of unsound mind, but not found lunatic, an order may be made by the Lord Chancellor on a petition in Chancery, under the Trustee Acts, appointing a person to convey the legal estate so vested.—*HERRING v. CLARK* (1868), 4 Ch. App. 167, L. C. & L. J.

*Annotation :—Rejd. Re M.*, [1899] 1 Ch. 79.

**501. To dispense with consent of lunatic—Sale of lease by trustees.]—**Where the interest under a lease made by an ecclesiastical corpn. is vested in trustees without power of sale, & the person entitled to the rents is, through unsoundness of mind, incapable of consenting to a sale, the order sanctioning such sale is to be made in Chancery & not in Lunacy.—*Re CHESHIRE* (1871), 7 Ch. App. 50 ; 41 L. J. Ch. 208 ; 25 L. T. 721 ; 20 W. R. 49, L. JJ.

**502. ——— Investment by trustees.]—***Re T—*, No. 523, *post*.

**503. To direct accounts & inquiries—Action by lunatic against agent—Where receiver appointed.]—***BEALL v. SMITH*, No. 485, *ante*.

**504. To transfer fund in court to account in lunacy—Jurisdiction of judge in chambers.]—***Re ARMFIELD* (1889), 88 L. T. Jo. 97, L. JJ.

**505. Effect of orders in lunacy—Administration of estate—Lunatic debtor.]—***Re SEAGER HUNT, SILICATE PAINT CO. & ORR (J. B.) & CO., LTD. v. HUNT*, No. 1091, *post*.

**506. ——— Distribution of estate—Lunatic testatrix.]—***Re MERRALL, GREENER v. MERRALL*, No. 977, *post*.

**Appointment of new trustees.]—***See Part X., Sect. 10, sub-sect. 1, post*.

**——— Vesting orders.]—***See Part X., Sect. 10, sub-sect. 2, post*.

#### SUB-SECT. 2.—MAINTENANCE OF LUNATIC.

**507. Infant found lunatic abroad—When fund in court.]—**An infant, who was entitled to dividends of stock standing in ct., was found a lunatic by the laws of the United States of North America. This branch of the ct. made an order for payment of the dividends to the infant's mother for his support, she undertaking duly to apply the same, without requiring that the fund should be paid to a separate account, & an application be made to the Lord Chancellor.—*VOLANS v. CARR* (1848), 2 De G. & Sm. 242 ; 11 L. T. O. S. 123 ; 12 Jur. 643 ; 64 E. R. 109.

Maintenance of lunatic generally, *see Part IX., Sect. 2, post*.

**508. Lunatic not so found—When fund in court—Jurisdiction to order purchase of government annuity.]—***DAVIES v. DAVIES*, No. 1012, *post*.

**509. ———.]—**Where an order had been made by the late Vice-Chancellor of England directing the purchase of an annuity for the benefit of a lunatic, the Vice-Chancellor consented to hear a petition in reference to that order.

As the order for the purchase of the annuity was originally made by the Vice-Chancellor of England, I will hear this matter. . . . I think I may safely follow that authority [*Davies v. Davies*, No. 1012, *post*] ; it seems to me precisely the same case as the present (*KINDERSLEY, V.-C.*).—*Re BINGLEY'S TRUST* (1853), 22 L. T. O. S. 166.

**510. ——— Jurisdiction to order payment of capital—Necessity for security.]—***SYMES v. LEE, Ex p. BONE*, No. 514, *post*.

**511. ———.]—***Re BRANDON'S TRUSTS*, No. 491, *ante*.

**512. ———.]—**The Ch. Div. has jurisdiction to order maintenance of a person of unsound mind not so found by inquisition, out of the capital as well as out of the income of his property.—*Re TUEER'S WILL TRUSTS* (1886), 32 Ch. D. 39 ; 55 L. J. Ch. 454 ; 54 L. T. 910 ; 34 W. R. 751, C. A.

*Annotation :—Distd. Re Grimmett's Trusts* (1887), 56 L. J. Ch. 419.

**513. ——— Jurisdiction to order payment of income.]—***Re TUEER'S WILL TRUSTS*, No. 512, *ante*.

**514. ——— To husband.]—**A fund in ct., belonging to a married woman, who is a lunatic, will not be paid to her husband unconditionally. The ct. will, however, make an order for payment of the dividends to the husband ; & it will also order a transfer of the stock to him upon his giving a security, approved by the chief



*Sect. 3.—As to property: Sub-sect. 2. Part VI.  
Sect. 1: Sub-sects. 1 & 2.]*

clerk, either upon property or personally with sureties, to replace the stock when so directed by the ct.—*SYMES v. LEE, Ex p. BONE* (1857), 26 L. J. Ch. 665; 29 L. T. O. S. 37.

**515. ——— To relations having charge of lunatic.]**—An idiot, aged twenty-nine, not found lunatic by inquisition, lived with a brother & sister. The income of his property was about £220 *per annum*. Of the capital a sum of £4,446 3 per cent. Consols had been paid by trustees into ct. under the Trustees' Relief Act. The brother, as the next friend of the idiot, petitioned for payment of the dividends of the fund to them, the brother & sister, so long as the idiot should reside with them. Their lordships did not require a commission to be issued; but granted the prayer of the petition, the brother & sister giving an undertaking to apply the dividends for the benefit of the idiot.—*Re BURKE* (1860), 2 De G. F. & J. 124; 29 L. J. Ch. 608; 2 L. T. 587; 24 J. P. 659; 6 Jur. N. S. 717; 8 W. R. 534; 45 E. R. 569, L. J. J.

*Annotation:—Reid. Re Taylor* (1861), 2 De G. F. & J. 125.

**516. ——— To wife.]**—On a petition by a person of unsound mind not so found, who was married but had no children, & whose sole property consisted of a fund in ct., for payment of the whole income of the fund, amounting to £212 *per annum*, to the wife of petitioner, the ct. made an order as asked, upon the undertaking by the wife to apply the income for the maintenance, comfort, & support of petitioner.—*Re SILVA'S TRUSTS* (1888), 57 L. J. Ch. 281; 58 L. T. 46; 36 W. R. 366.

**517. ——— Trust property.]**—*Re CARR'S TRUSTS, CARR v. CARR*, No. 1258, *post*.

**518. ———.]**—*Re BARKER'S TRUSTS*, [1904] W. N. 13.

**519. ——— Property small—Lunacy proceedings undesirable.]**—The Ch. Div. has jurisdiction to give directions as to the application of a fund in ct. for the benefit of a person of unsound mind not so found, & for the appointment of a guardian, where the property is small, & proceedings in lunacy are not desirable.—*BLIGH v. O'CONNELL* (1878), 38 L. T. 217; 26 W. R. 311.

**520. ———.]**—The Ch. Div. has no jurisdiction to direct the application of the property of a person of unsound mind, not so found, for his maintenance unless there is either money belonging to him in ct., or the ct. has control over his property by reason of there being an action or some other proceeding pending relating to the property.—*Re GRIMMETT'S TRUSTS* (1887), 56 L. J. Ch. 419.

**521. ——— Where issue of commission unlikely—Though property exceeds one thousand pounds.]**—*VANE v. VANE, VANE v. VANE*, No. 488, *ante*.

**522. ——— In administration of trust.]**—*Re BLIGH*, No. 490, *ante*.

**523. ———.]**—A married woman who was of unsound mind, but not so found by inquisition, was entitled for her separate use to the income of certain trust funds. Her written consent was also required to the investments by the trustees. Upon a petition under Trustee Relief Act, 1859 (c. 35), s. 30, for the advice of the ct.:—*Held*: the ct. had jurisdiction to entertain the petition; the whole income might be paid to the husband on his undertaking to apply it to the maintenance of the wife, & her consent to investments might be dispensed with.—*Re T——* (1880), 15 Ch. D. 78; 29 W. R. 42.

**524. ——— Where property in control of court.]**—*Re GRIMMETT'S TRUSTS*, No. 520, *ante*.

**525. Whether payment will be ordered to two persons successively.]**—*VARNEY v. HILL* (1846), 6 L. T. O. S. 450.

## Part VI.—Jurisdiction in Lunacy.

### SECT. 1.—THE JUDGE IN LUNACY.

#### SUB-SECT. 1.—IN GENERAL.

*See Lunacy Act, 1890 (c. 5), ss. 108, 110, 116 (4), 135–138, 141; Lunacy Act, 1891 (c. 65); Lunacy Act, 1908 (c. 47); Lunacy Act, 1911 (c. 40); Lunacy Act, 1922 (c. 60); Trustee Act, 1925 (c. 19), ss. 54, 70, Sched. II.; Settled Land Act, 1925 (c. 18); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 3 (1); Rules in Lunacy, 1892, rr. 11, 16–20, 22, 23; Rules in Lunacy, 1925, rr. 10, 13–21.*

**526. Cannot make title—Lunatic's leasehold estate.]**—The Lord Chancellor cannot make a title to a lunatic's leasehold estate, but will direct the usual reference to the master if the purchaser states his willingness to accept the title.—*Re HALFORD* (1837), 1 Jur. 524, L. C.

**527. Jurisdiction to transfer funds—Without reference to lunacy commissioners.]**—*Re COBB* (1844), 2 L. T. O. S. 305, L. C.

**528. Jurisdiction to apply lunatic's property—**

#### PART VI. SECT. 1, SUB-SECT. 1.

**528 i. Jurisdiction to apply lunatic's property—For maintenance of lunatic—Without directing inquiry—Where property small.]**—Where the sum is of small amount, the ct. will decide, without putting the estate to the

expense of a reference to the master, whether the application of money sought for is for the benefit of the lunatic.—*Re RUTLEDGE, Ex p. BARNWALL* (1827), 1 Mol. 4.—*IR.*

**d. Jurisdiction to dissolve partnership.]**—The ct. has not jurisdiction

For maintenance of lunatic—Without directing inquiry—Where property small.]—The power given to the Lord Chancellor, by Lunacy Regulation Act, 1862 (c. 86), s. 12, extended by Lunacy Regulation Amendment Act, 1882 (c. 82), s. 3, to make an order for the application of the property of a person of unsound mind for his maintenance or benefit, when the property is below a specified amount, without directing any inquiry under a commission of lunacy, ought not, even if the jurisdiction extends in cases in which the alleged lunatic appears & denies unsoundness of mind, to be exercised in such cases.—*Re LEES* (1884), 26 Ch. D. 496; 53 L. J. Ch. 1022; 50 L. T. 489; 32 W. R. 1005, C. A.

*See, generally, Part IX., Sect. 2.*

**529. ——— Effect of Lunacy Act, 1890 (c. 5), s. 299.]**—Above sect., which enables a justice to order the application to the expenses of maintenance of a lunatic chargeable to any union or local authority of any property of the lunatic more than sufficient to maintain his family, if any,

under Lunacy Statute, No. 309, s. 164, to dissolve a partnership upon an application on behalf of a lunatic partner, but only upon the application of the other partners.—*Re ANDERSON* (1878), 4 V. L. R. (Eq.) 103.—*AUS.*

**e. Jurisdiction to order realisation**

does not affect the jurisdiction of the Ct. in Lunacy as to the application of the lunatic's property.

A man who was taken in charge as a wandering lunatic, & placed in a pauper lunatic asylum, had in his possession a sum of about £337. His only other property was a £10 share in a co-operative society & some furniture of small value. He had carried on business as a market gardener. He had not been found lunatic by inquisition. He was sixty-four years of age & his wife was sixty. He had a daughter aged twenty, who lived with her mother, & seven grown-up sons, who did not contribute to their mother's support:—*Held*: the discretion of the ct. as to the application of the lunatic's property would be properly exercised by allowing out of the fund, the capital being used for the purpose, the sum of £26 a year to the guardians as the cost of his maintenance in the asylum, & the sum of £25 a year to the wife, & an order was made accordingly. *Semble*: after the making of the order the lunatic would no longer be in the position of a pauper lunatic.—*Re TYE*, [1900] 1 Ch. 249; 69 L. J. Ch. 153; 81 L. T. 743; 48 W. R. 276; 44 Sol. Jo. 175, C. A.

*Annotation*:—*Reid*. Gloucester Union Grdns. v. Gloucester Industrial Co-op. Soc. (1907), 96 L. T. 168.

**530. Chancery jurisdiction—Exercise in aid of lunacy jurisdiction.]**—The letter of the Lord Chancellor requesting the judges of the Ct. of Appeal sitting in Lunacy to act as additional judges of the Ch. Div. is not limited to petitions under the Trustee Acts, but applies to all applications in Lunacy which require also an exercise of the jurisdiction of the Ch. Div.—*Re PLATT* (1887), 36 Ch. D. 410; 57 L. J. Ch. 152; 57 L. T. 857; 36 W. R. 273, L. JJ.

*Annotations*:—*Apld.* *Re Blake* (1895), 72 L. T. 280. *Reid.* *Re Farnham* (No. 2), [1896] 1 Ch. 836.

**531. ———.]**—*Re BARBER*, No. 15, *ante*.

**532. ——— Costs of petition against Parliamentary bill.]**—*Re BLAKE*, No. 1215, *post*.

**533. ——— Transfer of funds in Chancery Court.]**—Where part of the lunatic's property consisted of a fund paid into ct., in the Ch. Div., by trustees under Trustee Relief Act, the ct. sitting in lunacy & acting also under the Lord Chancellor's request as judges of the Ch. Div., made an order on a petition entitled in lunacy in the Ch. Div., & in the matter of Trustee Relief Act, for transfer of the funds to the account of the lunatic.—*Re TATE* (1882), 20 Ch. D. 135; 47 L. T. 2, L. JJ.

**534. ———.]**—*Re ARMFIELD* (1889), 88 L. T. Jo. 97, L. JJ.

**535. Conflict of jurisdiction with other courts—Action in county court—Claim by medical man for expenses of examination.]**—Lunacy Regulation Act, 1862 (c. 86), s. 11, in substance provides that it shall be lawful for the Lord Chancellor to order the costs, charges, & expenses of & incidental to the presentation of a petition for a commission in the nature of a writ *de lunatico inquirendo*, or for any order of inquiry under the Lunacy Regulation Act, 1853 (c. 70), & to the prosecution of any inquiry on such commission or order, to be paid either by the party who has presented the peti-

tion, or by the party opposing it, or out of the estate of the alleged lunatic, or partly in one way & partly in another; & that such order shall have the effect of an order for the payment of money made by the Ct. of Ch.

An inquiry having been ordered under Lunacy Regulation Acts whether or not deft. was of unsound mind, pltf., a medical man, was employed by deft.'s solr. to examine deft., for the purpose of giving evidence of his sanity at the inquiry. Pltf. accordingly did so, & attended & gave evidence at the inquiry, but notwithstanding such evidence deft. was found to be a lunatic. Pltf. subsequently brought an action in the county ct. against deft. for his charges in respect of the services so rendered by him, but was nonsuited on the ground that he could not recover such charges without an order under the above sect.:—*Held*: the sect. did not take away or affect pltf.'s right of action, assuming the action to be in other respects maintainable, & therefore that the nonsuit was wrong & there must be a new trial.

If it be shown that deft. B. was a lunatic when pltf. was employed, then I think that in order to succeed pltf. must show that his employment was a necessary (LORD ESHER, M.R.).—*BROCKWELL v. BULLOCK* (1889), 22 Q. B. D. 567; 58 L. J. Q. B. 289; 53 J. P. 405; 37 W. R. 455; 5 T. L. R. 362, C. A.

*Annotations*:—*Consd.* *Re Rhodes*, *Rhodes v. Rhodes* (1890), 44 Ch. D. 94; *Re Farnham* (No. 2), [1896] 1 Ch. 836; *Re Clarke*, [1898] 1 Ch. 336. *Reid.* *Re Watson*, *Stamford Union v. Bartlett*, [1898] 1 Ch. 72; *Re J.*, [1909] 1 Ch. 574.

**Jurisdiction of Chancery Court.]**—See Part V., *ante*.

**Jurisdiction of Bankruptcy Court.]**—See BANKRUPTCY, Vol. IV., p. 30, Nos. 243–246, 250.

**Jurisdiction to refuse commission.]**—See Part VII., Sect. 2, sub-sect. 2, *post*.

**Jurisdiction to appoint new trustees & make vesting orders.]**—See Part IX., *post*.

**Appeals from judge in lunacy.]**—See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 26 (c).

#### SUB-SECT. 2.—PRINCIPLES GOVERNING EXERCISE OF JURISDICTION.

**536. Maintenance of lunatic to be insured.]**—

(1) *Qu.*: whether Geo. 2, c. 10, extends to lunatics at large, or confined to such of whom the custody has been granted under the Great Seal.

(2) Where one declared a lunatic at Hamburg, & a curator appointed there, the Lord Chancellor ordered both the lunatic & the curator to join in the conveyance.

(3) In cases of lunacy, the first care of the ct. is the maintenance of the lunatic; & after that, it is a rule never departed from, not to vary or change the property of the lunatic, so as to affect any alteration as to the succession of it (LORD HARDWICKE, C.).—*Ex p. ANNANDALE* (MAR-CHIONESS) (1749), Amb. 80; 27 E. R. 50, L. C.

*Annotations*:—*As to* (1) *Reid.* *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15. *As to* (3) *Consd.* *Oxenden v. Compton* (1793), 2 Ves. 69; *A.-G. v. Ailesbury* (1887), 12 App. Cas. 672.

*of personal estate.]*—The ct. may under Lunacy Act, 1890, s. 130, when giving orders in the respect of the management of a lunatic's estate, direct the Victorian Committee to realise the personal estate & remit the proceeds to the committee of the lunatic's residence & domicile.—*Re DICKSON* (1899), 24 V. L. R. 818.—AUS.

**f. Jurisdiction exercisable in chambers.]**—A judge in chambers granted an

application for a commission *de lunatico inquirendo*; the orders of June, 1853, giving to him authority to act in such a matter.—*Re STUART* (1853), 4 Gr. 44.—CAN.

**g. Commencement of jurisdiction.]**—The ct. has no jurisdiction over lunatics or their estates or their statutory committee, until an order declaring insanity had been made.—*Re MONTGOMERY ESTATE* (1912), 23

O. W. R. 342; 4 O. W. N. 308; 6 D. L. R. 912.—CAN.

**h. Termination of jurisdiction—Death of lunatic.]**—The jurisdiction in lunacy terminates with the life of the person found a lunatic, & no order can be made afterwards, except orders incidental to the authority to make the receiver account & take the fund into safe custody.—*Re BARRY* (1828), 1 Mol. 414.—IR.



*Sect. 1.—The judge in lunacy: Sub-sect. 2. Sects. 2 & 3. Part VII. Sects. 1 & 2: Sub-sect. 1, A. & B.]*

**537. Dealings with lunatic's property—Lunatic's benefit first consideration.]**—Timber being felled on a lunatic's estate by the committee, by order of the ct., the produce is personal estate of the lunatic. Bill by the heir at law for the money, dismissed.

The general rule is, that what is done be for the benefit of the lunatic; but this is not to be pursued by unnecessary alterations; the order being made & in full force the persons entitled after the lunatic must take it as they find it & have no equity between them (LORD LOUGHBOROUGH, C.). —OXENDEN v. COMPTON (LORD) (1793), 4 Bro. C. C. 231; 2 Ves. 69; 29 E. R. 868, L. C.; *subsequent proceedings, sub nom.* COMPTON (LORD) v. OXENDEN, 4 Bro. C. C. 397, L. C.

*Annotations:—Appld.* Compton v. Oxenden (1793), 2 Ves. 261. *Distd.* Re Leeming (1861), 3 L. T. 686. *Consd.* A.-G. v. Ailesbury (1887), 12 App. Cas. 672. *Refd.* Re Smith (1874), 10 Ch. App. 79; Re Freer, Freer v. Freer (1882), 22 Ch. D. 622; Re Pickard, Turner v. Nicholson (1885), 53 L. T. 293; Re Sefton (1898), 78 L. T. 765; Re Gist, [1904] 1 Ch. 398. *Mentd.* Cooke v. Dealey (1855), 22 Beav. 196; Dyer v. Dyer (1865), 34 Beav. 504; Steed v. Preece (1874), L. R. 18 Eq. 192.

**538. ———.]**—A lunatic was tenant for life of certain real estates, including the advowson of a rectory. A lease of this property had been granted by order of the ct. for ninety-nine years, if the lunatic should so long live. This lease had become vested in a person who was also first tenant in tail in remainder expectant on the death of the lunatic without issue male. The lunatic was over eighty years of age, & had never had any issue. The first tenant in tail in remainder wishing to sell the next presentation to the rectory presented a petition praying the ct., as protector of the settlement, to consent to the barring of the entail of the advowson:—*Held*: the ct. ought not to interfere, as the application was not made for the benefit of the lunatic's estate.—*Re THARP* (1876), 3 Ch. D. 59; *sub nom.* *Re THORP*, 35 L. T. 293, L. JJ.

**539. ———.]**—(1) The principles on which the ct. acts in dealing with the property of lunatics under its care are not open to question. The leading principle, the paramount consideration, is the interest of the lunatic (LORD MACNAGHTEN).

(2) Consistently with that principle it is settled that in the ordinary course of managing a lunatic's estate, the ct. pays no regard to the interests or expectations of those who may come after, but it is equally well settled that in matters outside the ordinary course of management, it is the duty of the ct. so far as may be possible not to alter the character of the lunatic's property, or to interfere with any rights of succession (LORD MACNAGHTEN). —A.-G. v. AILESBUURY (MARQUIS) (1887), 12 App. Cas. 672; 57 L. J. Q. B. 83; 58 L. T. 192; 36 W. R. 737, H. L.

*Annotations:—As to (1) Appld.* Re Gist, [1904] 1 Ch. 398. *As to (2) Refd.* Re Alston, Sinclair v. Willes, [1917] 2 Ch. 226. *Generally, Refd.* Re Sefton (1898), 78 L. T. 765. *Mentd.* Re Cleveland's S. E., [1893] 3 Ch. 244; A.-G. v. Dodd, [1894] 2 Q. B. 150.

**540. ———.]**—In exercising the power given to the judge by Lunacy Act, 1890 (c. 5), s. 118 to charge monies expended or to be expended under his order for the permanent improvement of the property of a lunatic upon the improved property, the judge may take into consideration, not only the benefit of the lunatic

personally, but also what is fair & right as between his real & personal estates.

Regard ought also to be had to the nature & extent of the estate & to the difficulty in drawing a clear line between ordinary repairs & permanent improvements.

The principle on which the ct. acts in dealing with the property of lunatics under its care is very clearly stated by LORD MACNAGHTEN in A.-G. v. Marquis of Ailesbury, No. 539, *ante*, where he said: "The leading principle, the paramount consideration, is the interest of the lunatic" (STIRLING, L.J.).—*Re GIST*, [1904] 1 Ch. 398; 73 L. J. Ch. 251; 90 L. T. 35; 52 W. R. 422, L. JJ. *Annotations:—Refd.* Re Crozier, Cooper v. Thorneycroft (1906), 50 Sol. Jo. 206. *Mentd.* Tofts v. Pearl Life Asso. (1913), 110 L. T. 190.

**541. ———.]**—Property not to be changed—So as to affect succession.]—*Ex p.* ANNANDALE (MARCHIONESS), No. 536, *ante*.

**542. ———.]**—(1) Lord Chancellor may make an order in lunatic's affairs after the death of the lunatic. Mtge. on his estate paid off, & the mtge. term ordered to be assigned to attend the inheritance & not in trust for the next of kin.

It was said to be the general rule that the ct. will not alter the lunatic's property to the prejudice of his successor, rightly understood. It is true that the ct. will not buy or sell land for him; but in the management of the estate the governing principle is the interest of the lunatic (LORD APSLEY, C.).

The great principle upon which I have always conceived the ct. to act, is the immediate care of the lunatic. In Morrison's case, Lord S. was indebted to the lunatic in £1,000 by bonds in England; the committee brought an action against Lord S. in Scotland, but afterwards prayed the direction of the ct., & its assistance, on some doubts made in Scotland as to the right of suing. LORD HARDWICKE made no hesitation as to the order; but, on the ground, that it was for the benefit of the lunatic, without regard to the succession; for the rights of the succession were altered by it.

In Lord Annandale's case, there was a motion not reported by Vesey; the Scotch & the English next of kin opposing each other, LORD HARDWICKE referred it to the master, to inquire whether it was for the benefit of the trust, the money being English trust money, not whether it was for the benefit of the next of kin, nor whether for the benefit of the lunatic.

Upon these cases, it strikes me that the ct. alters the succession to the personal estate, without regard to the interest of the next of kin, if the interest of the lunatic requires it.

If so, why may not the personal estate be taken from the next of kin, if the immediate interest of the lunatic requires it, to favour the heir at law; repairs may be made, new buildings, such as barns: if so why not restore the estate to the condition in which it was, by paying off incumbrances? (LORD DE GREY, C.J.).

(2) When a person is found a lunatic, the King alone can grant the custody of the lunatic by sign manual & therefore to save repeated applications, there always is a sign manual to the Chancellor on his coming into office (LORD APSLEY, C.). —*Ex p.* GRIMSTONE (1772), Amb. 706; 4 Bro. C. C. 239, n.; 27 E. R. 458, L. C.

*Annotations:—As to (1) Consd.* *Ex p.* Bromfield (1792), 1

#### PART VI. SECT. 1, SUB-SECT. 2.

**5371. Dealings with lunatic's property—Lunatic's benefit first consideration.]**—The ct. has, under Lunacy Act,

1914 (c. 68), s. 12, wide powers for the management & administration of the estate of a lunatic or person declared incompetent under sect. 37, "for the maintenance or benefit of the lunatic

or of his family"; & these words ought to be construed liberally.—*Re D.* (1917), 40 O. L. R. 365; 39 D. L. R. 368.—CAN.

Ves. 453. *Appld.* *Compton v. Oxenden* (1793), 2 Ves. 261. *Expld.* *Oxenden v. Compton* (1793), 2 Ves. 69. *Consd.* *A.-G. v. Ailesbury* (1887), 12 App. Cas. 672. *Refd.* *Re Sefton* (1898), 78 L. T. 765; *Re Gist*, [1904] 1 Ch. 398.

543. ———.]—*A.-G. v. AILESBUURY* (MARQUIS), No. 539, *ante*.

*See, also*, Parts IX. & X., *post*.

## SECT. 2.—THE MASTERS IN LUNACY.

*See* Lunacy Act, 1890 (c. 5), ss. 111 (1), 112, 114; Lunacy Act, 1891 (c. 65), ss. 26 (2), 27 (1); Lunacy Act, 1908 (c. 47), ss. 1, 3; Lunacy Act, 1922 (c. 60), ss. 1 (1), (2), 2 (1), (8); Trustee Act, 1925 (c. 19), s. 54; Rules in Lunacy, 1892, r. 10; Rules in Lunacy, 1925, rr. 10, 21.

544. *Reference to master—To fix scale of maintenance—Lunatic not so found.*]—Reference to a master, to see what was proper to be allowed for the maintenance of a person of insane mind: no commission of lunacy having issued: ordered after consideration.—*MACHIN v. SALKELD* (1784), 2 Dick. 634; 2 Coop. temp. Cott. 198; 21 E. R. 418, L. C.

*Annotation:—Refd.* *Vane v. Vane* (1876), 45 L. J. Ch. 381.

545. ——— *Duty to report—Though lunatic deceased.*]—Where there is a reference to the master, in a case of lunacy, he shall make his report, although the lunatic be dead.—*Ex p. ARMSTRONG* (1791), 3 Bro. C. C. 238; 29 E. R. 511, L. C.

546. *Enforcement of orders—Reference to*

*judge.*]—*Re HOLMES* (1827), as reported in *Shelford on Lunatics*, 2nd ed. 875, L. C.

*Annotation:—Consd.* *Re B—*, [1891] 3 Ch. 274.

547. ———.]—A master who is holding an inquisition in lunacy has power to order a writ of attachment to issue against an alleged lunatic for the purpose of enforcing his attendance, but as a matter of convenience & discretion it is more desirable that he should refer such matters to the Lords Justices sitting in open ct.—*Re B—*, [1892] 1 Ch. 459; 66 L. T. 38; 40 W. R. 369; *sub nom.* *Re BATHE*, 61 L. J. Ch. 446, L. JJ.

548. ——— *Order of attachment.*]—*Re B—* (1892), No. 547, *ante*.

549. ——— *Attendance of lunatic for examination—Where no jury.*]—*Re B—* (1891), No. 689, *post*.

550. *Order for examination of lunatic—Pending inquiry into lunacy.*]—*Re B—* (1891), No. 689, *post*.

551. *Appointment of receiver of dividends—No transfer of securities into court.*]—*Re BROWNE*, No. 1290, *post*.

For particular powers, *see* Part X., *post*.

## SECT. 3.—THE COUNTY COURT.

*See* Lunacy Act, 1890 (c. 5), ss. 132, 300, 338 (4); C. C. R., 1903, O. L., r. 17.

552. *Jurisdiction to make vesting order—Stock standing in name of lunatic—Lunacy Act, 1890 (c. 5), s. 132.*]—*Re NOYCE*, No. 1244, *post*.

# Part VII.—Judicial Inquisitions as to Lunacy.

## SECT. 1.—WHEN REQUIRED.

*See, generally*, Lunacy Act, 1890 (c. 5), ss. 94, 95, 108 (2), 116; Lunacy Act, 1908 (c. 47), ss. 1, 2.

*Appointment of quasi-committee without inquisition.*]—*See* Part VIII., *post*.

## SECT. 2.—PROCEEDINGS BEFORE INQUIRY.

### SUB-SECT. 1.—THE PETITION.

#### A. In General.

*See, generally*, Lunacy Act, 1890 (c. 5), ss. 90, 96, & Rules in Lunacy, 1892, rr. 16, 18, 26, 28, 29.

553. *Two petitions presented—Priority of first presented.*]—Where two petitions are presented in

the same matter, the one first presented is entitled to be first opened.—*Re MALLORIE* (1849), 1 H. & Tw. 435; 47 E. R. 1481, L. C.

*Annotation:—Folld.* *Re Brookman* (1849), 1 H. & Tw. 435.

554. *Death of petitioner—Necessity for new petition—No further evidence required.*]—*Re MARTIN* (1897), Halsbury's Laws of England, Vol. XIX., p. 417.

#### B. Who may be Petitioner.

555. *Stranger.*]—A stranger may petition, but the next natural relation, if he desires it, & no objection exists, ought nevertheless to have the carriage of the commission (LORD ELDON, C.).—*Re BEDELL* (1809), 2 Coop. temp. Cott. 163; 47 E. R. 1104, L. C.

## PART VI. SECT. 2.

k. *Reference to master—Several objects—Estate small.*]—When the estate of a person who has been found a lunatic is small, the ct. will combine in one reference to the master all the usual inquiries, although the several objects are in England the subjects of separate references.—*Re DUGGAN* (1851), 2 Gr. 622.—CAN.

l. ——— *To appoint committee—Death of lunatic—No jurisdiction to inquire into duration of lunacy.*]—When the ct. by order declared a person to be a lunatic & directed a reference to a master to appoint a committee:—*Held*: the master had, upon the reference so directed, no jurisdiction, after the death of the lunatic, to inquire whether the lunatic had in fact, some years before his death, become of sound mind & capable of managing his own affairs.—*Re ROURKE* (1915), 8 O. W. N. 282; 9 O. W. N. 347; 33

O. L. R. 519.—CAN.

## PART VI. SECT. 3.

m. *No jurisdiction to appoint next friend.*]—A county ct. judge has no jurisdiction to appoint a next friend to act on behalf of a person of unsound mind not so found.—*PALMER v. M'NAMEE* (1910), 44 I. L. T. 112.—IR.

n. *Compulsory detention in asylum—Not sufficient to give county court jurisdiction.*]—*Re R.* (1912), 46 I. L. T. 220.—IR.

## PART VII. SECT. 2, SUB-SECT. 1.—A.

o. *Renewal.*]—An application for a commission when renewed should be disposed of before the same judge.—*Re MILNE* (circa 1858), 1 Ch. Ch. 194.—CAN.

p. *Signature of petitioner.*]—*Held*: there was no substantial distinction between the petition of A. by her

guardian B., & that of B. as guardian of A.—*McNIEL v. McNIEL* (1859), 4 N. S. R. (Coch.) 32.—CAN.

q. *Insufficient evidence—Whether petition dismissed.*]—An application was made by petition to declare R. a lunatic, & petitioner, failing to produce sufficient medical testimony, asked for an order dismissing the petition. The ct. declined to make such order, but made an order declaring that the ct. did not see fit to make any order on the application.—*Re RANDALL* (1880), 8 P. R. 202.—CAN.

r. *Form of petition.*]—*Re BULGER* (1911), 19 W. L. R. 573; 1 W. W. R. 248; 21 Man. L. R. 702.—CAN.

t. ———.]—*Re GEORGE* (1912), 22 W. L. R. 885; 8 D. L. R. 731.—CAN.

## PART VII. SECT. 2, SUB-SECT. 1.—B.

a. *General rule—Nearest relations.*]—A stranger may present a petition: so might the A.-G.; but when



*Sect. 2.—Proceedings before inquiry: Sub-sect. 1, B., C., D. & E.; sub-sect. 2, A., B. & C. (a).]*

**556. — Relative opposing petition.]—**Commission of Lunacy in a proper case granted upon the application of a stranger; & without regard to his motive: the lunatic being a natural child; & his mother opposing it.—*Ex p. OGLE* (1808), 15 Ves. 112; 33 E. R. 697, L. C.

**557. — Creditor—Family not coming forward.]—**The family of the alleged lunatic not coming forward, the commission may very properly issue on the petition of his creditors (LORD ELDON, C.).—*Re BELL* (1809), 2 Coop. temp. Cott. 163; 47 E. R. 1104, L. C.

**558. — Circumstances warranting interference.]—**This ct. will, on the application of a stranger, issue a commission of lunacy, where the particular circumstances of the case are such as to warrant its interference for the protection of the alleged lunatic's person or property.—*Re* — (1854), 23 L. T. O. S. 123, L. C.

#### C. Service of Petition.

See Lunacy Act, 1890 (c. 5), s. 90 (2); Lunacy Rules, 1892, r. 28.

**559. Substituted service—On solicitor of lunatic—Alleged lunatic unable to be found—Affidavit of solicitor.]—***Re* — (1844), 3 L. T. O. S. 237, L. C.

#### D. Service of Order on Petition.

See Lunacy Act, 1890 (c. 5), s. 96; Lunacy Rules, 1892, rr. 28, 29.

**560. Who must be served—Husband of alleged lunatic—Petition by nephew without husband's consent.]—**The alleged lunatic is a *feme coverte*, & this is a petition for a commission of lunacy by her nephew, & the husband does not concur. Notice of executing the commission must be given to the husband (LORD ELDON, C.).—*Re REAN* (1809), 2 Coop. temp. Cott. 163; 47 E. R. 1104, L. C.

**561. — Creditor.]—**Before an order can be duly made for issuing the commission *de lunatico inquirendo*, a creditor or other person interested in the supposed lunatic's estate, lodging a *caveat*, must have proper notice (LORD ELDON, C.).—*Re BUSHNELL* (1821), 2 Coop. temp. Cott. 163; 47 E. R. 1104, L. C.

**562. — Person interested in estate.]—***Re BUSHNELL*, No. 561, *ante*.

**563. — The alleged lunatic.]—**In its nature a lunacy inquisition is an *ex parte* proceeding, & where no *caveat* has been entered on his

the petition is not by the nearest relations, the ct. looks at it with particular jealousy, for it implies that the persons who ought to protect him, neglect their duty.—*Ex p. PERSSE* (1828), 1 Mol. 219.—IR.

**b. Stranger—Creditor.]—**A commission in lunacy is not a method for creditors to procure the administration of estates; & therefore where a creditor petitioned for an inquiry as to the lunacy of his debtor, the ct. refused the application.—*Re BURNS* (1876), 2 V. L. R. (Eq.) 136.—AUS.

#### PART VII. SECT. 2, SUB-SECT. 1.—C.

**c. Substituted service — On master.]—**The effect of New South Wales Lunacy Act, 1898, s. 106 (2), is that where personal service of a petition for a declaration of lunacy cannot be effected or is inexpedient, substituted service may be effected, either in manner prescribed by the Rules of Ct. or, in special circumstances, as may be ordered by the ct., & when such circumstances exist service on the

behalf, notice to the supposed lunatic is not in strictness necessary (LORD ELDON, C.).—*Re BRAITHWAITE* (1826), 2 Coop. temp. Cott. 164; 47 E. R. 1104, L. C.

**564. — Order dispensing with presence of alleged lunatic—Step-father.]—**(1) Where an inquiry was directed concerning the lunacy of an alleged lunatic resident abroad, & whose presence was dispensed with, service of the order to that effect was directed to be made upon her step-father, with whom she was living, by registered letter.

(2) The question as to whether or not next of kin shall have liberty to attend the proceedings upon such an inquiry is a matter of general practice, & is therefore left to the discretion of the master.—*Re LANWARNE* (1882), 46 L. T. 668; 30 W. R. 759, L. JJ.

**565. Mode of service—Registered post.]—***Re LANWARNE*, No. 564, *ante*.

#### E. Costs.

See Part XII., Sect. 3, *post*.

#### SUB-SECT. 2.—GRANT OR REFUSAL OF PETITION.

##### A. Discretion of Court.

**566. General rule.]—**(1) Commission of lunacy the subject of discretion; regulated solely by the benefit of the lunatic, with reference to the care of his person & property: not of course, therefore upon the mere fact of lunacy.

(2) The nearest relations, though opposing a commission of lunacy, shall have the carriage of it, if granted; unless some reason to the contrary.—*Ex p. TOMLINSON*, *Ex p. BROADHURST* (1812), 1 Ves. & B. 57; 35 E. R. 22, L. C.

**567. —.]—**Although the evidence of unsoundness of mind be *prima facie* satisfactory, yet the commission does not always issue of course. There are several cases in which the petition must be set down for hearing; as where the supposed lunatic being married, the husband, or the wife, does not concur in the petition, or the party applying is not a relation, or a *caveat* has been lodged with the Secretary of Lunatics (LORD ELDON, C.).—*Re TURNER* (1823), 2 Coop. temp. Cott. 162; 47 E. R. 1104, L. C.

**568. Exercise of discretion—Benefit of lunatic—Protection of his person & property.]—***Ex p. TOMLINSON*, *Ex p. BROADHURST*, No. 566, *ante*.

**569. — — —.]—**(1) In determining whether it is proper that a commission of lunacy

lunatic, he must be served with notice of the application, & any counsel, or other person he may desire to see in relation to the matter, must be allowed access to him.—*Re MILLER* (circa 1860), 1 Ch. Ch. 215.—CAN.

**g. —.]—**An application by petition for a declaration of lunacy was refused where there was no evidence that it had been served upon the supposed lunatic, nor that service had been dispensed with.—*Re BULGER* (1911), 19 W. L. R. 573; 1 W. W. R. 248; 21 Man. L. R. 702.—CAN.

#### PART VII. SECT. 2, SUB-SECT. 2.—A.

**566 i. General rule.]—**On a petition for a commission of lunacy the Lord Chancellor requires all the facts & evidence to be laid before him & a case to be made amounting at least to a probability of insanity. The mere issuing a commission may produce consequences highly detrimental & it is not to issue without great circumspection.—*Ex p. PERSSE* (1828), 1 Mol. 219.—IR.

**f. Necessity for.]—**Before granting an order declaring a person a

should issue, the ct. is governed solely by the consideration of what is necessary for the protection of the person & property of the party, & has no regard to the possible result of the commission upon the validity of his antecedent acts, or to the motives which have actuated the proceeding.

(2) Distinction between lunacy with lucid intervals, & a state of sound mind subject to occasional unsoundness arising from accidental & temporary causes.—*Re J. B.* (1836), 1 My. & Cr. 538 ; 40 E. R. 482, L. C.

*Annotation* :—*As to* (1) *Distd.* *Re Whitaker* (1839), 8 L. J. Ch. 313.

570. — Application not by nearest relative.]—*Re TURNER*, No. 567, *ante*.

571. — Effect upon validity of antecedent acts.]—*Re J. B.*, No. 569, *ante*.

572. — Motives for petition.]—*Re J. B.*, No. 569, *ante*.

573. — Allen—Resident here for short time—Or for particular purpose.]—A commission of lunacy may issue against an alien.

The domicil of the party against whom a commission of lunacy is applied for, is not material to the question of jurisdiction, though it may be material to the question of discretion, if, for instance, the party has come here for a short time or for a particular purpose. If an alien, who is resident, & possessed of property in this country, become insane, the Lord Chancellor has jurisdiction to issue a commission of lunacy with a view to the protection of his person & property.—*Re BARIATINSKI (PRINCESS)* (1843), 1 Ph. 375 ; 13 L. J. Ch. 69 ; 2 L. T. O. S. 265 ; 8 Jur. 157 ; 41 E. R. 674, L. C. ; *subsequent proceedings* (1844), 1 Ph. 442, L. C.

*Annotation* :—*Re B.*—, [1891] 3 Ch. 274.

— Degree of insanity necessary.]—See Subsect. 2, B., *post*.

#### B. Degree of Insanity Necessary.

See, now, Lunacy Act, 1890 (c. 5), s. 98.

574. Weak understanding & imbecile mind.]—In this case a commission was refused in respect of a person of merely weak understanding & imbecile mind.

Lunacy is a distemper occasioned either by disorders or accident ; & to one of these two cases were commissions at first confined ; but in some time this part of the prerogative, this paternal care, was enlarged & extended to one, who is *non compos mentis* ; but here it stopped, & this at least, this ct. insists, must be found to entitle any one to a commission : & therefore though a jury finds, that one is incapable of managing his affairs, yet such a finding is not sufficient, but they must expressly find him to be of unsound mind. In the present case I allow, Lord Donegal is of very weak understanding & of no resolution of mind ; but that is not sufficient for me whereon to ground a commission. If I was to grant any, it must be that of idiocy : for no time is mentioned, when he was of better understanding. Beside the petition is in behalf of infants, whose remainder might by

this means be defeated : but this ct. will take care, that an infant shall never be hurt by any proposal that may be made in his name. It is objected, that there must be a very large personal estate at death of Lord Donegal, & if the commission is not granted, he may dispose of it by will ; but fraud & imposition upon weakness is a sufficient ground to set aside a will of real, much more of personal estate ; & yet such weakness is not sufficient to ground a commission (LORD HARDWICKE, C.).—*DONEGAL'S (LORD) CASE* (1751), 2 Ves. Sen. 408 ; 28 E. R. 260, L. C.

*Annotation* :—*Re B.* *Blachford v. Christian* (1829), 1 Knapp, 73.

575. Incapable of managing own affairs.]—To support a commission in nature of a writ *de lunatico inquirendo* it is sufficient, that the party is incapable of managing his own affairs.—*GIBSON v. JEYES* (1801), 6 Ves. 266 ; 31 E. R. 1044, L. C.

*Annotations* :—*Mentd.* *Morse v. Royal* (1806), 12 Ves. 355 ; *Cane v. Allon* (1814), 2 Dow. 289 ; *Adamson v. Evitt* (1830), 9 L. J. O. S. Ch. 1 ; *Hunter v. Atkins* (1834), *Coop. temp. Brough*, 464 ; *Dent v. Bennett* (1839), 4 My. & Cr. 269 ; *Edwards v. Meyrick* (1842), 2 Hare, 60 ; *Cooke v. Lamotte* (1851), 15 Beav. 234 ; *Hoghton v. Hoghton* (1852), 15 Beav. 278 ; *Holman v. Loynes* (1854), 4 De G. M. & G. 270 ; *Barnard v. Hunter* (1856), 28 L. T. O. S. 152 ; *Savery v. King* (1856), 5 H. L. Cas. 627 ; *Waters v. Thorn* (1856), 22 Beav. 547 ; *Johnson v. Fosmeyer* (1858), 3 De G. & J. 13 ; *Gresley v. Mousley* (1859), 4 De G. & J. 78 ; *Smith v. Kay* (1859), 7 H. L. Cas. 750 ; *King v. Anderson* (1874), 23 W. R. 196 ; *Pisani v. A.-G. for Gibraltar* (1874), L. R. 5 P. C. 516 ; *Widgery v. Tepper* (1877), 38 L. T. 434 ; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218 ; *Lovesy v. Smith* (1880), 49 L. J. Ch. 809 ; *Ward v. Sharp* (1884), 53 L. J. Ch. 313 ; *Plowright v. Lambert* (1885), 52 L. T. 646 ; *Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500 ; *Readdy v. Prendergast* (1886), 55 L. T. 767 ; *Liles v. Terry* (1895), 12 T. L. R. 26 ; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392 ; *Bischoff's Trustee v. Frank* (1903), 89 L. T. 188 ; *Moody v. Cox & Hatt*, [1917] 2 Ch. 71 ; *Re Rogerstone Brick & Stone Co.*, *Southall v. Wescomb*, [1919] 1 Ch. 110.

576. — Imbecility of mind to extent of incapacity.]—The commission of lunacy is not confined to strict insanity ; but is applied to cases of imbecility of mind, to the extent of incapacity, from any cause ; as disease, age, or habitual intoxication.—*RIDGEWAY v. DARWIN* (1802), 8 Ves. 65 ; 32 E. R. 275, L. C.

*Annotations* :—*Consd.* *Ex p. Cranmer* (1806), 12 Ves. 445 ; *Re Holmes* (1827), 4 Russ. 182. *Re B.* *Re Clarke*, [1898] 1 Ch. 336.

577. Delusion upon one point.]—*Re MITCHELL* (*circa* 1820), cited 3 L. T. O. S. at p. 485, L. C.

*Annotation* :—*Re B.* *Re Dyce Sombre* (1844), 3 L. T. O. S. 485.

578. Mind affected merely by age & infirmity.]—*Ex p. CRANMER*, No. 1, *ante*.

579. —.]—*Re WILSON*, No. 611, *post*.

#### C. Against Whom.

##### (a) In General.

580. Person found lunatic abroad—Property situate abroad—Resident in England—Accompanied by committee.]—A person, found a lunatic in Jamaica, where his property is situated, comes to England accompanied by one of his committee : a commission of lunacy ought to issue against him

572 i. *Exercise of discretion—Motives for petition.*]—Where a petition to have C. declared a lunatic was presented by one of his daughters, & it appeared that it was presented with a view to attack a disposition which C. had made of his estate in favour of another daughter, the petition was dismissed.—*Re CLARK* (1892), 14 P. R. 370.—CAN.

572 ii. —.]—A commission of lunacy refused, where the lunatic did not require the protection of the ct. either for himself or his property ; the

object of petitioner being to obtain a maintenance out of the estate.—*Re CLARE* (1846), 3 Jo. & Lat. 571.—IR.

h. — Application by Crown — After finding of sanity.]—When a commission issued, & the inquisition return found the person not to be of unsound mind, the Crown cannot, in right of the prerogative, issue a commission to try whether the party was of sufficient understanding to manage himself & his affairs.—*ROCHFORD v. ELY (LORD)* (1767), 1 Ridg. Parl. Rep. 524.—IR.

#### PART VII. SECT. 2, SUB-SECT. 2.—B.

575 i. *Incapable of managing own affairs.*]—The jurisdiction of the Chancellor to grant a commission in the nature of a writ *de lunatico inquirendo*, is not confined to cases of mere lunacy : the ct. will extend its protection where, from imbecility of mind, the party is incapable of managing his own affairs.—*Re MONAGHAN* (1846), 3 Jo. & Lat. 258.—IR.



*Sect. 2.—Proceedings before inquiry: Sub-sect. 2, C. (a), (b), (c) & (d), & D.; sub-sect. 3, A. & B.]*

here.—*Re HOUSTOUN* (1826), 1 Russ. 312; 38 E. R. 121.

*Annotation:—Refd. Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42.

**581. Criminal lunatic.]—**The Chancellor has jurisdiction to issue a commission *de lunatico* in respect of a criminal lunatic, notwithstanding the custody of such persons is within the absolute discretion of the Crown under Criminal Lunatics Act, 1800 (c. 94), for their property will still have to be administered in lunacy.—*Re PEARCE* (1843), 2 L. T. O. S. 114; 8 Jur. 89.

(b) *Infants.*

**582. Jurisdiction to grant.]—**HODSELL'S CASE (1743), cited in Amb. at p. 110; 27 E. R. 71.

**583. — Whether infant sufficiently protected in Chancery.]—***Re EDWARDS*, No. 494, ante.

**584. — Whether sane at time of marriage.]—**(1) Distinction between the jurisdiction of the Ct. of Ch. & that in Lunacy, under a special warrant from the Crown, usually intrusted to the Keeper of the Great Seal.

(2) Traverse of a verdict of unsound mind under a commission, being the right of the party, cannot be refused; & prevents the Crown's taking the custody, & consequently allowing the costs of the proceedings, however meritorious; but they were given out of a fund of the lunatic's, in ct., in a cause, on the principle, on which the ct. protects persons in a state of incapacity, though adult, & not objects of a commission; assigning guardians, etc. The costs of the traverse also, though not of course, allowed; the lunatic having been permitted herself to traverse after a personal examination.

(3) The Keeper of the Great Seal usually the person, to whom the care of lunatics is intrusted.

(4) The private examination for the purpose of a traverse of a verdict of Lunacy under a commission is merely to ascertain the wish of the party to exercise the right of traverse.

(5) Verdict of unsound mind equivalent to idiocy or lunacy but mere incapacity to manage his affairs will not alone support the commission. Incapacity to comprehend the most simple proposition of figures evidence of unsound mind: to be estimated with reference to age, situation, etc.

(6) Right of alienee of lunatic to traverse.

(7) Jurisdiction to direct inquiry as to the marriage of an infant; whether of sound mind at the time & whether for the infant's benefit that a commission should issue.—*SHERWOOD v. SANDERSON* (1815), 19 Ves. 280; 34 E. R. 521.

*Annotations:—As to (2) Refd. Re Bridge* (1841), Cr. & Ph. 338; *Nelson v. Duncombe* (1846), 9 Beav. 211; *Taylor v. Taylor* (1851), 3 Mac. & G. 426; *Re Loveday, Ex p. Loveday* (1852), 1 De G. M. & G. 275; *Vane v. Vane* (1876), 34 L. T. 613.

(c) *British Subject out of Jurisdiction.*

**585. Alleged lunatic ordered to be brought back.]—**Where a lunatic had been taken out of the jurisdiction, before the commission issued, an order

was made that she should be brought back to England.—*Re WYKEHAM* (1823), Turn. & R. 537; 37 E. R. 1207.

**586. —.]—**A person of unsound mind, resident in a foreign country, & who has property in this country, will be ordered to be brought here that a commission of lunacy may be issued.—*Re AUSTIN* (1844), 4 L. T. O. S. 109.

**587. —.]—**Upon petition for inquiry into the alleged lunacy of A., who was resident in Australia, but whose property was wholly situated in England, the ct. ordered an inquiry before a jury in Middlesex, & gave permission to the petitioners to take proper steps to bring him to England.—*Re SCOTT* (1874), 22 W. R. 748.

**588. Commission issued—Though no property in this country.]—**HODSELL'S CASE (1743), cited in Amb. at p. 110; 27 E. R. 71.

**589. —.]—***Ex p. SOUTHCOTE*, No. 658, post.

**590. — Foreign authorities refusing to permit removal.]—***Re AUSTIN* (1844), 4 L. T. O. S. 109.

(d) *Aliens.*

**591. Jurisdiction of court—Whether residence here essential.]—***Re BARIATINSKI (PRINCESS)*, No. 573, ante.

**592. — —.]—**A Portuguese gentleman whose domicile was in Portugal, whose property, with a very trifling exception, was in Portugal, & whose wife & only child were residing there, became lunatic in England, & had been so for some years. A petition was now presented by some relations in England, for an inquiry as to his state of mind. Proceedings in lunacy were at the same time taken in Portugal by his wife, & the Portuguese Ct. issued a request to the English Cts. to inquire into his state of mind. The wife applied here to have an inquiry as to the time when the lunacy commenced, it being desired by the Portuguese Ct. that such an inquiry should be made in England:—*Held*: (1) 25 & 26 Vict. c. 86, s. 3, does not take away the power of the ct. to direct such an inquiry where special circumstances render it desirable; (2) in the circumstances of the present case, such an inquiry ought not to be directed, as it was not required for any purpose of the proceedings in England, & the finding might affect other parties who could not effectually intervene in the inquiry, & yet would probably be treated in Portugal as concluded by it.—*Re SOTTOMAIOR* (1874), 9 Ch. App. 677, L. JJ.

*Annotations:—As to (1) Refd. Re Danby* (1885), 30 Ch. D. 320; *Re Burbidge*, [1902] 1 Ch. 426.

**593. — — Alien not resident here.]—***Re SOLTYKOFF (PRINCESS)*, [1898] W. N. 77, C. A.

**594. — — Alien temporarily resident here.]—**There is jurisdiction to direct an inquisition as to the lunacy of an alien domiciled abroad who is temporarily resident in this country, although all the property of the alleged lunatic, except such personal chattels & cash, if any, as he may have brought with him, is situate abroad.—*Re BURBIDGE*, [1902] 1 Ch. 426; 71 L. J. Ch. 271; 86 L. T. 331; 18 T. L. R. 347, C. A.

**595. — Amount of property within jurisdiction.]—***Re BARIATINSKI (PRINCESS)*, No. 573, ante.

PART VII. SECT. 2, SUB-SECT. 2.—  
C. (c).

**589 i. Commission issued.]—**Where an alleged lunatic is resident out of the jurisdiction of the ct. to which application is made for a declaration of lunacy, but is alleged to possess property in the jurisdiction the ct. has power, in a proper case, to make a declaration of lunacy, & to appoint a committee of the lunatic's estate in the jurisdiction.

*BULGER* (1911), 19 W. L. R. 573; 1 W. W. R. 248; 21 Man. L. R. 702.—CAN.

**589 ii. —.]—**A commission of lunacy ordered to be issued against a person absent in a foreign country, when it appeared, that he was declared a lunatic according to the law of that country.—*OLIVER v. OLIVER* (1834), 3 Ir. L. Rec. N. S. 14.—IR.

**k. Commission not issued — Luna-**

*tic confined in English asylum.]—*The Lord Chancellor of Ireland will not grant a commission *de lunatico inquirendo* when the personal attendance of the alleged lunatic is sought to be dispensed with, he being confined in a lunatic asylum in England under medical treatment, & the circumstance of all his property being situated in Ireland will not induce the ct. to grant the application.—*Re G*—(1850), 15 L. T. O. S. 98.—IR.

**596.** ——— **Of trifling amount.]** — *Re SOTTOMAIOR*, No. 592, *ante*.

**597.** ——— **]** — *Re SOLTYKOFF (PRINCESS)*, [1898] W. N. 77, C. A.

**598.** ——— **Only personal chattels & cash.]** — *Re BURBIDGE*, No. 594, *ante*.

**599.** ——— **Discretion—Inquiry not required for proceedings in England—Estoppel of parties unable to intervene.]** — *Re SOTTOMAIOR*, No. 592, *ante*.

**600.** **Joinder of foreign committee.]** — *Re SOLTYKOFF (PRINCESS)*, [1898] W. N. 77, C. A.

#### *D. To Whom.*

*See, generally*, Lunacy Act, 1890 (c. 5), ss. 92, 94, 95.

**601.** **Both Masters in Lunacy personally interested.]** — *Re BRAITHWAITE* (1823), Pope on Lunacy, 2nd ed. 49.

### SUB-SECT. 3.—CONDUCT OF PROCEEDINGS.

#### *A. In General.*

**602.** **Given to person most likely to bring out truth.]** — *Re GREEN* (1831), 2 Coop. temp. Cott. 163; 47 E. R. 1104, L. C.

**603.** ——— **]** — *Re WEBB*, No. 659, *post*.

**604.** ——— **]** — (1) On a contest for the carriage of a commission of lunacy, that party is selected who is most likely to bring out the whole truth; subject to which a preference is given to the nearest of kin.

(2) Applications by other parties for leave to attend the execution of the commission are in the discretion of the ct., & mere relations are not generally allowed to do so unless they have an interest.

(3) A suggestion that a party who applied for such leave on the ground of interest should, as the condition of its being granted, be concluded by the verdict, overruled. — *Re NESBITT* (1847), 2 Ph. 245; 41 E. R. 936, L. C.

*Annotation:* — *As to* (1) & (2) *Refd. Re Richards* (1852), 21 L. J. Ch. 739.

**605.** **Proximity of relationship—How far regarded—Where no objection exists.]** — *Re BEDELL*, No. 555, *ante*.

**606.** ——— **]** — *Ex p. TOMLINSON*, *Ex p. BROADHURST*, No. 566, *ante*.

**607.** ——— **]** — *Re WEBB*, No. 659, *post*.

**608.** ——— **]** — *Re NESBITT*, No. 604, *ante*.

**609.** **Refused to relatives—No communication between relatives & lunatic.]** — *Re CLEATOR* (1845), 5 L. T. O. S. 325, L. C.

**610.** ——— **Lunatic improperly treated by relatives.]** — Where the circumstances under which a lunatic has been kept by his relatives are such as to lead the Lord Chancellor to the conclusion that he has not been properly treated, a stranger who has intervened for his protection will be entrusted with the carriage of the petition. — *Re ANSTIE* (1849), 1 Mac. & G. 200; 1 H. & Tw. 313; 13 L. T. O. S. 133; 41 E. R. 1240, L. C.

**611.** ——— **Improper dealing with alleged lunatic's property.]** — The ct. is very reluctant at issuing commissions in the cases of persons whose minds have become affected merely by age & infirmity.

Petition presented by the son-in-law & daughter of the alleged lunatic, who applied for the carriage of the commission. The alleged lunatic was a person of considerable substance, & lately lived upon his own property. At the instance of his son-in-law he sold it, & went to reside with him. Part of the produce of the sale the son-in-law borrowed, on the security of a bill of sale of his household furniture, & the good will of a school,

which he, the son-in-law, had lately established:—*Held*: a commission ought to issue to protect, as well his person as his property, but the ct. refused to trust the carriage of the commission to petitioners. — *Re WILSON* (1852), 19 L. T. O. S. 357, L. C.

**612.** **Priority of presentation of petition—Gives primâ facie right—Though later petition presented by wife.]** — (1) The right to the carriage of a commission in lunacy belongs *primâ facie* to those who first present the petition.

Two petitions for a commission of lunacy were presented, one by the wife of the lunatic, the other by a nephew jointly with his wife, who was the daughter of the lunatic by a former marriage. The petition of the nephew & his wife was the earlier in date:—*Held*: a wife is not entitled to any preference over a child of the alleged lunatic as to the conduct of proceedings under a commission of lunacy, & it not being shown that there was any impropriety on the part of the nephew & daughter, or that the petition of the wife was preferable, the conduct of the proceedings ought to be given to the nephew & daughter as having presented the earlier petition.

(2) The fact that one of the earlier petitioners had accepted a power of attorney to act for the alleged lunatic, did not tend to deprive him of his *primâ facie* right. — *Re WOOD* (1859), 1 De G. F. & J. 142; 29 L. J. Ch. 54; 1 L. T. 119; 24 J. P. 100; 6 Jur. N. S. 113; 8 W. R. 70; 45 E. R. 313, L. JJ.

**613.** **Petitioner with power of attorney—To act for lunatic.]** — *Re WOOD*, No. 612, *ante*.

**614.** **Imposition of terms by court—On person having carriage.]** — The ct. is at liberty to impose any terms on the person having the carriage of the commission (LORD LYNTHURST, C.). — *Re WATTS* (1844), 4 L. T. O. S. 270, L. C.; *subsequent proceedings, sub nom. Re WATTS, Ex p. SNOOK* (1845), 1 Ph. 512, L. C.

#### *B. Contests between Relatives.*

**615.** **Wife & brother—Interest to carry lunacy further back.]** — In a competition between the brother & the wife of an alleged lunatic for the carriage of the commission, the Lord Chancellor gave a preference to the brother on the ground that, in the particular case, the wife had an interest in preventing the proof of the lunacy being carried back beyond a certain period. — *Re WHITTAKER* (1839), 4 My. & Cr. 441; 8 L. J. Ch. 313; 3 Jur. 693; 41 E. R. 170, L. C.

**616.** ——— **Onus on more remote to show cause.]** — The wife of the lunatic would have the carriage of the commission, unless some special circumstances are shown to render it proper to take it from her. . . . The onus is on the brother to show why the usual course should be departed from, & there being no objection made by affidavit, the wife, as the nearest relation, will have the carriage of the commission. The order will be made in both petitions, & the costs of the brother's petition must be reserved (LORD LYNTHURST, C.). — *Re MILNES* (1845), 6 L. T. O. S. 81, L. C.

**617.** **Wife & mother—Wife seeking to prove definite commencement of lunacy.]** — *Re MALLONI* (1849), 13 L. T. O. S. 133, L. C.

**618.** **Wife & child by former marriage—Child's petition presented earlier.]** — *Re WOOD*, No. 612, *ante*.

**619.** **Next of kin & distant relative—Next of kin unknown to alleged lunatics—& in poor circumstances.]** — *Re CLEATOR* (1845), 5 L. T. O. S. 325, L. C.



**Sect. 2.—Proceedings before inquiry: Sub-sects. 4, 5 & 6, A. & B. (a) & (b); sub-sects. 7 & 8.**  
**Sect. 3: Sub-sects. 1, 2 & 3.]**

**SUB-SECT. 4.—MEDICAL EXAMINATION.**

**620. Jurisdiction of court—To order alleged lunatic to be brought up—For medical examination.]—***Re BAGSTER (alias NEWTON) (undated), Shelford on Lunatics, 1st ed. pp. 656, 657, L. C.*

*Annotation:—Reid. Re B—, [1891] 3 Ch. 274.*

**621. Examination by court doctor.]—***Re WATTS (1844), 4 L. T. O. S. 270, L. C.; subsequent proceedings, sub nom. Re WATTS, Ex p. SNOOK (1845), 1 Ph. 512, L. C.*

**622. — For report to court.]—**The medical examination of an alleged lunatic, which the master has power to order under Lunacy Act, 1891 (c. 65), s. 26 (2), may be made by a medical practitioner appointed to report to the ct., or by one who will see the alleged lunatic in the interest of petitioner, & with a view to being called as a witness by him at the inquisition. In the former case the medical practitioner would have to make a report to the ct.; in the latter, he is not obliged to make any written report at all, & if he does make one, & send it to petitioner's solr., it is in the nature of a proof of the evidence that he is to give, & the alleged lunatic has no right to see it before the inquisition.—*Re B—, [1892] 3 Ch. 194; 67 L. T. 62; sub nom. Re BATHE (No. 2), 61 L. J. Ch. 487, L. J.J.; previous proceedings, sub nom. Re B—, [1892] 1 Ch. 459, L. J.J.*

**623. Examination by private doctor—Report not necessarily made.]—***Re B— (1892), No. 622, ante.*

**624. Report by private doctor—In nature of proof of petitioner's evidence.]—***Re B— (1892), No. 622, ante.*

**625. — Right of alleged lunatic to inspect.]—***(1892), No. 622, ante.*

**626. Disputes as to access by doctors—Two visitors in lunacy ordered to visit & report.]—**(1) A petition for an inquiry into the state of mind of an alleged lunatic having been presented, & disputes having arisen as to the terms under which access of medical witnesses should be allowed, the ct. made an order that two of the visitors in lunacy should see the alleged lunatic & report to the ct.

(2) The rule is not inflexible that an inquiry by a jury as to the state of mind of an alleged lunatic must take place near his place of residence, & there being reason to believe that a strong local feeling as to the proceedings existed in the neighbourhood where the alleged lunatic resided, the inquiry was directed to be held in London.

(3) When the medical witnesses for the alleged lunatic had seen her alone, it was held that they were not entitled to be present when the medical witnesses for petitioner saw her.—*Re — (1881), 18 Ch. D. 26; sub nom. Re X. Y. Z., 45 L. T. 97, L. J.J.*

*Annotation:—As to (1) Reid. Re B—, [1891] 3 Ch. 274.*

**627. Right of doctors for alleged lunatic to be present—At examination by doctors for petitioner—Doctors for alleged lunatic having seen lunatic alone.]—***Re — (1881), No. 626, ante.*

**PART VII. SECT. 2, SUB-SECT. 4.**

**622 i. Examination by court doctor—For report to court.]—**The Supreme Ct. has jurisdiction, under the Charter of Justice, to make an order, *in invitum* an alleged lunatic, that medical experts should examine the alleged lunatic & report to the ct. on his mental state & capacity.—*Re W. M. (1903), 3 S. R. N. S. W. 552; 20 N. S. W. W. N. 124.—AUS.*

**l. Duty of doctor.]—**Before giving a certificate under the Lunacy Statute, No. 309, s. 11, that any person is a lunatic, it is the duty of the medical practitioner to make a sufficient examination of such person, as well as to make inquiries.—*SMITH v. IFFLA (1881), 7 V. L. R. 435.—AUS.*

**m. Certificate — Not by keeper of asylum.]—**Certificates of lunacy should be given by medical men unconnected with private lunatic asylums.—*ANON.*

**628. Leave for friend of lunatic to be present—At examination by court doctor.]—***Re WOODCOCK (1844), 4 L. T. O. S. 149, L. C.*

**629. Inspection of reports by court doctors.]—**If the lunatic is dead, & appct. wants to see documents in the custody of the ct. in order to make good a claim to the lunatic's property such a purpose is *prima facie* sufficient to induce the ct. to allow inspection, even although the request is opposed by a rival litigant. The ct. would not under any circumstances make an order for the inspection of the reports confidentially made to the ct. by its own medical advisers, but with this exception the general rule is to allow inspection by any person claiming an interest in the property of the deceased lunatic or alleged lunatic & who can satisfy the ct. that he wants inspection for some reasonable & proper purpose.

Where an inquiry in lunacy was directed, but the alleged lunatic died before anything further was done, & the same issues were raised in a subsequent probate action a party to such action who claimed under the deceased was not allowed to inspect affidavits filed in the lunacy proceedings, inasmuch as appct. wanted inspection not to support her own case, but to enable her to ascertain what allegations of mental incapacity were intended to be made at the trial of the probate action, so that she might have an opportunity of rebutting them.—*Re STRACHAN, [1895] 1 Ch. 439; 64 L. J. Ch. 321; 72 L. T. 175; 60 J. P. 36; 43 W. R. 369; 11 T. L. R. 215; 12 R. 148, L. J.J.*

*Annotation:—Reid. Goldstone v. Williams, Deacon, [1899] 1 Ch. 47.*

**SUB-SECT. 5.—ACCESS TO ALLEGED LUNATIC.**

**630. Enforcement of order—By committal for contempt.]—***WENMAN'S (LORD) CASE (1721), 1 P. Wms. 701; 2 Eq. Cas. Abr. 584; 24 E. R. 578, L. C.*

**631. — Solicitor opposing access — For medical examination.]—***Re JAMES (1844), 4 L. T. O. S. 109, L. C.*

**632. When order made—Access by relatives—To oppose petition.]—***Re FLETCHER (1832), Shelford on Lunatics, 2nd ed. p. 125, L. C.*

*Annotation:—Consd. Re B—, [1891] 3 Ch. 274.*

**Access for purposes of medical examination.]—***See, also, Sub-sect. 4, ante.*

**SUB-SECT. 6.—PROVISIONAL PROTECTION OF ALLEGED LUNATIC'S PERSON OR ESTATE.**

**A. Protection of Person.**

**633. Alleged lunatic being taken to Scotland.]—***MARR'S (LADY) CASE (circa 1730), cited in Amb. at p. 82; 27 E. R. 51, L. C.*

*Annotation:—Reid. Ex p. Annandale (1749), 1 Amb. 80.*

**634. Alleged lunatic taken out of jurisdiction.]—***Re WYKEHAM, No. 585, ante.*

**635. Protection from confinement.]—***Re NAYLOR (1862), 1 New Rep. 173, L. J.J.*

*(1844), 6 I. Eq. R. 389.—IR.*

**PART VII. SECT. 2, SUB-SECT. 5.**

**n. General rule.]—**Before granting an order declaring a person a lunatic, he must be served with notice of the application & any counsel, or other person he may desire to see in relation to the matter, must be allowed access to him.—*Re MILLER (circa 1860), 1 Ch. Ch. 215.—CAN.*

*B. Protection of Estate.**(a) In General.*

**636. Rents ordered to be remitted to England—Property abroad.]—**MARR'S (LADY) CASE (*circa* 1730), cited in Amb. at p. 82; 27 E. R. 51, L. C.  
*Annotation:—*Reid. *Ex p.* Annandale (1749), Amb. 80.

**637. By provisional order.]—**Where the lunacy of a person is in question, the ct. will make a provisional order as to his effects, till the point of the lunacy is determined.—*Re* HELI (1748), 3 Atk. 635; 26 E. R. 1165, L. C.  
*Annotation:—*Reid. *Re* Cumming (1852), 1 De G. M. & G. 537.

**638. By injunction.]—***Re* KING (1827), Shelford on Lunatics, 2nd ed. p. 159, L. C.

**Appointment of interim receiver.]—**See Sub-sect. 6, B. (b), *post*.

*(b) Appointment of Interim Receiver.*

**639. Petition presented—But not served—Application ex parte.]—**Where a petition had been presented in lunacy for an inquisition but not served on the alleged lunatic, & the case was urgent, the ct., under the special circumstance, on an *ex p.* application appointed an *interim* receiver of the estate of the alleged lunatic.—*Re* POUNTAIN (1888), 37 Ch. D. 609; 57 L. J. Ch. 465; 59 L. T. 76, L. JJ.

*Annotations:—*Reid. *Re* Plenderleith, [1893] 3 Ch. 332; *Re* Clarke, [1898] 1 Ch. 336.

**640. — Immediate appointment till further order.]—**The judge in lunacy directed the appointment of a receiver & manager "till further order" of the estate & business of a person in respect of whom a petition in lunacy had been presented, with liberty to such receiver & manager to act at once pending the giving of security in the usual way.—*Re* A. G. (1909), 25 T. L. R. 673; 53 Sol. Jo. 615, L. J.

See also, Part VIII., *post*.

## SUB-SECT. 7.—INTERIM EXPENSES.

**641. Allowance to alleged lunatic—Out of his estate—To oppose inquiry.]—***Re* BAKER (1815), Shelford on Lunatics, 2nd ed. p. 159.

**642. — — — — —.]—***Re* NELSON (1845), 4 L. T. O. S. 409, L. C.

**643. — — — — —.]—***Re* NAYLOR (1862), 1 New Rep. 173, L. JJ.

**644. — — — — —.]—**Where an inquiry is pending as to the unsoundness of mind of an alleged lunatic, the Lords Justices have jurisdiction to sanction the payment out of the property of the alleged lunatic of an allowance for his necessary household expenses & for his legal expenses of the inquiry.—*Re* BULLOCK (1886), 55 L. T. 722; 35 W. R. 109, L. JJ.

**645. — — — Personal or household expenses.]—***Re* NAYLOR (1862), 1 New Rep. 173, L. JJ.

**646. — — — — —.]—***Re* BULLOCK, No. 644, *ante*.

## SUB-SECT. 8.—PRODUCTION OF DOCUMENTS.

See DISCOVERY, Vol. XVIII., p. 62, Nos. 187, 188.

**647. Appeal from Judge in Lunacy—Lies to Court of Appeal.]—***Re* CATHCART, [1902] W. N. 80, C. A.

PART VII. SECT. 2, SUB-SECT. 6.—  
B. (b).

*a. Whether notice necessary.]—*By the

law of Scotland, an *interim curator bonis* may be appointed by the Ct. of Session, without notice to the party affected by the appointment, & without

## SECT. 3.—THE INQUIRY.

## SUB-SECT. 1.—TIME FOR.

**648. Should be prosecuted at once—Or order discharged.]—**An alleged lunatic is entitled of right to have an inquiry which has been ordered prosecuted at once, or to have the order for such inquiry discharged.—*Re* NAYLOR (1862), 1 New Rep. 173, L. JJ.

**649. Delay—Amounts to contempt of court.]—**A commission of lunacy kept back for several years, without putting it in execution, is a contempt of the ct., & will be discharged with costs.—LUNATICK PETITIONS (1740), 2 Atk. 52; 26 E. R. 429.

## SUB-SECT. 2.—ISSUE DIRECTED IN HIGH COURT.

See, now, Lunacy Act, 1890 (c. 5), s. 94.

**650. Writ of summons—Necessity for.]—**When an issue is directed by an Order in Lunacy to try the question of the insanity of an alleged lunatic before a judge of the High Ct. of Justice under 25 & 26 Vict. c. 86, s. 4, it is not necessary to commence the proceedings by a writ of summons, the order for the issue being sufficient to give jurisdiction to the judge.—*Re* SCOTT (1884), 27 Ch. D. 116; 54 L. J. Ch. 194; 51 L. T. 735; 32 W. R. 801, L. JJ.

## SUB-SECT. 3.—PLACE OF.

**651. Residence of lunatic—Permanent residence—Or last place of abode.]—***Ex p.* BAKER, No. 660, *post*.

**652. — Many witnesses residing at another place—Of which alleged lunatic is a native.]—**A commission of lunacy is properly directed to the place where the alleged lunatic has generally resided, although a great many witnesses to be produced & examined at the inquiry reside at another place, of which the lunatic is a native.—*Re* JEPSON (1838), 2 Jur. 200, L. C.

**653. — Former place of residence—Not where since conveyed—Evidence of inability to be moved.]—***Ex p.* SMITH, No. 690, *post*.

**654. — — — Convenience of witness.]—***Re* GREEN (1831), Shelford on Lunatics, 2nd ed. p. 123, L. C.

**655. — Unless local feeling prejudicial—Removal to Middlesex.]—***Re* — (1881), No. 626, *ante*.

**656. In Middlesex—To avoid inconvenience—Expense.]—**To avoid inconvenience & expense a commission was directed to issue into Middlesex, although the supposed lunatic was residing in the county of Hertford.—*Re* WATERS (1836), 2 My. & Cr. 38; 40 E. R. 555, L. C.

**657. — No fixed abode—Principal witness in Middlesex.]—***Re* MILLS (1830), 2 My. & Cr. 39, n.; 40 E. R. 555, L. C.

**658. Alleged lunatic abroad—At residence in this country.]—**Commission of lunacy ordered against a person who was at St. Venant in France, to be executed in Essex, where his mansion house was.—*Ex p.* SOUTHCOTE (1751), as reported in Amb. 109; 2 Ves. Sen. 401; 27 E. R. 71, L. C.

*Annotations:—*Folld. *Ex p.* Baker (1815), Coop. G. 205. Reid. *Re* B —, [1891] 3 Ch. 274.

**659. — In Middlesex—No residence in this country.]—**(1) Supposed lunatic, being in the

cognition or inquest before a jury.—*DICKSON v. GRAHAM* (1828), 4 Bli. N. S. 492; 5 E. R. 175.—SCOT.



**Sect. 3.—The inquiry: Sub-sects. 3 & 4, A. & B.; . 5 & 6.]**

neighbourhood of Paris, & having no place of residence in this country, commission of lunacy ordered to be executed in Middlesex. Commission ordered to issue for the examination of witnesses residing in or near Paris.

(2) The carriage of the commission should be given to that party, by whom, it is most likely, that the whole truth will be brought out.

(3) In questions as to the issuing & carriage of commissions of lunacy, relations are, unless under peculiar circumstances, always preferred to creditors.

(4) There has been, in general, a reluctance to make orders, giving parties liberty to attend the execution of a commission of lunacy by their counsel & solrs.

The proper order, in cases where it may be fit to give a party liberty to carry in proposals for committees of the person & estate, is to direct that the Master in Lunacy, in case the inquisition should be returned, finding the lunacy, shall not proceed to the approval of committees of the person & estate until further order. A practice, in the appointment of committees, to give a preference to the proposal of the party who, upon a contest, has succeeded in obtaining the carriage of a commission, would be a most improper practice.—*Re WEBB* (1846), 2 *Coop. temp. Cott.* 145; 47 *E. R.* 1095, *L. C.*; *previous proceedings*, 2 *Ph.* 10, *L. C.*

**660. Convenience of witnesses — Whether ground for exception.]—**Commission of lunacy uniformly executed at the residence of the party; for that purpose his mansion house; if none, his last place of abode. No instance of exception, where he was within the realm. Convenience of witnesses, etc., is no ground for exception. *Qu:* as to the jurisdiction, after a commission of lunacy has issued, to make any alteration as to the place of execution.—*Ex p. BAKER* (1815), 19 *Ves.* 340; *Coop. G.* 205; 34 *E. R.* 544, *L. C.*

**661. ———.]—***Re GREEN* (1831), *Shelford on Lunatics*, 2nd ed. p. 123, *L. C.*

**662. ———.]—***Re JEPSON*, No. 652, *ante.*

**663. Change of place—Jurisdiction to alter.]—***Ex p. BAKER*, No. 660, *ante.*

#### SUB-SECT. 4.—WHO MAY ATTEND.

##### A. Without Special Permission of Court.

**664. Alleged lunatic & persons acting on his behalf.]—**Where there is a commission of lunacy, none but the alleged lunatic, or persons acting on his behalf, can take part in the inquiry without the special permission of the Lord Chancellor.—*Re CLEMENTS* (1831), 2 *Coop. temp. Cott.* 165; 47 *E. R.* 1106.

##### B. By Special Permission of Court.

**665. Discretion of court to grant.]—***Re NESBITT*, No. 604, *ante.*

**666. ———.]—***Re LANWARNE*, No. 564, *ante.*

**667. Necessity for—Next of kin.]—***Re CHAMBERS* (1844), 3 *L. T. O. S.* 318.

**668. To whom given—Wife of alleged lunatic.]—**Liberty given to the wife to attend by counsel the execution of a commission of lunacy against her husband.—*Re PARKINSON* (1841), 5 *Jur.* 547.

**669. ——— Relations without interest.]—***Re NESBITT*, No. 604, *ante.*

**670. ——— Heir-at-law — Position where no order made.]—***Re WATTS* (1844), 4 *L. T. O. S.* 429, *L. C.*

**671. ——— Co-heirs.]—***Re SHEIGHT* (1845), 5 *L. T. O. S.* 121.

**672. ——— Natural daughter resident with alleged lunatic—Residuary legatee under will made before lunacy.]—**Lunatic being illegitimate, & never having been married, but having a natural daughter, residuary legatee under a will made before the lunacy, order that she should have notice of all proceedings, & be at liberty to attend the same. Such natural daughter having constantly resided with the lunatic, order that she should be at liberty to carry in a proposal for committee of the person. The aforesaid lunatic being tenant for life of large real estates, & the commission having been issued at the instance of the remainderman, order that such natural daughter should be at liberty to carry in a proposal for committee of the estate.—*Re WEBB* (1846), 2 *Ph.* 116; 2 *Coop. temp. Cott.* 102; 17 *L. J. Ch.* 276; 47 *E. R.* 1073.

**673. ——— Trustees of settlement — Under which alleged lunatic a beneficiary.]—***Re NORTH* (1847), 8 *L. T. O. S.* 461.

**674. ——— Made on alleged lunatic's marriage.]—***Re WATTS* (1847), 10 *L. T. O. S.* 241.

**675. ——— Persons named in alleged lunatic's will.]—***Re SCARLETT*, No. 701, *post.*

**676. Permission subject to condition — To be bound by result—Proof of commencement of lunacy in party's own interest.]—***Ex p. NEWBURY* (1845), cited in 1 *Ph.* at p. 513.

*Annotation:—**Reid. Re Watts, Ex p. Snook* (1845), 1 *Ph.* 512.

**677. ——— Mortgagee of alleged lunatic's estate.]—**Where a mtgee. presented a petition against the issuing of a commission of lunacy, praying in the alternative that if the commission issued, she might be at liberty to attend it, the ct. refused the prayer of the petition, unless she consented to be bound by the result of the inquiry.—*Re WATTS, Ex p. SNOOK* (1845), 1 *Ph.* 512; 14 *L. J. Ch.* 241; 4 *L. T. O. S.* 389; 41 *E. R.* 727.

**678. ——— Relation with interest.]—***Re NESBITT*, No. 604, *ante.*

**679. ——— To abide by order as to costs — Cestui que trust of settlement by alleged lunatic.]—**Where a petition for a commission of lunacy stated that the alleged lunatic had been of unsound mind for upwards of thirty years, a *cestui que trust*, under a settlement made during this period, was allowed to attend the execution of the commission, upon an undertaking to abide by such order as the ct. might make as to any increased costs occasioned by the attendance.—*Re RICHARDS* (1852), 1 *De G. M. & G.* 719; 21 *L. J. Ch.* 739; 19 *L. T. O. S.* 253; 16 *Jur.* 508; 42 *E. R.* 732, *L. JJ.*

#### SUB-SECT. 5.—HEARING.

*See Lunacy Act, 1890 (c. 5), s. 94 (2).*

**680. Power of Commissioners to summon witnesses.]—**The Comrs. of Lunacy came in the room of another authority; & were meant to have all the powers that authority had; & among those there is reason to say, it must be incident to the office of Comr. of Lunatics to summon witnesses

#### PART VII. SECT. 3, SUB-SECT. 5.

**p. Acceleration of hearing.]—**A petition in lunacy may be heard out of its turn when it relates to the person of the lunatic, to his estate, if his estate be in danger.—*ANON.* (1828), 1 *Mol.* 160.—*IR.*

(LORD ELDON, C.).—*Ex p. LUND* (1802), 6 Ves. 781; 31 E. R. 1306.

*Annotation*:—*Refd. Re B*—, [1891] 3 Ch. 274.

**681. Hearing in camera — Exception to general rule as to publicity.**—The three exceptions which are acknowledged to the application of the rule prescribing the publicity of cts. of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; & thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention, trade secrets, is of the essence of the cause. The first two of these cases depend upon the familiar principle that the jurisdiction over wards & lunatics is exercised by the judges as representing His Majesty as *parens patriæ*. The affairs are truly private affairs; the transactions are transactions truly *intra familiam*; & it has long been recognised that an appeal for the protection of the ct. in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs (LORD SHAW).—SCOTT v. SCOTT, [1913] A. C. 417; 82 L. J. P. 74; 109 L. T. 1; 29 T. L. R. 520; 57 Sol. Jo. 498, H. L.

*Annotations*:—*Mentd. Cleland v. Cleland, Cleland v. Cleland & McLeod* (1913), 109 L. T. 744; *Moosbrugger v. Moosbrugger, Moosbrugger v. Moosbrugger & Martin* (1913), 29 T. L. R. 658; *Ex p. Norman* (1915), 85 L. J. K. B. 203; *Norman v. Mathews* (1916), 85 L. J. K. B. 857; *R. v. Lewes Prison, Ex p. Doyle*, [1917] 2 K. B. 254; *Re Stevenson*, [1919] B. & C. R. 106; *Laidler v. Laidler* (1920), 90 L. J. P. 28; *R. v. Manchester Local Profiteering Committee, Ex p. Lancs. & Yorks. Ry.* (1920), 89 L. J. K. B. 1089; *Russell v. Russell* (1924), 93 L. J. P. 97.

#### SUB-SECT. 6.—THE JURY.

*See, generally, Lunacy Act, 1890 (c. 5), ss. 90–93, 96, 97; Rules in Lunacy, 1892, r. 30.*

**682. Right to demand jury—Confined to original inquiry.**—(1) Where an Order in Lunacy has been made in Ireland by the ct. having jurisdiction for that purpose, & a transcript of the record has, under 16 & 17 Vict. c. 70, s. 52, been transmitted to this country, the English ct. must treat the order as a binding order, & has no jurisdiction to entertain an application either for the purpose of setting aside the proceedings in Ireland, or for a *supersedeas*. Any such application must be made to the ct. which originally made the order. (2) The right of an alleged lunatic to demand a jury is confined to the original inquiry.—*Re TALBOT* (1882), 20 Ch. D. 269; 51 L. J. Ch. 360; 45 L. T. 730; 30 W. R. 386, C. A.

—*See, now, Lunacy Act, 1890 (c. 5), s. 90 (2).*

**683. Withdrawal of demand — On application of petitioner—Alleged lunatic appearing & consenting.**—*Re CROMPE* (1869), 4 Ch. App. 653, L. JJ.

—*See, now, Lunacy Act, 1890 (c. 5), s. 90 (3).*

**Dispensing with jury—Discretion of court.**—*See Lunacy Act, 1890 (c. 5), ss. 91, 92.*

**684. Number of jury.**—(1) In a case where the ct. directed an inquiry as to the soundness of mind of an individual, the jury returned a verdict in favour of the individual; & the ct., considering that upon the whole evidence there was reasonable ground for questioning the sanity, refused to order the applicants for the inquiry to pay the costs of the alleged lunatic. It is at least doubtful whether in such a case the Ct. has jurisdiction to order them to pay such costs.

(2) *Semble*: from an order directing such an inquiry an appeal lies to the Privy Council.

(3) Where lunacy is found, the care of the

lunatic & his estate is in the Crown as *parens patriæ*, but where not found, there can be no trust or duty in the Crown, on which the powers of the ct. can attach.

(4) Distinction between congenital imbecility & unsoundness arising from the mind being imperfect, & conduct may be so extraordinary as to amount, even in absence of delusions, to evidence of such unsoundness.

(5) The result was a verdict of soundness of mind, in which fifteen certainly (of course more than a sufficient number) of the jurymen concurred. Those fifteen alone signed their names as assenting. With regard to the other seven (for only twenty-two of the original number were able to go through the whole inquiry), a written communication, made to us by the learned master, at our request, which one of us read in ct. on Mar 13, showed that some, at least, of these seven expressly dissented from that verdict; & I think also that not one of the seven assented to it, an absence of assent which indeed would, I suppose, have been properly presumable from the absence of their signatures (KNIGHT BRUCE, L.J.).—*Re WINDHAM* (1862), 4 De G. F. & J. 53; 10 W. R. 499; 45 E. R. 1102; *sub nom. Re WINDHAM, WINDHAM v. GIUBILEI*, 31 L. J. Ch. 720; 6 L. T. 479; *sub nom. Re WYNDHAM*, 8 Jur. N. S. 448, L. JJ.

*Annotations*:—*As to (1) Refd. Re Danby* (1885), 30 Ch. D. 320; *Brockwell v. Bullock* (1889), 22 Q. B. D. 567; *Re Cathcart*, [1892] 1 Ch. 549; *Re Cathcart*, [1893] 1 Ch. 466. *As to (3) Refd. Re Cathcart*, [1893] 1 Ch. 466.

—*R. v. GILCHRIST* (1907), *Times*, Mar. 5.

—*See Lunacy Act, 1890 (c. 5), s. 97.*

**686. Attendance of all throughout inquiry — Necessity for.**—*Re WINDHAM*, No. 684, *ante*.

**687. How many need concur in verdict.**—*Re WINDHAM*, No. 684, *ante*.

**688.** —*Re FARRELL* (1910), *Times*, Nov. 16.

—*See, now, Lunacy Act, 1890 (c. 5), s. 97.*

**689. Alleged lunatic entitled to verdict of all jurors.**—(1) An order to examine an alleged lunatic against his will can be made by a master, & if necessary, by the ct., but no such order should be made adversely to a person, pending a petition, unless the master or other person conducting the inquiry inform the ct. that such an order is necessary to enable him to come to a decision.

*Qu.*: whether a master can enforce such an order when made by him in a case where there is no jury.

(2) The jury, if there is one, ought to see the alleged lunatic. . . . In order to inconvenience him as little as possible, sometimes one or two of the jury see him & report to the rest; but in strictness the supposed lunatic is entitled to the judgment of all the jurors (LINDLEY, L.J.).

(3) An examination in private could not render a report by the examiners admissible in evidence against the alleged lunatic (LINDLEY, L.J.).—*Re B*—, [1891] 3 Ch. 274; *sub nom. Re BATHE*, 60 L. J. Ch. 766; 65 L. T. 205; 40 W. R. 9, L. JJ.; *subsequent proceedings, sub nom. Re B*—, [1892] 1 Ch. 459, L. JJ.; [1892] 3 Ch. 194, L. JJ.

**690. Examination of alleged lunatic by one or two jurors—Report to remainder.**—(1) Commission of lunacy directed to be executed in the neighbourhood in which the lunatic resided prior to his lunacy, not in that to which he had been since conveyed; although evidence was given of his inability to bear removal.

(2) It is a practice by no means uncommon in cases of lunacy . . . that when the lunatic cannot be removed to the jury, & it is inconvenient for



*Sect. 3.—The inquiry: Sub-sects. 6 & 7, A. & B.; sub-sect. 8. Sect. 4: Sub-sects. 2, 3, 4, 5, 6,*

the jury to go to the lunatic, one or two of the jury examine the lunatic & report their observations to the rest (LORD ELDON, C.).—*Ex p. SMITH* (1818), 1 Swan. 4; 36 E. R. 274, L. C.

*Annotation:—As to (2) Reid. Re B—, [1891] 3 Ch. 274.*

691. ———.]—*Re B—* (1891), No. 689, ante.

#### SUB-SECT. 7.—SCOPE OF INQUIRY.

##### A. As to Date of Lunacy.

*See, now, Lunacy Act, 1890 (c. 5), s. 98 (1).*

692. Carrying back inquiry—25 & 26 Vict. c. 86, s. 3.]—*Re SOTTOMAIOR*, No. 592, ante.

693. ———.]—Above sect. takes away the power existing under 16 & 17 Vict. c. 70, s. 47, of directing an inquiry from what time an alleged lunatic has been of unsound mind.—*Re DANBY* (1885), 30 Ch. D. 320; 55 L. J. Ch. 583; 53 L. T. 850; 34 W. R. 125, L. JJ.

##### B. As to Nature and Causes of Insanity.

*See, now, Lunacy Act, 1890 (c. 5), s. 98 (2).*

Degree of insanity necessary for issue of commission.]—*See Sect. 2, sub-sect. 2, B., ante.*

Quashing inquisition on insufficient finding.]—*See Sect. 4, sub-sect. 6, post.*

694. Finding of capability of managing himself but not his affairs—Under Lunacy Act, 1890 (c. 5), s. 98 (2)—Constitutes him a lunatic so found.]—(1) Where a lunatic so found by inquisition sues by the committee of his estate under R. S. C., Ord. 16, r. 17, the committee must be a co-pltf.

(2) A special finding under above sub-sect. that the alleged lunatic, the subject of the inquisition, "is of unsound mind, so as to be incapable of managing his affairs, but that he is capable of managing himself, & is not dangerous to himself or to others," constitutes him a lunatic so found by inquisition within the above practice.—*Re TOWNSHEND'S (LORD) SETTLEMENT, TOWNSHEND (LORD) v. ROBINS*, [1908] 1 Ch. 201; 77 L. J. Ch. 167; 97 L. T. 884.

#### SUB-SECT. 8.—COSTS.

*See Part XII., Sect. 4.*

### SECT. 4.—PROCEEDING SUBSEQUENT TO INQUIRY.

#### SUB-SECT. 1.—IN GENERAL.

695. Must be made in lunacy—No jurisdiction in chancery.]—You must apply to the Great Seal to appoint a committee; there is no instance where a party hath been found a lunatic under a commission of inquiry, in which this Ct. has interfered (LORD THURLOW, C.).—*MURRAY v. FRANK* (1779), 2 Dick. 555; 21 E. R. 386, L. C.

696. Practice—Right to begin.]—A petition to confirm the Master's report in Lunacy, & a cross-petition in the nature of exceptions to it, coming in to be heard together:—*Held*: the counsel for the cross-petition ought to begin.—*Re TOWNSHEND* (1847), 1 Ph. 804; 16 L. J. Ch. 266; 41 E. R. 839, L. C.

#### SUB-SECT. 2.—NOTICE OF PROCEEDINGS.

697. Served on Attorney-General—Finding of idioy.]—Petitions in the matter of a person found

an idiot must be served on the A.-G.—*Ex p. WATSON* (1821), Jac. 161; 37 E. R. 811, L. C.

698. ——— Lunatic with no next of kin.]—Where the lunatic has no next of kin, the A.-G. on behalf of the Crown must have notice of the proceedings subsequent to the return of the inquisition.—*Re EARLY* (1837), 2 Coop. temp. Cott. 107; 1 Jur. 524; 47 E. R. 1076, L. C.

699. ———.]—*Re BOURKE* (1864), 2 De G. J. & Sm. 426; 46 E. R. 440, L. JJ.

#### SUB-SECT. 3.—WHO MAY ATTEND.

700. Heir-at-law.]—*Re BROWN*, No. 805, post.

701. Persons interested under lunatic's will.]—S. died, leaving a will by which he gave all his property to his widow, requesting her to bequeath certain parts of it to A., if living. The widow, immediately after her husband's death, made a will in conformity with this request, & shortly afterwards became lunatic. T. & wife, the wife being heiress-at-law & sole next of kin of the lunatic, were appointed committees of the person, & their eldest son committee of the estate. Letters of administration of the estate of S. were granted to Mrs. T. for the use & benefit of the lunatic, & during the lunacy. After a few months a new committee of the estate was appointed, & Mr. & Mrs. T.'s eldest son filed a bill against Mr. & Mrs. T., the lunatic & the committee of the estate, seeking to make T. & the estate of S. liable for very large sums alleged to have been improperly received by Mrs. T. & the lunatic & their husbands in excess of what they were entitled to as tenants for life under the will of the lunatic's father. A. then presented a petition for leave to attend proceedings under the lunacy, alleging that none of the parties were substantially interested in defending the suit:—*Held*: a precedent ought not to be made for allowing persons named in the wills of lunatics to attend the proceedings in lunacy, & application refused accordingly.—*Re SCARLETT* (1873), 8 Ch. App. 739; 29 L. T. 232; 21 W. R. 717, L. JJ.

702. Copyhold land in Duchy of Lancaster—Lunatic illegitimate & unmarried—The Attorney-General.]—A lunatic, who was illegitimate & unmarried was resident in Lancashire, & a part of her property consisted of copyholds held of the Duchy of Lancaster:—*Held*: A.-G. was entitled to attend the proceedings in the lunacy as representing the Crown, & the A.-G. of the Duchy of Lancaster was not entitled to do so.—*Re KERSHAW* (1882), 21 Ch. D. 613; 48 L. T. 51; 31 W. R. 130, C. A.

703. ——— Attorney-General of Duchy.]—*Re KERSHAW*, No. 702, ante.

704. Lunatic & wife—Lunatic capable of managing himself—Incapable of managing affairs.]—In 1906 Lord T. was found to be a person incapable of managing his affairs, but capable of managing himself. A committee of the estate was appointed & the person who in default of issue male to Lord T. was the next heir to the title & also tenant for life in remainder of the settled estates was given liberty to attend generally upon the proceedings. Since the management of the estate was taken over by the committee the income received by Lord T. had increased from a nominal sum to about £800 per annum. In 1911 Lord T. & his wife applied that they or one of them might be at liberty to attend the future proceedings in the matter generally at the expense of the estate:—*Held*: the application must be refused.—*Re TOWNSHEND (MARQUESS)* (1911), 28 T. L. R. 12, C. A.

## SUB-SECT. 4.—CONFIRMATION OF COMMISSIONER'S REPORT.

**705. Petition & counter petition filed—Right to begin.]**—At the hearing of a petition & counter-petition in lunacy, the one praying the confirmation of the comrs.' report & the other simply opposing, the counsel for the first petition is entitled to begin.—*Re BARIATINSKY (PRINCESS)* (1844), 1 Ph. 442; 13 L. J. Ch. 386; 41 E. R. 700, L. C.; *sub nom. Re BARYATINSKI*, 3 L. T. O. S. 177.

## SUB-SECT. 5.—APPEAL.

**706. No appeal to House of Lords.]**—No appeal to the House of Lords lies against an order, awarding a commission of idiocy, or lunacy, by the Lord Chancellor, Lord Keeper, or Lords Comrs. of the Great Seal; nor against any proceedings, touching the awarding or refusing of such commission.—*ROCHFORD v. ELY (EARL)* (1768), 1 Bro. Parl. Cas. 450; 1 E. R. 682, H. L.

**707. Whether appeal to Privy Council.]**—*Re WINDHAM*, No. 684, *ante*.

**Quashing inquisition.]**—*See* Sub-sect. 6, *post*.

**Traverse of inquisition.]**—*See* Sub-sect. 7, *post*.

## SUB-SECT. 6.—QUASHING INQUISITION.

**708. Insufficient finding—Not found by express words.]**—*Ex p. READ* (1654), cited 3 Atk. at p. 169; 26 E. R. 899.

**709. — Not always in senses as other men—Condition arising from fear & provocation.]**—*Ex p. FREAK* (1732), cited 3 Atk. at p. 168; 26 E. R. 899.

**710. — Not a lunatic but incapable.]**—*Ex p. ASHTON* (1733), cited in 3 Atk. at p. 168; 26 E. R. 899.

**711. — Not sufficient understanding to manage affairs.]**—*Ex p. HARVEY* (1733), cited 3 Atk. at p. 168; 26 E. R. 899, L. C.

**712. — Incapable of governing himself & his lands.]**—That W. B. was incapable of governing himself & his lands, etc., is an illegal & void return to an inquisition of lunacy.—*Ex p. BARNSELY* (1744), 3 Atk. 168; 26 E. R. 899; *sub nom. BARNSELY'S CASE*, 2 Eq. Cas. Abr. 580, L. C.

*Annotation:—Reid. Ex p. Cranmer* (1806), 12 Ves. 445.

**713. — Incapable of general management of affairs.]**—*Ex p. CRANMER*, No. 1, *ante*.

**714. — —.]**—*SHERWOOD v. SANDERSON*, No. 584, *ante*.

**715. — — Partly from paralysis & partly from old age.]**—Under a commission of lunacy, the jury found, "that the party is not a lunatic, but that, partly from paralysis & partly from old age, his memory is so much impaired as to render him incompetent to the management of his affairs, & consequently, of unsound mind, & that he has been so for the term of two years last past":—The inquisition was quashed, & a new commission was ordered to issue.—*Re HOLMES* (1827), 4 Russ. 182; 38 E. R. 774, L. C.

**716. — Finding of lunacy—In terms amounting to idiocy.]**—An inquisition in lunacy having found that a person was a lunatic, & had been in the same state of lunacy from the time of her birth, the inquisition was quashed, & a new commission issued.

The proper finding would have been that she was of unsound mind, the finding as it stood was a contradiction in terms (*LORD COTTENHAM, C.*).—*Re BRUGES* (1836), 1 My. & Cr. 278; 40 E. R. 381, L. C.

**717. Misconduct in execution of inquiry.]**—*Ex p. ROBERTS*, No. 723, *post*.

**718. — Not executed near lunatic's abode.]**—*Ex p. HALL*, No. 749, *post*.

**719. — Notice not given to lunatic.]**—*Ex p. HALL*, No. 749, *post*.

— — —.]—*See, now, Lunacy Act, 1890 (c. 5), s. 116 (1) (d); Lunacy Act, 1908 (c. 47), ss. 1, 2.*

**720. Effect of quashing—New inquisition must issue—Amendment of finding not allowed.]**—*Ex p. CRANMER*, No. 1, *ante*.

**721. — — No need for new petition.]**—Order made for a new commission in lunacy on quashing the return on a previous commission, without the necessity of presenting a second petition to the ct.—*Re BENNETT* (1837), 1 Jur. 469, L. C.

## SUB-SECT. 7.—TRAVERSE OF INQUISITION.

## A. In General.

*See Lunacy Act, 1890 (c. 5), ss. 101–104.*

**722. Traverse by lunatic—Whether petition necessary.]**—*Re CUMMING*, No. 735, *post*.

**723. — Different appearance upon second inspection.]**—(1) The person against whom the commission of lunacy issued, on the different appearance he made upon a second inspection, was allowed to traverse the inquisition & the grant of the custody suspended till further order.

(2) Where there is any misbehaviour in the execution of an inquisition of lunacy, the ct. upon examining into it may, if they see cause, quash it, & direct a new commission.

(3) I asked whether F. would submit to be bound by the traverse; for though it would be binding against R. [the lunatic] it would not be so against F. as to the grant of the custody of the land who claims as a purchaser (*LORD HARDWICKE, C.*).—*Ex p. ROBERTS* (1743), 3 Atk. 5; 26 E. R. 806, L. C.; *subsequent proceedings, sub nom. ROBERTS'S CASE* (1746), 3 Atk. 308, L. C.

*Annotations:—As to (1) Distd. Ex p. Barnsley* (1744), 3 Atk. 184. *Reid. Re Bridge* (1841), Cr. & Ph. 338. *Generally, Reid. Ex p. Grimstone* (1772), Amb. 706; *Elliott v. Ince* (1857), 3 Jur. N. S. 597.

**724. Traverse by attorney—In case of idiot.]**—*SMITHIE'S CASE* (1728), cited 3 Atk. at p. 7; 26 E. R. 807, L. C.

*Annotation:—Reid. Ex p. Roberts* (1743), 3 Atk. 5.

**725. — In case of lunatic.]**—*SMITHIE'S CASE* (1728), cited 3 Atk. at p. 7; 26 E. R. 807, L. C.

*Annotation:—Reid. Ex p. Roberts* (1743), 3 Atk. 5.

**726. How far traverse binding—On lunatic.]**—*Ex p. ROBERTS*, No. 723, *ante*.

**727. — On alienee—Traverse by lunatic.]**—*Ex p. ROBERTS*, No. 723, *ante*.

**728. — — Traverse by lunatic & alienee.]**—(1) Not only the lunatic, but the heir of the lunatic is bound upon the traverse of the inquisition.

(2) Where the alienee & the lunatic traverse, if he is found a lunatic at the time of the alienation the alienee is bound.

(3) To say that, after [the lunatic's] death, when he cannot appear in proper person, & cannot be inspected by the jury, it should still be open to

## PART VII. SECT. 4, SUB-SECT. 5.

**708 i. No appeal to House of Lords.]**—An appeal from orders in lunacy lies to the Sovereign in council, & not to the House of Lords.—*Re LANESBOROUGH (EARL)* (1826), L. & G. temp. Plunk. 503.—*IR.*



**Sect. 4.—Proceeding subsequent to inquiry: Sub-sect. 7, A. & B. (a), (b), (c) & (d), C., D. & E.; sub-sect. 8, A., B., C. & D.]**

a traverse by the heir-at-law, carries a great absurdity with it (LORD HARDWICKE, C.).—ROBERTS'S CASE (1746), 3 Atk. 308; 26 E. R. 979, L. C.; *previous proceedings, sub nom. Ex p. ROBERTS* (1743), 3 Atk. 5, L. C.

*Annotations:—As to (1) Rejd. Re Bridge* (1841), Cr. & Ph. 338. *Generally, Rejd. Ex p. Grimstone* (1772), Amb. 706. *Mentd. Tarleton v. Liddell* (1851), 17 Q. B. 390.

**729. Traverse after death of lunatic—By heir.]—ROBERTS'S CASE, No. 728, ante.**

**730. Traversor considered as defendant.]—The traversor of an inquisition for the King is to be considered as a deft.—R. v. ROBERTS (1744), 2 Stra. 1208; 93 E. R. 1131.**

**731. Discretion to allow lunatic sum of money—To defray expenses of traverse.]—(1) Leave to traverse an inquisition of lunacy, if applied for by the party himself, who has been found a lunatic, is matter of right.**

(2) *Semble*: the allowance of a sum of money out of the estate of the party so found lunatic, towards defraying the expense of the traverse, is subject to the Lord Chancellor's discretion.—*Re BRIDGE* (1841), Cr. & Ph. 338; 10 L. J. Ch. 404; 6 Jur. 69; 41 E. R. 520, L. C.

*Annotations:—As to (1) Rejd. Re Dyce Sombre* (1844), 8 Jur. 817; *Re Cumming* (1852), 21 L. J. Ch. 753; *Re Gilchrist*, [1907] 1 Ch. 1. *Generally, Rejd. Re Dyce Sombre* (1846), 7 L. T. O. S. 485.

## B. The Petition.

### (a) By Lunatic.

*See, generally, Lunacy Act, 1890 (c. 5), ss. 101–103.*

**732. Right by law—Evidence supporting finding.]—Upon a search of precedents it was held no objection to the return to an inquisition, finding a person lunatic, that it does not state that the lunatic has or has not lucid intervals. A traverse to the return to an inquisition, finding a person lunatic, is a right by law; though the Lord Chancellor is not dissatisfied with the return upon the evidence. The order was therefore suspended for the purpose of taking the traverse.—*Ex p. WRAGG, Ex p. FERNE* (1800), 5 Ves. 450; 31 E. R. 677, L. C.; *subsequent proceedings sub nom. Ex p. FERNE* (1801), 5 Ves. 832, L. C.**

*Annotation:—Rejd. Re Cumming* (1852), 1 De G. M. & G. 537.

**733. —.]—SHERWOOD v. SANDERSON, No. 584, ante.**

**734. —.]—Re BRIDGE, No. 731, ante.**

**735. —.]—(1) On application to the Lord Chancellor for that purpose by a person found lunatic under a commission:—Held: leave to traverse the inquisition is matter of right.**

*Qu.*: whether it is necessary for a lunatic, found so by inquisition, who is desiring of traversing the inquisition, to come by petition to the Chancellor, under 6 Geo. 4, c. 53, or whether he may go direct to the Petty Bag Office & lodge his traverse.

(2) *Semble*: the same holding applies to a similar application by another person having an interest.

(3) The fact of the traverse being of right does not, however, preclude the Lord Chancellor from exercising such a control over the matter as may be necessary for the protection of the person & estate of the alleged lunatic, as, for instance, by satisfying himself that the application is *bond fide*,

& that the alleged lunatic, where he is the person applying, is competent to judge of what he is doing & is really desirous that the traverse shall issue.

*Qu.*: whether, if the Lord Chancellor should not be otherwise able to satisfy himself on the points above mentioned, he would allow any & what evidence to be gone into respecting them.

(4) Where the ct. considered it expedient in the circumstances of the case that, pending a traverse, the system of personal care of the supposed lunatic should not be disturbed, & that she should continue to receive her income, the appointment of committees & the execution of the grant were not stayed on that account, but the order for the appointment & grant was qualified by the introduction of directions to the above effect.—*Re CUMMING* (1852), 1 De G. M. & G. 537; 21 L. J. Ch. 753, 758; 19 L. T. O. S. 38; 20 L. T. O. S. 37; 16 Jur. 483; 42 E. R. 660, L. C. & L. JJ.; *subsequent proceedings* (1854), 5 De G. M. & G. 30, L. JJ.

*Annotations:—As to (1) Apld. Re Gilchrist*, [1907] 1 Ch. 1. *Rejd. Re Cumming* (1854), 23 L. J. Ch. 261. *Generally, Rejd. Re —* (1854), 23 L. T. O. S. 123. *Mentd. Blann v. Bell* (1852), 2 De G. M. & G. 775.

**736. —.]—Upon the petition under Lunacy Act, 1890 (c. 5), s. 101, of a person found by inquisition to be of unsound mind for leave to traverse the inquisition:—Held: leave to traverse the inquisition was a matter of right, but this does not prevent the Judge in Lunacy from exercising such a control in the matter as may be necessary for the protection of the person & estate of the alleged lunatic by satisfying himself, e.g., by a personal interview, that the application is *bond fide*, & that the alleged lunatic is competent to exercise an act of volition upon the subject.—*Re GILCHRIST*, [1907] 1 Ch. 1; 76 L. J. Ch. 63; 95 L. T. 739, L. JJ.**

**737. Examination of lunatic—Competency of exercising volition as to traverse.]—SHERWOOD v. SANDERSON, No. 584, ante.**

**738. —.]—Re MILLSON (1825), cited in 1 De G. M. & G. 552; 42 E. R. 666; *sub nom. ANON.*, cited in 21 L. J. Ch. 756; 19 L. T. O. S. 41; 16 Jur. 486, L. C.**

*Annotation:—Consd. Re Cumming* (1852), 1 De G. M. & G. 537.

**739. —.]—Re CUMMING, No. 735, ante.**

**740. —.]—Re GILCHRIST, No. 736, ante.**

**741. Inquisition finding idiocy.]—One found an idiot, had leave to traverse the inquisition at her own request, on condition she would appear in person at the trial.—ANON. (1728), Mos. 71; 25 E. R. 277, L. C.**

**742. Traverse of second inquisition.]—After B. had been found a lunatic under two inquisitions, the ct. would not allow him to traverse the second.—*Ex p. BARNSLEY* (1744), 3 Atk. 184; 26 E. R. 908, L. C.**

*Annotations:—Consd. Ex p. Wragg, Ex p. Ferne* (1800), 5 Ves. 450. *Rejd. Re Bridge* (1841), Cr. & Ph. 338.

**Costs.]—See Sub-sect. 7, E., post.**

### (b) By Person Interested in Lunatic's Estate.

**743. Whether petition granted.]—SHERWOOD v. SANDERSON, No. 584, ante.**

**744. —.]—Re MILLSON (1825), cited in 1 De G. M. & G. 552; 42 E. R. 666; *sub nom. ANON.*, cited in 21 L. J. Ch. 756; 19 L. T. O. S. 41; 16 Jur. 486, L. C.**

*Annotation:—Consd. Re Cumming* (1852), 1 De G. M. & G. 537.

## PART VII. SECT. 4, SUB-SECT. 7.—B. (a).

**733 i. Right by law.]—The granting of an order for the traverse of an inquisition *de lunatico* is a matter of right where the alleged lunatic is the petitioner.—*Re LEGH* (1888), 14 V. L. R. 204.—AUS.**

**745. — Whether matter of right.] —***Re CUMMING*, No. 735, *ante*.

**746. — After death of lunatic.] —***ROBERTS'S CASE*, No. 728, *ante*.

**747. Sufficiency of interest—Husband—Validity of marriage doubtful.] —**It is in the discretion of the Lord Chancellor to grant leave to any person grieved, etc., to traverse an inquisition of lunacy. Refused to the husband of the lunatic under circumstances which made the validity of the marriage doubtful.—*Re FUST* (1787), 1 Cox, Eq. Cas. 418; 29 E. R. 1229, L. C.

*Annotations:—*Consd. *Re Cumming* (1852), 1 De G. M. & G. 537. *Refd. Re Bridge* (1841), Cr. & Ph. 338.

(c) *By Person having Contract with Lunatic.*

**748. Permission granted.] —***Ex p. MORLEY* (circa 1795), cited in 7 Ves. 262; 32 E. R. 106, L. C.

*Annotations:—*Folld. *Ex p. Hall* (1802), 7 Ves. 261. *Refd. Re Cumming* (1852), 1 De G. M. & G. 537.

**749. —.] —**A person having an interest under a contract with the lunatic, permitted to traverse. The Lord Chancellor inclined to quash the inquisition; the commission not having been executed near the place of abode; & an order, that the lunatic should have due notice, having been disobeyed.—*Ex p. HALL* (1802), 7 Ves. 261; 32 E. R. 106.

*Annotations:—*Consd. *Re Cumming* (1852), 1 De G. M. & G. 537. *Refd. Re Watts, Ex p. Snook* (1845), 1 Ph. 512.

(d) *Other Persons.*

**750. Person grieved.] —***Re FUST*, No. 747, *ante*.

**751. Party having fair & reasonable grounds.] —**Any fair & reasonably provident application as to the execution of a commission of lunacy is not discouraged: but in this instance the petition being wholly groundless was dismissed with costs. *Qu.*: whether a mere stranger having no interest would be permitted to traverse an inquisition of lunacy.—*Ex p. WARD* (1801), 6 Ves. 579; 31 E. R. 1205, L. C.

*Annotations:—*Refd. *Re Bridge* (1841), Cr. & Ph. 338; *Re Cumming* (1852), 1 De G. M. & G. 537.

**752. Stranger without interest.] —***Ex p. WARD*, No. 751, *ante*.

C. *The Hearing.*

**753. Right to begin.] —**On the traverse of an inquisition *de lunatico inquirendo*, the traverser alleging that the traverser is of unsound mind, & the replication denied that allegation & concludes to the country, & issue is thereupon joined, the traverser has a right to begin.—*R. v. LOVEDAY* (1851), 5 Cox, C. C. 343.

**754. Inspection of lunatic by jury—In presence of judge.] —**On the traverse of an inquisition for lunacy, the practice will be the same as before the comr. The lunatic will be inspected by the jury in the presence of the judge.—*R. v. ARMSTRONG* (1858), 30 L. T. O. S. 312.

D. *New Trial.*

*See Lunacy Act, 1890 (c. 5), s. 104.*

E. *Costs.*

*See Part XII., Sect. 5.*

SUB-SECT. 8.—SUPERSEDEAS.

A. *In General.*

*See, generally, Lunacy Act, 1890 (c. 5), ss. 105, 106.*

**Conditional supersedeas.] —***See Lunacy Act, 1890 (c. 5), s. 105.*

**755. Partial supersedeas—When jurisdiction to make order.] —***Re GORDON*, No. 772, *post*.

*See, now, Lunacy Act, 1890 (c. 5), s. 106 (1).*

**Unconditional supersedeas.] —***See Lunacy Act, 1890 (c. 5), s. 106 (2).*

**756. Inquiry in Ireland—No jurisdiction to grant supersedeas here.] —***Re TALBOT*, No. 682, *ante*.

B. *The Petition.*

*See, now, Rules in Lunacy, 1892, r. 17.*

**757. Must be in lunatic's name.] —***Ex p. STANLEY* (1750), 2 Ves. Sen. 25; 28 E. R. 17, L. C.

C. *Personal Examination of Lunatic by Judge.*

**758. Whether examination essential—Presence in court—Or in convenient place.] —**(1) *Semble*: a petition to supersede a commission of lunacy will not be entertained unless the lunatic be either personally present in ct., or at least in such a situation as that he may be personally examined by the Lord Chancellor or some one under his authority.

*Qu.*: whether, if a party who has been found lunatic escapes to a foreign country, & while resident there is pronounced by a competent tribunal to be of sound mind, the Lord Chancellor will give such credit to that decision as to entertain a petition by the party to supersede the commission, without requiring him first to return to the jurisdiction for the purpose of being personally examined.—*Re DYCE SOMBRE* (1844), 1 Ph. 436; 13 L. J. Ch. 335; 3 L. T. O. S. 217; 8 Jur. 817; 41 E. R. 697, L. C.; *subsequent proceedings* (1844), 3 L. T. O. S. 157, 197, 485, L. C.; (1849), 1 Mac. & G. 116, L. C.

**759. — Party found sane—By competent foreign tribunal.] —***Re DYCE SOMBRE*, No. 758, *ante*.

**760. —.] —***Re GORDON*, No. 772, *post*.

D. *Proof.*

**761. Supersedeas assumes sanity of petitioner—Indulgence of court to infants not applicable.] —**

(1) In the case of infants, it is the habit of the ct. very much to disregard form in order better to protect their interests, & in some respects lunatics are entitled to a similar privilege. This indulgence, however, is not to be granted to the same extent to a lunatic applying for a *supersedeas*, for he cannot at the same time assert his soundness of mind & claim the benefit of any relaxation of practice conceded to those of unsound mind. *Semble*: for the purpose of discouraging improper applications for a *supersedeas*, the Lord Chancellor will not adjudicate upon a case in favour of petitioner, where it clearly appears that improper means have been used in getting up the petition.

Although the Great Seal may withhold a commission, if not required for the protection of person or property, where the circumstances of the case create great difficulty in ascertaining whether there exists unsoundness of mind of a character

PART VII. SECT. 4, SUB-SECT. 7.—  
B. (c).

**748 i. Permission granted.] —***Re LEGH* (1888), 14 V. L. R. 204.—AUS.

PART VII. SECT. 4, SUB-SECT. 7.—C.

**q. Venue.] —**Traverse of inquisition of lunacy directed under the circumstances to be tried in a different

county from that in which the subject of the inquiry had been found a lunatic.—*Re NUGENT* (1817), 2 Mol. 517.—IR.

**r. Appointment of solicitor to oppose**



*Sect. 4.—Proceeding subsequent to inquiry: Sub-sect. 8, D., E., F. & G.; sub-sects. 9 & 10, A B. & C. (a).]*

to subject the party to the operation of a commission, yet very different considerations will regulate the discretion of the ct. in deciding upon an application for superseding a commission which has once regularly issued.

(2) The existence of a delusion is the symptom or result of a diseased mind, & therefore so long as it continues, whether exhibiting itself more or less distinctly, there must still be unsoundness.

(3) The most satisfactory proof of recovery from an unsound state of mind is the conviction of the non-reality of the delusions which arose from the disease. *Semble*: a commission will not be superseded when any declared illusion continues to exist.

(4) A petition for *supersedeas* having failed, the ct., under the circumstances, refused to make any order as to costs, but directed the matter on this point to stand over, by way of affording a security against the repetition of the application except on proper grounds.

(5) Where a petition for a *supersedeas* was presented in the name of a lunatic & was dismissed, the ct. refused to make any order as to costs, although it was apparent that the petition originated with third parties, the ct. considering that it had no power to make those parties pay the costs.—*Re DYCE SOMBRE* (1849), 1 Mac. & G. 116; 1 H. & Tw. 285; 41 E. R. 1207; *sub nom. Re DYCE SOMBRE*, *Ex p. SOMBRE*, 13 Jur. 857, L. C.

*Annotation*:—*As to* (1), (4) & (5) *Refd. Re Blackmore* (1863), 32 L. J. Ch. 436.

**762. Clearest possible case to be made out.]—***Re DYCE SOMBRE*, No. 837, *post*.

**763. Proof of recovery—Proof by competent persons—With knowledge of former evidence.]—**To supersede a commission, it is not necessary, that the mind should be restored to its original state; competence to common purposes, as to make a will of personal estate, is sufficient. But the absence of the disorder, especially if of a dangerous tendency, must be satisfactorily proved by the evidence of persons, having competent knowledge of the whole subject, not only as to the present state of the party, but with reference to all the former evidence.—*Ex p. HOLYLAND* (1805), 11 Ves. 10; 32 E. R. 990, L. C.

*Annotations*:—*Consd. Re Blackmore* (1863), 32 L. J. Ch. 436.

*Refd. Steed v. Calley* (1836), 1 Keen, 620; *Prinsep & East India Co. v. Dyce Sombre* (1856), 10 Moo. P. C. C. 232.

**764. — Degree of recovery—Mind not necessarily restored to original state—Competent for common purpose.]—***Ex p. HOLYLAND*, No. 763, *ante*.

**765. — Delusion—Discontinuance of delusion.]—***Re DYCE SOMBRE*, No. 761, *ante*.

#### E. Practice.

See Rules in Lunacy, 1892, r. 23.

**766. Lunatic abroad without funds—Allowance made for expenses.]—***Re DYCE SOMBRE* (1844), 3 L. T. O. S. 157, L. C.; *previous proceedings*, 1 Ph. 436, L. C.; *subsequent proceedings*, 3 L. T. O. S. 197, 485, L. C.

**767. Adjournment of hearing—To obtain evidence.]—***Re DYCE SOMBRE* (1844), 3 L. T. O. S.

—*Petitioner declining to proceed.]—*

*Re CROSBIE* (1859), 12 Ir. Jur. 257.—IR.

PART VII. SECT. 4, SUB-SECT. 8.—F.

t. Commission set aside as to person

—*Not as to estate.]—* The ct. has power under Lunacy Act, 1898, to supersede an order declaring a person to be insane, so far as the person is

197, L. C.; *previous proceedings*, 1 Ph. 436, L. C.; *subsequent proceedings*, 3 L. T. O. S. 485, L. C.

**768. — For period of probation.]—***Re DYCE SOMBRE* (1844), 3 L. T. O. S. 197, L. C.; *previous proceedings*, 1 Ph. 436, L. C.; *subsequent proceedings*, 3 L. T. O. S. 485, L. C.

**769. Trial by jury not available.]—***Re TALBOT*, No. 682, *ante*.

#### F. The Order.

**770. Court not satisfied as to restoration—Lunatic with lucid intervals.]—**A lunatic having recovered his understanding, petitioned for a *supersedeas* of the commission, but the ct. only suspended it for some months, to see if he was perfectly recovered, because he had often relapsed, & was found by the inquisition, a lunatic with lucid intervals.—*Ex p. FERRARS* (1730), Mos. 332; 25 E. R. 423, L. C.

*Annotation*:—*Refd. Re Blackmore* (1863), 32 L. J. Ch. 436.

**771. — — — With liberty to apply.]—**BROOKE'S (OR ROOKE'S) CASE (1737), cited in 1 De G. J. & Sm. at p. 86; 1 New Rep. at p. 187; 32 L. J. Ch. at p. 437; 8 L. T. at p. 265; 9 Jur. N. S. at p. 90; 46 E. R. 34, L. C.

*Annotation*:—*Refd. Re Blackmore* (1863), 32 L. J. Ch. 436.

**772. — — — Liberty & possession of estate temporarily restored to lunatic.]—**(1) The Lord Chancellor will not in general supersede a commission of lunacy after verdict, without seeing the lunatic. The Lord Chancellor has no authority to grant a partial *supersedeas* of a commission of lunacy. A commission cannot be superseded as to the person of the lunatic, & at the same time continued in force as against the parties accountable for the lunatic's estate.

(2) A lunatic who has recovered will be allowed, without superseding the commission, to have the control of his fortune, & to superintend the prosecution of accounts against accounting parties without the intervention of the committee.—*Re GORDON* (1847), 2 Ph. 242; 41 E. R. 935; *sub nom. Re STAIR (LADY)*, 8 L. T. O. S. 405, L. C.; *previous proceedings, sub nom. Re STAIR* (1846), 6 L. T. O. S. 449, L. C.; 1 Coop. temp. Cott. 227, L. C.

**773. — — — — —.]—**Where a person duly found lunatic appeared to have recovered his sanity, but the medical evidence was conflicting, their lordships refused to order an immediate *supersedeas*, but suspended the commission for six months, giving the lunatic his personal liberty, & full possession of his estate in the meanwhile.—*Re BLACKMORE* (1863), 1 De G. J. & Sm. 84; 1 New Rep. 187; 32 L. J. Ch. 436; 8 L. T. 264, 476; 27 J. P. 132; 9 Jur. N. S. 90; 46 E. R. 33, L. JJ.

—.]—*Re COLLINS* (1848), 12 L. T.

O. S. 61, L. C.

**Partial supersedeas.]—**See Sub-sect. 8, A., *ante*.

#### G. Costs.

See Part XII., Sect. 6, *post*.

#### SUB-SECT. 9.—TRANSMISSION OF PROCEEDINGS.

See, generally, Lunacy Act, 1890 (c. 5), s. 107.

**775. Proceedings originating in Ireland—Transcript transmitted to England—Alleged miscarriage of justice in Ireland—No jurisdiction to rectify.]—***Re TALBOT*, No. 682, *ante*.

concerned, while leaving it in force as to the estate.—*Re AN INSANE PERSON* (1899), 20 N. S. W. L. R. (Eq.) 84; 15 N. S. W. N. 324.—AUS.

## SUB-SECT. 10.—COMMITTEES.

A. *Proposals for Appointment.*

**776. Attendance of next of kin—Order discouraging attendance avoided.]**—It is greatly to the advantage of lunatics, generally speaking, that all the next of kin & the heir-at-law should be present when the proposals for committees of the estate & of the person are discussed. In their absence many cases would be decided in total ignorance of, or only with a partial & imperfect acquaintance with, those circumstances a thorough knowledge of which is necessary to enable the Lord Chancellor to determine whether the plans he is required to sanction, will be beneficial, or detrimental, to the unfortunate persons on whose account they are framed. An order which might discourage the next of kin & heir-at-law from attending, when the proposals for committees of the person & estate are carried in, should be carefully avoided (LORD ELDON, C.).—*Re MEUX* (1808), 2 Coop. temp. Cott. 106; 47 E. R. 1075, L. C.

**777. — Generally ordered to attend.]**—In general an order is not requisite that any of the next of kin may be at liberty to carry in proposals for committees of the person & estate of the lunatic, & that they shall have notice of any proposal for committees of the person & estate, which the party prosecuting the commission shall carry in. Where from any peculiar circumstances such an order is requisite, the case probably will very rarely occur in which the Lord Chancellor will decline to make it. The policy here has long been in favour of making such an order. If the persons connected with the lunatic by blood, & interested in his estate, shall not come forward, & they not unfrequently will not care to come forward when obstacles are thrown in their way, the consequences will be extremely mischievous. It is, in general, only by means of the information, which such persons possess, that the Lord Chancellor can ascertain whether any proposal, upon which he is called to exercise a judgment, ought to be adopted as the most conducive to the case & welfare of the lunatic, & to the security of his property (LORD LYNTHURST, C.).—*Re HOWELL* (1829), 2 Coop. temp. Cott. 107; 47 E. R. 1075, L. C.

**778. Order for leave to propose—In anticipation of finding of jury.]**—*Re WEBB* (1846), 2 Ph. 10; 17 L. J. Ch. 276; 7 L. T. O. S. 465; 41 E. R. 844, L. C.; subsequent proceedings, 2 Coop. temp. Cott. 102, 145, L. C.

B. *Interim Committees.*

**779. When appointed—Leave to traverse—Husband of lunatic becoming incapable of attending to business.]**—A lady, who had been found lunatic, obtained leave to traverse, & no committee was appointed. Her husband, who had petitioned for the inquisition, having before the trial of the traverse, become incapable of attending to business, the ct. appointed *interim* committees of the lady's person, with liberty to take such proceedings with respect to the traverse as they should think fit.—*Re ARMSTRONG* (1858), 2 De G. & J. 123; 44 E. R. 934, L. C. & L. JJ.

**780. Improper performance of duties—Delay—**

**Practice.]**—(1) Where the nearest of kin are foreigners, domiciled abroad, the Chancellor will not appoint them committees of the person to the exclusion of persons resident in this country who are one degree more distantly related to the lunatic; but where the foreign relatives complained that the lunatic had been treated harshly & injudiciously, though the charges were not fully made out, the Lord Chancellor deemed sufficient had been proved to show that a change of treatment was necessary, & he therefore suspended the final appointment of the English relatives, who had been appointed *interim* committees, to be committees of the person until satisfactory changes of treatment had been made.

(2) It is the duty of the *interim* committees, under such circumstances, to communicate to the advisers of the foreign relatives the steps taken towards affecting his lordship's directions.—*Re BARIATINSKY* (1845), 6 L. T. O. S. 17, L. C.

**781. Duty of interim committee—To communicate with lunatic's relatives resident abroad—In respect of decisions of court—Relatives having interest in lunatic's affairs.]**—*Re BARIATINSKY*, No. 780, ante.

C. *Appointment of.*(a) *In General.*

*See, generally*, Lunacy Act, 1890 (c. 5), s. 108 (2).

**Mode of appointment.]**—*See* Lunacy Rules, 1892, rr. 31, 32.

**Temporary provision pending appointment.]**—*See* Lunacy Act, 1890 (c. 5), s. 130.

**782. Who appointed—Relative preferred to stranger.]**—Jurisdiction to expunge scandal from an affidavit in lunacy, or bkpcy., on reference to the master. In the appointment of committee of a lunatic relations, unless some specific objection, preferred to strangers. The wife appointed committee of the person, not alone, but jointly with a relation.—*Ex p. LE HEUP* (1811), 18 Ves. 221; 34 E. R. 300, L. C.

**783. — — —.]**—Reluctance with which a stranger is appointed committee of a lunatic, who has relations.—*Re WATKINS* (1846), 1 Coop. temp. Cott. 225; 47 E. R. 831, L. C.

**784. — Person with carriage of inquiry—Has no priority.]**—*Re WEBB*, No. 672, ante.

— **Committee of person.]**—*See* Sub-sect. 10, C. (b), post.

— **Committee of estate.]**—*See* Sub-sect. 10, C. (c), post.

**785. Jurisdiction to appoint—Inquisition in England—Lunatic's property in Ireland.]**—Where an individual is found lunatic under an inquisition taken in England, the appointment of committees of his person rests with the Lord Chancellor of Great Britain, notwithstanding that the property of the lunatic is situated in Ireland, & that a transcript of the record of the inquisition has been transmitted to the Chancery of that country, with a view to the appointment of committees of his estate by the Lord Chancellor of Ireland.—*Re TOTTENHAM* (1837), 2 My. & Cr. 39; 40 E. R. 556, L. C.

**786. Objection to appointment—On petition to confirm—Entry of caveat.]**—Leave may be given to the party who has entered a caveat to the

## PART VII. SECT. 4, SUB-SECT. 10.—C. (a).

**782 i. Who appointed—Relative preferred to stranger.]**—*Re PERSSE* (1828), 1 Mol. 439.—IR.

a. *Jurisdiction to appoint—Only to lunatic so found.]*—The ct. will not

appoint a committee of a lunatic not found so by inquisition nor make any order affecting the lunatic's property, however small it may be.—*Re ARNOTT, Re CHAMPIGNY* (1864), 2 W. W. & A'B. 11.—AUS.

b. *Objection to appointment—In-*

*competence must be shown.]*—The person whom the master has approved for the office of receiver of lunatic's estate must, to reject him, be shown incompetent. It is not sufficient, merely, that another person is more eligible.—*Re BANGOR (LORD)* (1818), 2 Mol. 518.—IR.



**Sect. 4.—Proceeding subsequent to inquiry: Sub-sect. 10, C. (a), (b) & (c), D., E. (a) & (b), & F.; sub-sect. 11.]**

appointment of the new committee to endeavour to substantiate his objection, but it must be at the risk as to costs of the party interposing (LORD LYNTHURST, C.).—*Re CLARKE* (1844), 3 L. T. O. S. 177, L. C.

**787. Appointment pending petition to traverse.]**—*Re CUMMING*, No. 735, *ante*.

(b) *Committee of Person.*

*See, generally*, Lunacy Act, 1890 (c. 5), s. 108 (2).

**Necessity for appointment.]—See** Lunacy Act, 1890 (c. 5), s. 108 (3).

**788. Who should be appointed—Comfort of lunatic paramount object.]—**The husband of a lunatic has no absolute right to be appointed the committee of her person. The ct. has jurisdiction to exercise its discretion in making such an appointment as it may think best for the benefit of the lunatic.—*Re DAVY*, [1892] 3 Ch. 38; 61 L. J. Ch. 578; 67 L. T. 180; 41 W. R. 96; 8 T. L. R. 701, L. JJ.

**789. — Female lunatic—Husband no absolute right.]—***Re L—D—* (No. 2) (1892), 36 Sol. Jo. 644, L. JJ.

**790. — Male lunatic—Wife—Jointly with relation.]—***Ex p. LE HEUP*, No. 782, *ante*.

**791. — — — Jointly with another where wife's superintendence injurious.]—**Where the immediate superintendence of him [a lunatic husband] by his wife would operate injuriously to him, the ct. will appoint her committee of the person but will associate with her some other individual, to whom the particular care of the lunatic may be entrusted.—*Re DYCE SOMBRE* (1844), as reported in 3 L. T. O. S. 485; 8 Jur. 817, L. C.

**— Preference given to relatives.]—See** Sub-sect. 10, C. (a), *ante*.

**792. — Whether proposed committee must be resident within jurisdiction.]—**The committee of a lunatic ought to be resident within the jurisdiction of the ct., & therefore, an allowance made him for expenses in visiting the lunatic, discontinued on his going to live in Scotland.—*Re SHIELDS, Ex p. ORD* (1821), Jac. 94; 37 E. R. 786, L. C.

*Annotation:—Reid. Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42.

**793. — — — Nearer relatives resident abroad.]—***Re BARIATINSKY*, No. 780, *ante*.

**794. — — —.]—**It being proposed to appoint as committee a person resident out of the jurisdiction, the Master in Lunacy reported that as the proposed committee was resident out of the jurisdiction he could not approve of him. The ct., though satisfied of the expediency of appointing him, declined to do so until the Master had certified that the proposed committee was a person whom, if resident within the jurisdiction, he should have approved.—*Re BRUÈRE* (1881), 17 Ch. D. 775; 45 L. T. 290; 30 W. R. 223, L. JJ.

**795. — Person interested in lunatic's estate.]—**COPE'S (LADY) CASE (1877), 2 Cas. in Ch. 239; 22 E. R. 926, L. C.

**796. — — — Lunatic in custody of next of**

**kin—Nominal committee appointed.]—DORMER'S CASE**, No. 407, *ante*.

**797. — — —.]—**No objection that the committee of the lunatic's person is the next of kin to the lunatic, & will come in for a share by Statute of Distribution, 1670 (c. 11), it being for the interest of the next of kin to prolong the lunatic's life, whereby his personal estate will be increased.—NEAL'S CASE (1729), 2 P. Wms. 544; 24 E. R. 854, L. C.

**798. — — —.]—**(1) The ct. will not grant the custody of the lunatic's person to the next heir; but the being entitled to a share of the personal estate by Statute of Distribution, 1620 (c. 11), is no objection.

(2) Inconvenient to grant the custody of a lunatic to two.—*Ex p. LUDLOW* (1731), 2 P. Wms. 635; 24 E. R. 893, L. C.

**799. — — —.]—**The old rule, that the next of kin of a lunatic is entitled to his estate upon his death, was not to be committee of the person, is not now adhered to.—*Ex p. COCKAYNE* (1802), 7 Ves. 591; 32 E. R. 238, L. C.

**800. — Married woman.]—**The custody of a lunatic may be granted to a *feme covert* though she be not *sui juris* but under the power of her husband (LORD PARKER, C.).—*Ex p. KINGSMILL* (1720), 3 P. Wms. 111, n.; 24 E. R. 990, L. C.

**801. Number to be appointed—Joint committee.]—***Ex p. LUDLOW*, No. 798, *ante*.

**802. Order for delivery of lunatic to the committee—Habeas corpus not necessary.]—***Ex p. CRANMER*, No. 1, *ante*.

(c) *Committee of Estate.*

*See, generally*, Lunacy Act, 1890 (c. 5), s. 108 (2).

**803. Who should be appointed—Master in Chancery.]—**The ct. will not appoint a Master in Chancery to an office, in respect of which he will be liable to account; as committee of a lunatic's estate. The ct. refused to appoint a person committee of a lunatic, upon the circumstances: particularly, that he had agreed to give part of the profits to another.—*Ex p. FLETCHER* (1801), 6 Ves. 427; 31 E. R. 1127, L. C.

*Annotation:—Apld. Ex p. Pincke* (1817), 2 Mer. 452.

**804. — Residence near lunatic.]—***Re ERINGTON, Ex p. FERMOR*, No. 889, *post*.

**805. — — — Residence at a distance not per se a disqualification.]—**(1) The residence of a committee at a great distance from the lunatic & his estate is not *per se* a disqualification for the office.

(2) The 13th General Order in Lunacy of Oct. 1842, enables the master to institute inquiries & report thereon without a previous order of reference for that purpose; but such report requires the sanction of the Great Seal before it can be acted upon. Where the committees of a lunatic, acting with the sanction of the master, but, by mistake, without the authority of the Great Seal, had expended large sums in improving the estate, & had done other acts of an important character, the ct. refused to discharge the committees, or to direct a reference at their cost to inquire as to the propriety of such acts, no *mala fides* being shown, & no improper items being pointed out in the accounts which had been passed by the master.

(3) In proceedings in lunacy, the attendance of

PART VII. SECT. 4, SUB-SECT. 10.—  
C. (b).

**788 i. Who should be appointed—Comfort of lunatic paramount object.]—**In the appointment of the committee of the person of a lunatic, the ct. will attend as far as possible to the wishes

& inclinations of the lunatic.—*Re LEACOCKE* (1838), L. & G. temp. Plunk. 498.—IR.

PART VII. SECT. 4, SUB-SECT. 10.—  
C. (c).

**c. Who should be appointed — Re-**

**lation preferred to master.]—**Whenever a person connected with the family can be found eligible & willing to give security, & undertake it, he ought to be appointed committee of the estate, & not a master.—*Re HUSSEY* (1828), 1 Mol. 226.—IR.

the heir-at-law is required, not for the protection of his own interest, but for the protection of the lunatic.

(4) Where an infant heiress-at-law, residing with her mother, a widow, was represented before the master by her mother's solr., & the accounts had been regularly passed, the ct. refused, on the petition of the heiress-at-law, to re-open the accounts on the sole objection, that the heiress at the time of passing such accounts had no legal guardian appointed.—*Re BROWN* (1849), 1 Mac. & G. 201; 1 H. & Tw. 348; 19 L. J. Ch. 96; 14 L. T. O. S. 101; 41 E. R. 1240, L. C.

**806. — — — — — Out of jurisdiction.] —**  
*Re BRUÈRE*, No. 794, *ante*.

**807. — — — — — Mother & guardian — Preferred to party interested in personal estate.] —**The mother & guardian of an infant tenant in tail in remainder preferred to the nominee of the party interested in the personal estate of a lunatic, tenant for life, as committee of his estate.—*Re WEBB* (1848), 2 Ph. 532; 41 E. R. 1049, L. C.

*Annotation:—Reid. Re Scarlett* (1873), 8 Ch. App. 739.

— **Preference given to relatives.] —**See Subsect. 10, C. (a), *ante*.

**808. — — — — — Person who is an accounting party.] —**  
*Re MILLINGTON* (1854), 2 Eq. Rep. 158, L. JJ.

**809. Number to be appointed — Where two estates some distance apart.] —**In a case where a lunatic had two estates situate at a distance from each other, & of considerable value, the ct. under the circumstances appointed a separate committee for each.—*Re ROBINS* (1831), 2 Russ. & M. 449; 39 E. R. 464, L. C.

**810. — — — — — One abroad.] —**Where a lunatic was a widow & interested in property of considerable value situate in Russia, the ct. appointed her eldest son, who resided in Russia, & her daughter, who resided in England, joint committees of her estate, & accepted as security the bond of the committees & of their brothers & sisters. — *Re HOPPER* (1897), 66 L. J. Ch. 569; 77 E. T. 154, L. JJ.

#### D. No one Willing to Act.

See Lunacy Act, 1890 (c. 5), s. 108 (2).

**811. Receiver appointed.] —**Receiver of a lunatic's estate appointed, when no one would act as committee.—*Re RADCLIFFE*, *Ex p. RADCLIFFE* (1820), 1 Jac. & W. 639; 37 E. R. 512.

**812. — — — — — Appointment of a receiver with a salary where no one is willing to become the committee of the estate.] —***Re BETTS* (1844), 3 L. T. O. S. 237.

See, generally, Part VIII., *post*.

#### E. Termination of Appointment.

##### (a) Committee of Person.

**813. Bankruptcy of committee.] —**Bkpcy. of the committee of the person of a lunatic is a suffi-

cient cause for removing him on account of the fund for maintenance; but the custody of the person will not be changed, if the master finds it proper with regard to the comfort of the lunatic, that it should continue.—*Ex p. MILD MAY* (1795), 3 Ves. 2; 30 E. R. 862.

*Annotation:—Reid. Re Birch, Ex p. Proctor* (1818), 1 Swan. 531.

**814. — — — — — The committee of the person of a lunatic not removed in consequence of his bkpcy. On a petition to remove the committee of the person, the ct., not being prevented by the form of the petition from granting relief according to the nature of the case, directed an inquiry, whether the comfort of the lunatic was sufficiently provided for; regard being had to the sum allowed.] —***Re BIRCH, Ex p. PROCTOR* (1818), 1 Swan. 531; 36 E. R. 493.

**Effect of death of lunatic.] —**See Part X., Sect. 14, sub-sect. 3.

##### (b) Committee of Estate.

**815. Joint appointment — Husband & wife — Wife next of kin — Death of wife.] —**A custody of a lunatic's estate granted to baron & feme, the feme being next of kin, determines on her death.—*Ex p. LYNE* (1735), Cas. temp. Talbot, 143; 25 E. R. 707.

**816. — — — — — Death of one — Estate very small.] —**When one of two committees of a lunatic's estate had died, & the property was very small, the ct., without a fresh reference to the master, ordered the income to be paid to the surviving committee on evidence of his solvency.—*Re NOBLE* (1852), 2 De G. M. & G. 280; 21 L. J. Ch. 748; 18 L. T. O. S. 266; 42 E. R. 880.

**817. Insolvency.] —***Ex p. MILD MAY*, No. 813, *ante*.

**818. — — — — — Re PORCH (1845), 4 L. T. O. S. 390.**

**819. Retirement due to age & health — Fresh appointment without reference to master.] —***Re POWEL* (1852), 19 L. T. O. S. 333, L. JJ.

**Position on death of lunatic.] —**See Part X., Sect. 14, sub-sect. 3.

#### F. Costs.

See Part XII., Sect. 8, sub-sect. 1, *post*.

#### SUB-SECT. 11.—PRODUCTION AND INSPECTION OF DOCUMENTS.

See DISCOVERY, Vol. XVIII., pp. 62, 63, Nos. 185-198.

**820. Inspection of papers for purpose of supersedeas.] —***Re DYCE SOMBRE* (1844), 2 L. T. O. S. 398.

**d. Duty of district judge to appoint.] —**Under Lunacy Act, 1858, s. 9, it is incumbent upon a district judge to appoint a manager of the estate of a person adjudged to be of unsound mind.—*Re JOGA KOER* (1903), 1 L. R. 30 Calc. 973.—IND.

**e. Discretion of court — Lunatic possessing business capacity.] —**A. B. v. C. D., [1891] A. C. 616.—SCOT.

**f. Effect on property outside jurisdiction.] —***Re KNOOP* (1883), 1 C. L. J. 115.—S. AF.

#### PART VII. SECT. 4, SUB-SECT. 10.—E. (b).

**817 i. Insolvency.] —**The committee of a lunatic is liable to be discharged from his office if he become insolvent.—*Re HUDSON* (1879), 1 Q. L. J. Supp. 1.—AUS.



## Part VIII.—Appointment of Receiver.

### SECT. 1.—PROCEDURE ON APPLICATION FOR APPOINTMENT.

See Rules in Lunacy, 1892, rr. 19, 48–52; Lunacy Acts, 1890 (c. 5), s. 116; 1908 (c. 47), s. 1.

**821. Two lunatics members of same family—Separate summonses—Necessity for separate affidavits in support.]—***Re MORRIS*, No. 1605, *post*.

### SECT. 2.—PERSONS FOR WHOM RECEIVER MAY BE APPOINTED.

See Lunacy Act, 1890 (c. 5), s. 116 (1).

**822. Person lawfully detained—Person detained abroad.]—**A “person lawfully detained as a lunatic” in Lunacy Act, 1890 (c. 5), s. 116 (1) (c), means a person lawfully detained under the provisions of that Act, & consequently within the jurisdiction, & does not include a person lawfully detained in a foreign country under the laws of that country. There is therefore no jurisdiction to appoint a receiver of the income of any such person under Lunacy Act, 1890 (c. 5), s. 116 (2).—*Re WATKINS*, [1896] 2 Ch. 336; 65 L. J. Ch. 636; 74 L. T. 504; 60 J. P. 500; 44 W. R. 609; 40 Sol. Jo. 512, L. JJ.

*Annotation:—Distd. Re Whalley*, [1906] 1 Ch. 565.

**823. — Under Idiots Act, 1886 (c. 25).]—***Re WHALLEY*, No. 1898, *post*.

See, now, Mental Deficiency Act, 1913 (c. 28).

**Persons incapable of managing affairs—Old age or disease—Person not detained or found insane.]—**See No. 1290, *post*.

**— Proved of unsound mind—Possessing property not exceeding certain sum in capital or income.]—**See Lunacy Act, 1890 (c. 5), s. 116 (1) (e).

**824. — — — — — How property ascertained.]—***Semble*: the order of the Lord Chancellor, under 11 Geo. 4 & 1 Will. 4, c. 60, s. 5, confers no title on a purchaser of mtged. hereditaments under a power of sale, where the purchase-money exceeds £700, although the total amount due & payable beneficially to the estate of the lunatic, not found so by inquisition is less than that sum; but the Lord Chancellor, on the petition of the receiver of the lunatic's estate, the purchaser consenting to take the title, directed a reference to the master, to inquire whether the lunatic was a mtgee., what sum was due on the mtge., whether the sale that had been made was a proper one, & what sum would be coming to the lunatic mtgee. on its completion.—*Re SANDFORD* (1849), 1 Mac. & G. 538; 2 H. & Tw. 137; 47 E. R. 1629, L. C.

**825. — — — — —.]—**In ascertaining whether the property of a person of unsound mind is of the amount of £1,000 or less, so as to bring the case within 25 & 26 Vict. c. 86, s. 12, his debts & the expenses incurred in his past maintenance since he became of unsound mind are to be deducted.—*Re FAIRCLOTH* (1879), 13 Ch. D. 307; 42 L. T. 72; 28 W. R. 481, L. JJ.

**826. — — — — —.]—**By Rules in Lunacy, 1892, r. 126, “There shall be paid a percentage at the rate of 4 per cent. *per annum* on the clear annual income, amounting to £100 & upwards, of every lunatic so found by inquisition, but so that no larger sum shall be payable in any

case in any one year than £400”:—*Held*: in calculating the “clear annual income” of a lunatic so found by inquisition no deduction could be allowed for the legal costs of general management or administration of his estate.—*Re WELD*, [1923] 1 Ch. 247; 92 L. J. Ch. 286; 129 L. T. 122; 39 T. L. R. 215, C. A.

**827. — — — — — Meaning of “property.”]**—(1) In ascertaining whether the property of a lunatic, under the summary jurisdiction of 25 & 26 Vict. c. 86, does or does not exceed £1,000 in value, the word “property” must be taken to mean “clear property.”

(2) An arrangement for the disposition of an estate, made between parties interested in common with a lunatic in the estate, although it involves complicated accounts, may be made the subject of a reference within 25 & 26 Vict. c. 86, s. 13.—*Re ADAMS* (1864), 4 De G. J. & Sm. 182; 3 New Rep. 339; 9 L. T. 626; 10 Jur. N. S. 137; 12 W. R. 291; 46 E. R. 886, L. C.

*Annotation:—As to (1) Apld. Re Faircloth* (1879), 13 Ch. D. 307.

### SECT. 3.—EFFECT OF APPOINTMENT.

**828. Protection of lunatic's property by court—Date of commencement—Necessity for order of court.]—***Re CLARKE*, No. 1077, *post*.

**829. Subsequent acts of lunatic—Void—Execution of equitable charge.]—***Re MARSHALL, MARSHALL v. WHATELEY*, No. 173, *ante*.

### SECT. 4.—EFFECT OF EXPIRATION OF ORDER FOR LUNATIC'S DETENTION.

**830. Continuance in force of order for receivership—Till discharged by further order.]—**An order made by a Master in Lunacy under 1890 Act (c. 5), s. 116 (1) (c), appointing a receiver & manager of the property of a person of unsound mind not so found, who at the date of the order was “lawfully detained” under a reception order, does not necessarily come to an end when the reception order expires & the person to whom it refers ceases to be lawfully detained; but a further order of the ct. is required to discharge it, & the ct. will not make such order unless satisfied that the person in question is no longer subject to the delusions which may have led to the detention.—*Re B. A. S.*, [1898] 2 Ch. 392; 67 L. J. Ch. 453; 78 L. T. 638, L. JJ.

**831. — — — — —.]—**A person of unsound mind, not being a lunatic so found by inquisition, on obtaining his discharge from an asylum is deemed to have recovered his sanity, notwithstanding that an order appointing his wife receiver of the dividends, interest & income of his property is still in force, & such a person can commit an act of bkpcy.

The order [under s. 116 of the Lunacy Act, 1890] remains in force until it is discharged (*PHILLIMORE, J.*).—*Re BELTON* (1913), 108 L. T. 344; 29 T. L. R. 313; 57 Sol. Jo. 343, D. C.

### SECT. 5.—COSTS.

See Part XII., Sect. 7, *post*.

#### PART VIII. SECT. 1.

*g. Medical affidavits.]—*An application to declare a person a lunatic without the expense of a commission must be supported by affidavits of

more than one medical man.—*Re PATTON* (circa 1858), 1 Ch. Ch. 192.—CAN.

*h. Who may appoint—Master in chambers.]—*An appon. under rule 69, O. J. Act, for an order appointing the

official guardian the guardian of one of defts., a person of unsound mind, not so found:—*Held*: the motion should be made before the master in chambers.—*CRAWFORD v. CRAWFORD* (1881), 9 P. R. 178.—CAN.

## Part IX.—Judicial Powers over Person.

## SECT. 1.—IN GENERAL.

**832. Access to lunatic—Power of court to refuse.]**—Access to a lunatic by a person entitled upon the death of the lunatic in default of appointment by her, to see, whether she was in a state to exercise the power, refused.—*Ex p. LYTTTELTON* (1801), 6 Ves. 7; 31 E. R. 911, L. C.  
*Annotation:—Consd. Re B—*, [1891] 3 Ch. 274.

## SECT. 2.—MAINTENANCE AND ACCOUNTING.

**833. Liability of committee to account—Sum allowed for maintenance of children—Gross fraud.]**—The ct. allowed the profits of the lunatic's estate to the committee for the maintenance of his person. The lunatic died, his administrator brought a bill for an account of these profits; defendant, the committee, pleaded this order of ct. of the allowance of the profits for the lunatic's maintenance; the plea ordered to stand for an answer: but the ct. declared they would not relieve in such case without gross fraud.—*SHELDON v. FORTESCUE ALAND* (1731), 3 P. Wms. 104; 24 E. R. 987, L. C.

*Annotation:—Mentd. Palmer v. Mure* (1773), 2 Dick. 490.

**834. ——— Special circumstances.]**—Where an annual sum of money is ordered to be paid to the committee of the person for the maintenance of a lunatic, the committee is not bound to keep accounts, &, as a general rule, will not be ordered to account. But the committee may be ordered to account under special circumstances, as when the lunatic has been improperly maintained, or the sum allowed has clearly not been expended. Where a committee had received one allowance for the maintenance of a lunatic & another for the maintenance of her infant children, & had, after properly maintaining the lunatic, spent the remainder of her allowance on the maintenance of the children:—*Held*: he would not be ordered to account on the petition of the children.—*Re FRENCH* (1868), 3 Ch. App. 317; 37 L. J. Ch. 537; 18 L. T. 139; 16 W. R. 657, L. J.

*Annotation:—Refd. Strangways v. Read*, [1898] 2 Ch. 419.

**835. ——— Separate maintenance for children—Account on petition by children.]**—*Re FRENCH*, No. 834, *ante*.

**836. ——— Proof of insufficient maintenance by committee.]**—The committee of the estate of a lunatic was authorised by an order of Mar. 1896, in the common form, to pay to the committee of the person £2,500 *per annum* for the lunatic's maintenance; the order also provided for the keeping up of a considerable establishment, & that the committee of the person should be at liberty to reside in the lunatic's own house & have the use of the horses, carriages, & other effects of the lunatic. As a matter of convenience to the committee of the person, the allowance was paid quarterly in advance. A quarterly payment of £625 was made on Oct. 29, 1896, & thirteen

days afterwards the lunatic died. The exors. of the lunatic claimed to be repaid the sum of £528, being the proportionate part of the quarter's allowance for the period subsequent to the death of the lunatic; or, in the alternative, an inquiry what was properly payable for the maintenance of the lunatic during the thirteen days, & brought an action to enforce this claim:—*Held*: as the lunatic had not been maintained for the whole year, the exors. were entitled to receive from the committee of the person such portion of the yearly allowance as had not been properly expended for the purposes of the lunatic; & an inquiry was directed what sum ought to be allowed to the committee of the person during the time the lunatic was maintained, regard being had to the order of Mar., 1896, with liberty to apply in chambers for any balance that might be found due to the lunatic's estate, & as to costs.—*STRANGWAYS v. READ*, [1898] 2 Ch. 419; 67 L. J. Ch. 581; 79 L. T. 245; 46 W. R. 671; 14 T. L. R. 508; 42 Sol. Jo. 654.

## SECT. 3.—RESIDENCE OF LUNATIC SO FOUND.

**837. Permission to reside out of jurisdiction.]**—(1) Where the lunatic's delusions are entirely consequential upon an unfounded jealousy of his wife's fidelity, the wife, though she may be continued one of the committees of the person, will not be allowed any active superintendence or control over the lunatic; & the lunatic, if attended by a proper person, will be permitted to reside abroad, out of the jurisdiction.

(2) The invariable principle & practice of this ct. is, that when once a jury had pronounced a person to be insane, the clearest possible case must be made out of recovery before the ct. can interfere to set aside the commission. The proper state of things, that the person should be conscious of his previous delusions, & that they left him; & not still to adhere to them as if they were true (*LORD COTTENHAM, C.*)—*Re DYCE SOMBRE* (1844), 3 L. T. O. S. 485; 8 Jur. 817, L. C.

**838. ———.]**—Leave given for a lunatic, under particular circumstances, to reside in Scotland, his committee, who resided in England, undertaking to bring him within the jurisdiction whenever it should be required.—*Re JONES* (1844), 1 Ph. 461; 4 L. T. O. S. 249; 41 E. R. 707, L. C.

**839. ———.]**—*Re DYCE SOMBRE* (1847), 10 L. T. O. S. 241, L. C.

## SECT. 4.—HABEAS CORPUS.

*See, generally*, CROWN PRACTICE, Vol. XVI. pp. 248 *et seq.*

**840. Habeas corpus ad subjiciendum—Validity of detention of lunatic.]**—Discharge from a mad house by *habeas corpus*.—*R. v. TURLINGTON* (1761) 2 Burr. 1115; 97 E. R. 741.

& usually resided there:—*Held*: "residence" under Lunacy Act, 1881 means ordinary residence as distinguished from compulsory detentio & the lunatic's real residence was Cavan.—*Re MURTHA, Ex p. CONLC* (1910), 44 I. L. T. 114.—IR.

## PART IX. SECT. 4.

**840 i. Habeas corpus ad subjiciendum—Validity of detention of lunatic.]**—

## PART IX. SECT. 1.

**k. No power to compel lunatic to go to asylum.]**—If a lunatic be well taken care of by his own people at home, he should not be forced to go to lunatic asylum, there being apparently no provision in the Lunacy Act authorising a district judge to send such a person to the asylum.—*Re JOGA KOER* (1903), 1 L. R. 30 Calo. 973.—IND.

## PART IX. SECT. 3.

**837 i. Permission to reside out of the jurisdiction.]**—Where a person has been declared a lunatic on petition, the Lord Chancellor will not, in the absence of special circumstances, send him to reside out of Ireland.—*Re BIRCH* (1892), 29 L. R. Ir. 274.—IR.

**1. Meaning of "residence".]**—A lunatic who was confined in Monaghan Asylum had a farm in County Cavan,



**Sect. 4.—Habeas corpus. Part X. Sect. 1: Subsect. 1, A. & B. (a).]**

**841.** ———.]—*Ex p.* LLOYD (1845), 4 L. T. O. S. 359; 9 J. P. Jo. 115.

**842.** ———.]—*Ex p.* LUNACY COMRS. (1849), 13 L. T. O. S. 123; 13 J. P. Jo. 313.

**843.** ———.]—*Re* DELL (1891), 91 L. T. Jo. 375.

**844.** ———.]—*Re* STENEULT (1894), 29 L. Jo. 345, D. C.

**845.** ———.]—*Re* ELTON (1896), *Times*, May 1.

**846.** ———.]—*Re* WILKINSON (1919), 83 J. P. Jo. 422.

**847.** ———.]—**Who may apply for writ—Stranger without authority.**—No one can support an application for a writ of *habeas corpus* on behalf of another without some authority or legal right to make it.

The relation of attorney & client on a special retainer for a specific purpose, or business not necessarily involving or importing a retainer to apply for a writ of *habeas corpus*, does not give an authority to the attorney to make such an application on behalf of his client. In the case of an alleged lunatic, his retainer of an attorney to prosecute a petition of lunacy does not give such an authority, even although the attorney be denied access to him, & if, under such circumstances the application be made by the attorney, without any affidavit from the client, & without any affidavit showing that he expressly authorised the application, or is detained against his will, & without any explanation of the absence of such express authority or affidavit on his part beyond the mere fact of his detention, & of the exclusion of his attorney, the rule will be discharged with costs.

*Semble*: the proper course is to apply to the Lord Chancellor of the Comrs. of Lunacy to admit the attorney to have access, or to allow a comr. for taking affidavits to wait on the alleged lunatic for the purpose of his making an affidavit if he desire to make one.—*Ex p.* CHILD (1854), 15 C. B. 238; 23 L. T. O. S. 190; 139 E. R. 413; *sub nom.* *Re* FITZGERALD, *Ex p.* CHILD, 2 C. L. R. 1801.

**848.** ———.]—**Attorney retained by client.**—*Ex p.* CHILD, No. 847, *ante*.

**849.** ———.]—**Sufficiency of return to writ.**—*R. v.* WRIGHT (1731), 2 Stra. 915; 93 E. R. 939; *sub nom.* ANON., 2 Barn. K. B. 35.

**850.** ———.]—*Re* FELL, No. 1853, *post*.

**851.** ———.]—**Whether lunatic must be**

**brought up.**—When it appears that the party is actually insane, the ct. will not direct the body to be brought up on *habeas corpus*.—*R. v.* CLARKE (1762), 3 Burr. 1362; 97 E. R. 875.

*Annotation*:—*Consd.* *R. v.* Brixton Prison, *Ex p.* Servini, [1914] 1 K. B. 77.

**852.** ———.]—*Ex p.* ——— (1852), 16 J. P. Jo. 53.

**853.** ———.]—**Whether court will direct issue as to lunacy—Lunatic not entitled as of right to issue.**—Neither under the Victoria Lunacy Act of 1890 nor under a *habeas corpus* is a person lawfully detained as a lunatic entitled as of right to have the question of his lunacy decided by means of a jury. Special leave to appeal from certain orders of ct. refused, petitioner's object being to obtain a jury's decision as to the lunacy.

The ct. may come to a conclusion, as it has done in this case, that appct. is lawfully detained upon the evidence before it. The ct. is not bound to direct an issue to be tried by a jury. The ct. can always direct such an issue if the ct. is of opinion that justice requires it (LORD LINDLEY).—*Ex p.* GREGORY, [1901] A. C. 128; 70 L. J. P. C. 19; 83 L. T. 441, P. C.

**854. Habeas corpus ad testificandum—Fitness to be removed from asylum.**—In order to obtain a *habeas corpus*, to bring up a person confined in a lunatic asylum as a witness, it is necessary that the affidavit should show that he is in a fit state to be removed, & that he is not a dangerous lunatic.—*Ex p.* ——— (1834), 3 Dowl. 161.

**855.** ———.]—A *habeas corpus ad testificandum* may be obtained to bring up the body of a confined lunatic to give evidence in a cause, upon an affidavit showing that he is not a dangerous lunatic, & that he is in a fit state to be brought up.—*FENNELL v.* TAIT (1834), 1 Cr. M. & R. 584; 5 Tyr. 218; 149 E. R. 1213.

**856. Habeas corpus ad respondendum—Removal to asylum after committal for trial—Issue of writ by judge of assize.**—Where prisoner was committed for trial by the magistrates to the assizes, but, after committal, was removed by them to the county lunatic asylum, the judge of assize has power to issue a *habeas corpus* to bring prisoner up for his trial.—*R. v.* PEACOCK (1870), 12 Cox, C. C. 21.

*Annotation*:—*Mentd.* *R. v.* Shurmer (1886), 2 T. L. R. 737.

**857. Habeas corpus to be surrendered in discharge of bail.**—A lunatic may be brought up by *habeas corpus* from St. Luke's Hospital to be surrendered in discharge of his bail.—*PILLOP v.* SEXTON (1803), 3 Bos. & P. 550; 127 E. R. 297.

DACK (1913), 25 O. W. R. 633; 5 O. W. N. 774.—CAN.

**m.** ———.]—**Whether court will direct issue as to lunacy.**—Upon a

*habeas corpus* application on behalf of an alleged lunatic for his discharge from an asylum, the ct. may direct an issue to try the question whether appct. is at the time of the inquiry of

unsound mind & incapable of managing himself & his affairs, & whether if being found insane, he is dangerous to be at large.—*Re* KING (1916), 35 W. L. R. 132; 11 W. W. R. 132.—CAN.

## Part X.—Judicial Powers over Estate.

## SECT. 1.—COMMITTEES AND RECEIVERS.

## SUB-SECT. 1.—POSITION OF COMMITTEE OR RECEIVER.

A. *In General.*

858 Lien on estate.]—BARNESLEY v. POWELL, No. 1646, *post*.

859. — Special lien—After death of lunatic—As against purchaser with notice of committee's claim.]—A committee of a lunatic has no special lien upon the estate, after the death of the lunatic, for money expended by him on his behalf, & a purchaser having notice of the claim of the committee is no more bound to see to the application of the purchase-money than if he bought with notice of simple contract debts.—JONES v. NOYES & ALLEN (1858), 28 L. J. Ch. 47; 32 L. T. O. S. 102; 4 Jur. N. S. 1033; 7 W. R. 21.

860. Application of savings of management—Payment of interest.]—Brother of lunatic, committee of the estate, had managed it nine years before the commission, during which time there were considerable savings. To pay interest, though alleged, he made no use of it, unless particular circumstances to justify that.—Re CHUMLEY (1790), 1 Ves. 156; 30 E. R. 278, L. C.

861. Who may be appointed—Solicitor under inquisition of lunacy.]—Solr. under a commission of lunacy not to be appointed receiver of the estate of the lunatic.—*Ex p.* PINCKE (1817), 2 Mer. 452; 35 E. R. 1013, L. C.

— Principles governing appointment.] — See Part VII., Sect. 4, sub-sect. 10, C.

862. Duty to keep down interest—Mortgage.]—Docketing the issue without docketing the judgment, & the debt, damages, & costs recovered thereby, is not a sufficient docketing a judgment within 4 & 5 Will. & Mar. c. 20. Therefore, where a committee of a lunatic, against whom judgment had been obtained but not duly docketed, paid over rents to a mtgee. of a date subsequent to the judgment, it was held, that he was not liable as for money had & received to the use of pltf., who claimed as tenant by *elegit* under the judgment; for it was his first duty as committee to keep down the interest on the mtge.—BRAITHWAITE v. WATTS (1832), 2 Cr. & J. 318; 2 Tyr. 293; 1 L. J. Ex. 97; 149 E. R. 136.

863. Officer of court—Powers.]—*Semble*: the committee of a lunatic has not power to vary or exchange debts, or alter contracts entered into by the lunatic, they being merely officers of the ct.—*Re* STOCKS, *Ex p.* PARKER (1842), 2 Mont. D. & De G. 511; 11 L. J. Bcy. 26; 6 Jur. 541, Ct. of R.

864. Freedom from interference—By person other than court—Complaint by creditor.]—The control of the committee over a lunatic's estate will not generally be interfered with, except in case of improper conduct on the part of the committee, & therefore a petition presented

on behalf of a joint-stock co., in which a lunatic was a shareholder, praying for a reference, whether it would be for the benefit of the lunatic that the amount due in respect of his shares by virtue of a call which had been made by the co., should be paid out of his estate, which petition was opposed by the committee, was dismissed with costs.—*Re* HITCHON (1846), 15 L. J. Ch. 126; 6 L. T. O. S. 409, L. C.

865. Complaint by relation—Against committee—Personal examination of lunatic.]—*Re* BAGSTER (1847), 9 L. T. O. S. 242, L. C.

866. Answer of committee—Whether binding on estate of lunatic.]—A bill was filed against a lunatic & her committees, A., B., and C. After answer by the committees & replication, & evidence having been taken, but before the hearing, the lunatic died. Administration having been granted to A. & D. & E. the wives of B. & C., the suit was revived against A., B., & C., D., & E. by bill of revivor; & in the answer to the bill of revivor defts. claimed the benefit of the previous answer of the committees. To this answer no replication was filed:—*Held*: (1) (LORD CRANWORTH, C.) although the answer of the committees might not in general be binding on the estate of a lunatic, yet the representatives, being really the same parties as the committees, & having adopted their answer, must be concluded by it; (2) (LORD ST. LEONARDS) the answer of committees was in general binding on a lunatic's estate, & under the circumstances there was nothing to take the case out of the general rule.—STANTON v. PERCIVAL (1855), 5 H. L. Cas. 257; 24 L. J. Ch. 369; 26 L. T. O. S. 49; 3 W. R. 391; 10 E. R. 898, H. L.; *affg.* S. C. *sub nom.* PERCIVAL v. CANEY (1852), 4 De G. & Sm. 610, L. C.

*Annotations*:—*Generally*, *Mentd.* Barbat v. Allen (1852), 21 L. J. Ex. 155; Stapleton v. Crofts (1852), 18 Q. B. 367; M'Neillie v. Acton (1853), 22 L. J. Ch. 820.

Effect of death of lunatic.]—See Part X., Sect. 14, sub-sect. 3, *post*.

B. *Duty to Act under Direction of Court.*(a) *In General.*

867. Liability for wrongful act of solicitor—Misapplication of estate of lunatic.]—A solr. to committees received & misapplied part of the estate of the lunatic & then died insolvent. The ct., although it held the committees answerable, yet, considering that, under the circumstances, the lunatic, if he recovered, would not enforce the liability, made a declaration that they were not to be charged with the loss, but the costs were not to be allowed out of the estate.—*Re* MOORE (1853), 23 L. J. Ch. 153.

868. Erroneous exercise of discretion.]—C., a committee of a lunatic, & who was also a trustee for other parties, was held liable for rents received, & wrongfully paid by him to those other parties

## PART X. SECT. 1, SUB-SECT. 1.—A.

n. *Assumption of control of estate by stranger—Liable to account as trustee.*]—A person who of his own motion assumes the care & control of the estate of a person of unsound mind, by so doing constitutes himself a trustee & is liable to account as such.—PERPETUAL TRUSTEE CO., LTD. v. THOMAS (1903), 3 S. R. N. S. W. 277; 20 N. S. W. W. N. 133.—AUS.

o. *Duty to pay moneys into court.*]—It is the duty of the committee to pay into ct. moneys which will not,

within a short time, be required for the purposes of the estate, & he is liable for interest upon moneys received by him from its receipt until payment.—*Re* NEVINS (1888), 5 Man. L. R. 137.—CAN.

p. —.]—*Re* NORRIS, *Re* DROPE (1902), 5 O. L. R. 99; 1 O. W. R. 817; 23 C. L. T. 49.—CAN.

q. *Public trustee as committee—Power to sell & convey.*]—*Re* BURLEY & LIVINGSTON, [1924] 2 D. L. R. 997; 54 O. L. R. 452.—CAN.

## PART X. SECT. 1, SUB-SECT. 1.—B. (a).

r. *Foreign curator—Recognition by court.*]—A curator or other person or body duly appointed by a foreign ct. to a lunatic within its jurisdiction will be recognised by the ct. & authorised to deal with the lunatic's immovable property situate in the Transvaal, subject to the rights of local creditors, if any. The responsibility of dealing with such property thereafter belongs to such curator & the ct. will not confirm his actions or give him directions



*Sect. 1.—Committees and receivers: Sub-sect. 1, B. (a), (b), (c) & (d), C., D., E. & F.; sub-sect. 2.]*

during the lifetime of the lunatic.—*WRIGHT v. CHARD* (1860), 1 De G. F. & J. 567; 29 L. J. Ch. 415; 2 L. T. 104; 6 Jur. N. S. 476; 8 W. R. 334; 45 E. R. 481, L. JJ.

*Annotations:—Mentd. Johnson v. Gallagher* (1861), 3 De G. F. & J. 494; *London Chartered Bank of Australia v. Lempriere* (1873), L. R. 4 P. C. 572.

*(b) Conduct of Proceedings.*

**869. Sanction of court — Necessity for.]**—A committee of a lunatic ought, before bringing or defending an action on behalf of a lunatic, to have the sanction of the ct.—*Re NOTLEY* (1839), 3 Jur. 719.

**870. — Bankruptcy proceedings.]**—(1) Where, in an English lunacy, a committee has been appointed, a *curator bonis* appointed by the Scottish Ct. of the lunatic's estates in Scotland, especially where appointed, prior to the lunacy, on account of physical incapacity has no *locus standi*, under Bkpcy. Act, 1883 (c. 52), s. 41, which provides that, for the purposes of the Act, "a lunatic may act by his committee of *curator bonis*" to intervene in English bkpcy. proceedings by the committee in the name & on behalf of the lunatic. The committee is, when appointed, the only person entitled under the sect. to represent the lunatic in the proceedings, & the *curator bonis* is only entitled to act therein for the lunatic where there is no committee.

(2) Where the committee of a lunatic debtor has been authorised by the Ct. in Lunacy to take preliminary proceedings with a view to making him bkpt., by filing in his name a declaration of insolvency, no subsequent steps such as admitting the debt of a creditor who may have presented the bkpcy. petition, or consenting to an adjudication, should be taken by the committee without first obtaining the sanction of the Ct. in Lunacy.—*Re R. S. A.*, [1901] 2 K. B. 32; 70 L. J. K. B. 475; 84 L. T. 477, C. A.

*(c) Expenditure of Money.*

**871. Necessity for application to court.]**—(1) The committee of a lunatic cannot make leases, nor encumber the lunatic's estate, without leave of the ct.

(2) Committee not to be allowed for buildings & improvements on the lunatic's estate.—*FOSTER v. MARCHANT* (1684), 1 Vern. 262; 23 E. R. 457.  
*Annotation:—Generally, Mentd. Oxenden v. Compton* (1793), 2 Ves. 69.

**872. —.]**—Expenditure by the committee of a lunatic's estate without a previous application not to be allowed.—*Ex p. MARTON* (1805), 11 Ves. 397; 32 E. R. 1140.

**873. —.]**—Expenditure by the committee of a lunatic's estate without a previous application not to be allowed.—*Ex p. HILBERT* (1805), 11 Ves. 397; 32 E. R. 1141.

**874. — Expenditure beneficial to estate.]**—A committee, who, having been authorised by the

as to the disposal of such property or the proceeds thereof.—*Ex p. PEARCE'S CURATOR* (1907), T. S. 887.—S. AF.

t. —.]—*Ex p. BOTTOMLEY*, [1911] T. P. D. 143.—S. AF.

PART X. SECT. 1, SUB-SECT. 1.—B. (b).

a. *Sanction of court — Bankruptcy proceedings.]*—The ct. has power to sanction the presentation of a petition in insolvency or for the liquidation of the affairs of an insane person by

his committee.—*Re NEWMAN-WILSON* (1895), 6 Q. L. J. 229.—AUS.

PART X. SECT. 1, SUB-SECT. 1.—B. (c).

b. *Unauthorised expenditure—Sanction by court.]*—*Re SHAW* (1869), 15 Gr. 619.—CAN.

c. —.]—Expenditures which have been made on behalf of a lunatic without authority may be allowed by the ct., but not by the master. Such expenditures will be

ct. to expend a certain sum in rebuilding a farmhouse, expended half as much again in building one of larger size on a different site, was not allowed the excess; although what he had done appeared to be beneficial to the estate.—*Re LANGHAM* (1847), 2 Ph. 209; 41 E. R. 958.

*(d) Leasing.*

**875. Power of receiver to grant lease.]**—*FOSTER v. MARCHANT*, No. 871, *ante*.

**876. Power to lease.]**—*FOSTER v. MARCHANT*, No. 871, *ante*.

**877. Lease by committee — At less than best rent.]**—The committee of a lunatic's estate, who, in conjunction with the wife & heir-at-law of the lunatic, had let the estate at a certain rent, without obtaining the sanction of the ct., three years afterwards, upon the report of the master finding that a larger rent might have been obtained, was held responsible for the amount of such larger rent, & ordered to pay all the costs occasioned by his having let the property at an under-value.—*Re WILKINS, Ex p. WILKINS, Ex p. JENVEY* (1842), 6 Jur. 308.

**878. — Failure to collect arrears of rent.]**—Where a committee of the estate of a lunatic permitted the solr. whom he employed in the lunacy to become tenant of a mansion house, forming part of the lunatic's estate, & allowed the rent to be in arrear for four years, none having, in fact, been paid, except by means of a set-off of a smaller sum, being the amount of the solr.'s bill of costs accruing from time to time:—*Held*: the committee was personally liable to make good the deficiency.—*Re SWINDELL, Ex p. SWINDELL* (1852), 2 De G. M. & G. 91; 21 L. J. Ch. 748; 19 L. T. O. S. 195; 42 E. R. 805, L. JJ.

*C. Employment of Agent.*

**879. Power of court to order.]**—Order made, without a reference to the master, that the committee of a lunatic should be at liberty to employ a particular person for inspecting the lunatic's property at a fixed salary, to be paid out of the rents.—*Re ERRINGTON* (1826), 2 Russ. 567; 38 E. R. 448.

*D. Neglect of Compliance with Orders.*

**880. Order for payment for special purposes.]**—*Re JODRELL* (1829), Shelford on Lunatics, 2nd ed. 182.

*Annotation:—Reid. Re French* (1868), 3 Ch. App. 317.

**881. Debt due from late committee — Order for payment disobeyed—Petition for committal.]**—*Re WILKINS* (1844), 2 L. T. O. S. 494.

**882. Payments authorised from lunatic's estate — Subsequent order by Master of Rolls discharged.]**—*AMES v. PARKINSON*, No. 495, *ante*.

*E. Remuneration.*

**883. General rule.]**—Ct. will not allow committee of a lunatic any thing for his trouble.—*Re ANNESLEY* (1749), Amb. 78; 27 E. R. 49.

*Annotation:—Mentd. Ex p. Annandale* (1749), Amb. 80.

less readily sanctioned after the death of a lunatic.—*Re NEVINS* (1888), 5 Man. L. R. 137.—CAN.

PART X. SECT. 1, SUB-SECT. 1.—B. (d).

d. *Lease by committee — Lunatic domiciled beyond jurisdiction.]*—*Re CROZIER* (1887), 13 V. L. R. 302.—AUS.

PART X. SECT. 1, SUB-SECT. 1.—E.

e. *Compensation.]*—The ct. has power to allow compensation to a

**884.** —.]—Committee of the person & estate of lunatic, with restriction not to receive any part of the estate. Receiver appointed of the estate.—*Re BILLINGHURST, Ex p. BILLINGHURST* (1750), Amb. 104; 27 E. R. 65.

**885.** —.]—No allowance to the committee of a lunatic's estate for his care & trouble.—ANON. (1804), 10 Ves. 103; 32 E. R. 783.

**886.** —.]—Where a lunatic's property consisted simply of public stock & moneys due in respect of half-pay, an allowance to the committee for receiving it, was refused.—*POWELL v. BONNER, CARTWRIGHT v. BONNER, Re POWELL* (1840), 9 L. J. Ch. 139.

**887.** —.]—*Re BRAMWELL* (1844), 3 L. T. O. S. 69.

**888. Exception to rule—No suitable person available as committee—Receiver.**—Where no one could be procured to act as committee of a lunatic, a receiver was appointed, with a salary; but to be considered, & give security, as committee.—*Ex p. WARREN* (1805), 10 Ves. 622; 32 E. R. 985.

**889.** — **Exceptional circumstances.**—(1) A salary allowed to the committee of the estate of a lunatic under peculiar circumstances.

If the question were, whether a committee is generally to receive a salary, I should say, No. But if the question were, whether there may not be cases where he ought to have a salary, I should say, Yes. (LORD ELDON, C.).

(2) Persons whose place of residence admits of their frequently visiting the lunatic, & inspecting the management of his concerns, to be preferred as committee.—*Re ERRINGTON Ex p. FERMOR* (1821), Jac. 404; 37 E. R. 903.

**890.** —.]—The committee of the estate of a lunatic is not entitled to any remuneration for his trouble. Where any allowance at all is made to him, it is not for his sake, but for the benefit of the estate, as where rents cannot be effectually collected by the committee without assistance.—*Re WALKER* (1848), 2 Ph. 630; 41 E. R. 1087.

**891.** — **Payment of out of pocket expenses.**—Allowance, not exceeding 5 per cent. on receipts, to committee of lunatic's estate for expenses out of pocket in collecting rents.—*Re WESTBROOKE* (1848), 2 Ph. 631; 41 E. R. 1087.

#### *F. Committee as Administrator on behalf of Lunatic.*

**Grant of administration to committee.**—See EXECUTORS, Vol. XXIII., pp. 151–152, 168, Nos. 1578–1582, 1839.

#### SUB-SECT. 2.—SECURITY.

**892. By committee—Son of lunatic.**—Even the eldest son & heir-at-law of a lunatic will not be appointed one of the committees of his estate, without giving security, unless the master reports that no person can be found to act as committee, who will give security.—*Re FRANK* (1826), 2 Russ. 450; 38 E. R. 405, L. C.

committee, but the master has no such power unless the matter is specially referred to him.—*Re NEVINS* (1888), 5 Man. L. R. 137.—CAN.

**1. Right to retain from maintenance allowance.**—*Re BOWMAN* (1868), 7 N. S. W. S. C. R. (Eq.) 34.—AUS.

**g. Right to charge commission—On moneys collected by committee.**—*Re GRAY, PUBLIC TRUSTEE v. STEVENS* (1902), 22 N. Z. L. R. 32.—N.Z.

**893. Change of security—Power of court to order.**—*Ex p. PERERIA* (1755), 2 Ves. Sen. 674; 28 E. R. 429, L. C.

**894. Reduction of security—Power of court to order.**—*Ex p. NORTHLEIGH* (1755), 2 Ves. Sen. 673; 28 E. R. 429, L. C.

**895. Dispensing with security—Funds in hands of Accountant—General—Security for application of income.**—*Re DODSON* (1844), 3 L. T. O. S. 53, L. C.

**896.** — **Portion of estate paid into court—Dispensation pro tanto.**—*Re MITCHIN* (1844), 3 L. T. O. S. 258, L. C.

**897.** —.]—*Re RUXTON* (1844), 4 L. T. O. S. 249, L. C.

**898.** —.]—*Re PEOVER* (1845), 4 L. T. O. S. 350, L. C.

**899.** —.]—Securities belonging to a lunatic's estate ordered to be deposited with the master, for the purpose of reducing the amount of the committee's recognisances.—*Re EAGLE* (1847), 2 Ph. 201; 41 E. R. 919, L. C.

**900.** — **Whole property in court—Approval of Attorney-General.**—*Re STONE* (1845), 5 L. T. O. S. 122, L. C.

**901.** —.]—*Re LOCKSLAM* (1846), 6 L. T. O. S. 477, L. C.

**902. Bond given to Crown by committee—Matter of record—33 Hen. 8, c. 39, s. 50.**—A bond given to the Crown by a committee of a lunatic, on his appointment, is within above sect. & the Crown is entitled to treat it as matter of record, & have a *sci. fa.* thereon.—*R. v. CHAMBERS* (1843), 11 M. & W. 776; 1 L. T. O. S. 315; 152 E. R. 1018.

**903. Amount of security—Whole estate in England—Foreign assets.**—*Re DYCE SOMBRE* (1844), 3 L. T. O. S. 277, L. C.

**904. Non-completion of security—Liability of committee.**—*Re OTTE* (1845), 4 L. T. O. S. 451, L. C.

**905. Sufficiency of—Bond of joint committees & their brothers & sisters—Property of lunatic abroad.**—*Re HOPPER*, No. 810, ante.

**906. Surety for committee of estate—Who may be—Committee of person.**—The heir-at-law of a lunatic, who with one other person was the next of kin of the lunatic, was appointed committee of his person. Another party being proposed, was approved of by the Master in Lunacy as committee of the estate. The committee of the person proposed himself as one surety for the committee of the estate. The A.-G. was willing to accept this security, but declined to do so without the sanction of the ct. An order was made that, upon the allowance to the lunatic being paid direct to the committee of the person, instead of passing immediately through the hands of the committee of the estate, the committee of the person be accepted as one of the sureties for the committee of the estate, the general rule, however, to remain unaltered.—*Re BURTON, Ex p. MOUNT* (1851), 21 L. J. Ch. 221; 18 L. T. O. S. 85, L. JJ.

**907.** — **Replacing surety.**—One of the sureties of the committee of the estate of a lunatic,

#### PART X. SECT. 1, SUB-SECT. 2.

**h. Dispensing with security—Discretion of court.**—*SHAW v CRAWFORD* (1879), 4 A. R. 371.—CAN.

**k.** —.]—The ct. may, if it see fit, appoint a committee of a lunatic's estate, without requiring the usual security.—*Re BURROUGHS* (1842), 2 Dr. & War. 207.—IR.

**l. Sufficiency of—Recognisance of**

committee or receiver.]—The recognisance of the committee, or of a receiver, will not be deemed sufficient security.—*Re WARD* (circa 1865), 2 Ch. Ch. 188.—CAN.

**m. Necessity for.**—*Re SIMPSON* (B. C.) (1907), 7 W. L. R. 36.—CAN.

**n. Purpose of.**—Security is ordered for the protection of the lunatic against misappropriation by his manager; it is not a proceeding affecting



*Sect. 1.—Committees and receivers: Sub-sects. 2, 3 & 4. Sect. 2: Sub-sects. 1 & 2, A. (a).]*

being dead, order made, upon the petition of the trustees & exors. of deceased surety, that the committee should enter into fresh security, & in default that it should be referred to the comr. to approve of another committee.—*Re BULL* (1843), 2 Coop. temp. Cott. 63; 47 E. R. 1052, L. C.

**908. — Liability of—No notice of default.]—**The sureties in a committee's recognisance, the condition of which was that the committee should obey the orders of the Lord Chancellor with respect to the lunatic's estate, held liable on the default of the committee, not only for the balance reported due from him on his accounts, but also for the costs of proceedings subsequently taken against him for the purpose of enforcing payment of such balance, although the sureties had no notice of the default of their principal until after those proceedings had been taken.—*Re LOCKEY* (1845), 1 Ph. 509; 14 L. J. Ch. 164; 4 L. T. O. S. 390, 409; 41 E. R. 726, L. C.

**909. — — — Extent of liability.] — Re** WALKER, No. 1411, *post*.

**910. — Enforcement of bond.]—**Where it has been found that a displaced committee is indebted to his lunatic's estate, & proceedings upon the usual bond by him & his sureties have been ordered, & the lunatic dies before they are taken, the ct. will order a delivery of the bond by the Master in Lunacy to the Queen's Remembrancer, who is the proper person to enforce it, & not to the lunatic's legal personal representative.—*Re HILL* (1863), 1 De G. J. & Sm. 487; 1 New Rep. 250; 7 L. T. 702; 11 W. R. 296; 46 E. R. 193, L. JJ.

**911. Liability to account—Committee—Action by Attorney-General.]—**Bill will lie by the A.G. on behalf of a lunatic, against her committees, for an account of & to secure the lunatic's property.—*A.-G. v. PANTHER* (1791), 2 Dick. 748; 21 E. R. 461, L. C.; *subsequent proceedings, sub nom. A.-G. v. PANTHER* (1792), 3 Bro. C. C. 441, L. C. *Annotation:—Refd. Jacobs v. Richards, Jacobs v. Porter* (1854), 18 Beav. 300.

**912. — — — Small property.] —**Appointment of committee of a lunatic without a reference & the balances to be paid in on affidavit, without annual account before the master, the property being very small.—*Ex p. PICKARD* (1814), 3 Ves. & B. 127; 35 E. R. 427, L. C.

*Annotation:—Refd. Re Adams, Ex p. Farrow* (1829), 1 Russ. & M. 112.

*See, now, Lunacy Act, 1890 (c. 5), s. 116.*

**913. — — — Jurisdiction of Court of Chancery.]—**SCAMMELL *v.* LIGHT, No. 1409, *post*.

**914. — Receiver—Effect of death of lunatic.]—***Re WALKER*, No. 1411, *post*.

**915. Passing of accounts—Inquiry as to money in hand at any time—Necessity for.]—**Committee

of lunatic's estate not permitted to pass his accounts without inquiry, what money in his hands from time to time. Master to state particular circumstances.—*Ex p. CATTON* (1790), 1 Ves. 156; 30 E. R. 278, L. C.

**916. — Necessity for regular passing—Failure involving disallowance of costs.]—**Costs to committee of lunatic refused, because he had not passed his accounts regularly, though no fraud.—*Ex p. CLARKE* (1791), 1 Ves. 296; 30 E. R. 352, L. C.

**917. — Neglect of committee — Committee retaining balances—Interest chargeable.]—**Committee of a lunatic neglecting to pass his accounts & retaining balances, charged with interest, on the petition of a creditor.—*Re LEGARD, Ex p. HALL* (1821), Jac. 160; 37 E. R. 811, L. C.

*Annotations:—Refd. Re Clarke*, [1898] 1 Ch. 336; *Re Brown, Llewellyn v. Brown*, [1900] 1 Ch. 489.

**918. — Accounts not passed annually—Sanction of court required.]—**A committee should have the previous sanction of the ct. for not passing his accounts annually.—*ANON.* (1829), 1 Russ. & M. 113; 39 E. R. 44, L. C.

**919. — Delay of many years—Committee suspended — Receiver appointed — Inquiry into estate.]—***Re STUART* (1845), 5 L. T. O. S. 33, L. C.

**920. — Disallowance of sums not properly chargeable.]—***Re SAUMAREZ* (1845), 6 L. T. O. S. 1, L. C.

**921. — Refusal to pass accounts—Balance in committee's hands—Payment into court—Petition by interim committee.]—***Re MACDOUGAL* (1848), 11 L. T. O. S. 169, L. C.

**922. Inspection of accounts—Who entitled to inspect—Next of kin—Accounts of committee, heir-at-law.]—**The heir-at-law is often disposed to apply the personal estate in the improvement of the real estate. But the next of kin are interested in taking care that what will belong to them, shall not be expended in increasing the value of that, which will never belong to them. The heir-at-law being, as generally happens, the committee of the estate, a better check upon his accounts can, in my opinion, hardly be devised, than to subject them to the inspection & objection of the next of kin.—*Re CRANMER* (1808), 2 Coop. temp. Cott. 107; 47 E. R. 1075, L. C.

**923. Taking accounts—Presence of next of kin—Where next of kin numerous.]—***Re —* (1844), 3 L. T. O. S. 258, L. C.

**924. Waiving of accounts—Application of ex-lunatic—Practice.]—***Re FOWLER* (1844), 4 L. T. O. S. 150, L. C.

**925. Re-opening accounts—Accounts regularly passed—In presence of solicitor to heir & next of kin.]—***Re BROWN*, No. 805, *ante*.

#### SUB-SECT. 4.—LODGMET OF DOCUMENTS, ETC., IN COURT.

**926. Deposit of testamentary papers—Duty of committee.]—**It is the duty of the committee of

a judgment-debtor of the lunatic.—*SARODA PROSAUD MULLICK v. LUTCHMEEPAT SINGH DOOGUR* (1872), 10 B. L. R. 214; 17 W. R. 289; 14 Moo. Ind. App. 529.—IND.

#### PART X. SECT. 1, SUB-SECT. 3.

**9131. Liability to account—Committee—Jurisdiction of Court of Chancery.]—**ELY'S (LORD) CASE (1764), 1 Ridg. Parl. Rep. 515.—IR.

**o. — — —.]—***Re BOWMAN* (1868), 7 N. S. W. S. C. R. (Eq.) 34.—AUS.

**9141. — Receiver—Effect of death**

*of lunatic.]—Re BARRY* (1828), 1 Mol. 414.—IR.

**p. Passing of accounts — Neglect of committee.]—**Where a committee neglects to collect rent of a tenant whom he finds in possession of a portion of the estate, he will be charged with the amount thereof on passing his accounts.—*Re SHAW* (1869), 15 Gr. 619.—CAN.

**q. — Accounts not passed annually—Failure not involving disallowance of costs.]—**The committee of a lunatic's estate expended money on the estate without authority of the ct. & failed to pass accounts yearly:—

*Held: the mere failure to account yearly should not ipso facto disentitle the committee to costs of accounting & other allowances.—Re BREEN, BREEN v. TORONTO GENERAL TRUSTS CORPN.* (1909), 18 O. L. R. 447; 13 O. W. R. 1060.—CAN.

**r. — Application for — Lunatic resident outside jurisdiction—Payment of balance to foreign committee.]—**MURRAY *v.* FERRIER (1852), 1 W. R. 133.—SCOT.

**t. Taking accounts — Consent of committee.]—***Re PERSSE* (1828), 3 Mol. 94.—IR.

the estate, having learnt that the lunatic has made a will, to take immediate steps to have the same deposited with the master.—*Re HUMBLEBY* (1829), 2 Coop. temp. Cott. 165; 47 E. R. 1106, L. C.

**927. — Will executed before lunatic so found.]**—Will of testator, subsequently found a lunatic, directed to be deposited in the custody of the master.—*Re THOMPSON* (1830), 1 Russ. & M. 355; 39 E. R. 137, L. C.

**928. Delivery out of deposited documents to committee—Jurisdiction of court to order.]**—*Re WINDSOR, WINDSOR v. WINDSOR* (1844), 4 L. T. O. S. 1, L. C.

**929. — When ordered.]**—The ct. will not, except in a very special case supported by affidavits, make a general order authorising the committee of a lunatic's estate to act under the opinion & advice of the master in the management of the estate.

Where the title-deeds of a lunatic's estate have been deposited in the master's office, the ct. will not direct them to be delivered out to the committee unless circumstances are stated on affidavit, showing that the due administration of the estate requires that they should be placed in the custody of the committee.—*Re COOPER* (1836), 1 My. & Cr. 32; 40 E. R. 288.

**930. Production of deposited documents—Whether ordered against committee.]**—There is no power to make an order in an action of trespass to land brought against the committee of a lunatic, for the production of title deeds in the custody of the ct. having jurisdiction in lunacy, & therefore out of his possession or control.—*VIVIAN v. LITTLE* (1883), 11 Q. B. D. 370; 52 L. J. Q. B. 771; 48 L. T. 793; 47 J. P. 566; 31 W. R. 891, D. C.

*Annotations:—Reid. London & Yorkshire Bank v. Cooper* (1885), 15 Q. B. D. 7; *Re Strachan*, [1895] 1 Ch. 439.

**How obtained.]**—See DISCOVERY, Vol. XVIII., pp. 62, 63, Nos. 190–198.

## SECT. 2.—EXTENT OF POWERS OF MANAGEMENT AND ADMINISTRATION.

### SUB-SECT. 1.—PROPERTY OUT OF THE JURISDICTION.

**931. Property in Scotland—Sum secured on estate—Ordered to be called in.]**—A sum devised to be laid out in lands in England, in trust for A. with remainders over, was by Act of Parliament secured on A.'s estate in Scotland, during his minority. A. attained twenty-one, & became a lunatic:—*Held*: it might be called in, & laid out, pursuant to the trust, & it was to be considered as if it were a real estate in England, the interest thereon, however, to be considered as personal estate in England.

The master was ordered to settle a ratable proportion for the lunatic's maintenance & his debts, between the real & personal estate in England & those in Scotland respectively. Another sum in the Exchr. in England, arising from the sale

of heritable jurisdiction in Scotland, considered as real estate in Scotland.—*ANANDALE (MARQUESS) v. ANANDALE (MARCHIONESS)* (1751), 2 Ves. Sen. 381; 28 E. R. 244, L. C.

*Annotation:—Reid. Oxenden v. Compton* (1793), 4 Bro. C. C. 231.

**See, now, Lunacy Act, 1890 (c. 5), s. 131 (1) (4).**

**932. Property in Ireland—Jurisdiction of Lord Chancellor of Great Britain—Lunacy found by inquisition in England—Appointment of committee of person.]**—*Re TOTTENHAM*, No. 785, ante.

**933. — Under Trustee Act, 1850 (c. 60).]**—Order made under above Act, appointing a new trustee & vesting the trust premises in him jointly with the continuing trustees, in a case where one of three trustees was lunatic, & though the will contained a power to appoint new trustees.

Above Act does not give to the Lord Chancellor of Great Britain sitting in lunacy jurisdiction over lands in Ireland.—*Re DAVIES* (1851), 3 Mac. & G. 278; 42 E. R. 268, L. C.

*Annotation:—Reid. Re Parker's Trusts* (1863), 32 Beav. 580.

**See, now, Lunacy Act, 1890 (c. 5), ss. 110, 131 (2), (3).**

**934. Property in Dependency or Dominion—Power of committee of estate to get in income.]**—*Re THOMAS* (1844), 3 L. T. O. S. 257, L. C.

**See, now, Lunacy Act, 1890 (c. 5), s. 110.**

**Dependencies & Dominions.]**—See DEPENDENCIES, Vol. XVII., pp. 414 et seq.

### SUB-SECT. 2.—MAINTENANCE AND VOLUNTARY ALLOWANCES.

#### A. Maintenance of Lunatic.

##### (a) In General.

*See Lunacy Act, 1890 (c. 5), s. 116 (4).*

**935. Primary consideration of court.]**—*Ex p. ANNANDALE (MARCHIONESS)*, No. 536, ante.

**936. —.]**—*Ex p. GRIMSTONE*, No. 542, ante.

**937. —.]**—*EDWARDS v. ABREY*, No. 1081, post.

**938. —.]**—*Re PINK*, No. 1093, post.

**939. — Regardless of expectants.]**—*DORMER'S CASE*, No. 407, ante.

**940. —.]**—*Ex p. WRIGHT*, No. 1057, post.

**941. —.]**—Lunatic is to have every comfort, his situation & fortune will admit of without any regard to expectants.—*Ex p. CHUMLEY* (1791), 1 Ves. 296; 30 E. R. 352, L. C.

**942. —.]**—*OXENDEN v. COMPTON (LORD)*, No. 537, ante.

**943. —.]**—*Re HINDE, Ex p. WHITBREAD*, No. 978, post.

**Regardless of rights of creditors.]**—See Sub-sect. 3, A., post.

**944. — Consistent with condition in life.]**—*Ex p. CHUMLEY*, No. 941, ante.

**945. —.]**—A liberal application of the property of a lunatic is to be made, to secure

dealing with a lunatic's estate is his comfort & benefit, & the ct. exercises great freedom in dealing with the estate.—*Re NEVINS* (1888), 5 Man. L. R. 137.—CAN.

**935 ii. —.]**—*Re HILL*, [1900] 1 I. R. 349.—IR.

**d. In pauper lunatic asylum—Payment to asylum authority.]**—*Re NASH & CANADIAN ORDER OF CHOSEN*

### PART X. SECT. 2, SUB-SECT. 1.

**a. Action by English committee in Scotland.]**—Found that persons appointed in England by the Lord Chancellor to manage the affairs of a lunatic, are not thereby entitled to maintain action in Scotland upon the lunatic's right.—*BAYNE & MORISON v. SUTHERLAND (EARL)* (1750), 1 Pat. App. 454.—SCOT.

**b. — Maintainable as to per- XXXIII.**

*sonal estate only.]*—*GORDON v. STAIR (EARL)* (1835), 13 Sh. (Ct. of Sess.) 1073.—SCOT.

**c. —.]**—*M'TAGGART'S REPRESENTATIVES v. WATSON* (1835), 13 Sh. (Ct. of Sess.) 878.—SCOT.

### PART X. SECT. 2, SUB-SECT. 2.—A. (a).

**935 i. Primary consideration of court.]**—The paramount consideration in



*Sect. 2.—Extent of powers of management and administration: Sub-sect. 2, A. (a) & (b), & B. (a) & (b).]*

every comfort his situation will admit.—*Ex p. BAKER* (1801), 6 Ves. 8; 31 E. R. 911, L. C.

**946. Liability of husband for—Lunatic wife having separate estate—Husband's ability to maintain her.]—**Distinction as to maintenance between an infant & a married woman with a separate income; the father, of ability, not exonerated from maintenance by the infant's property; the husband, maintaining his wife, & receiving her separate income, not liable to account for more than one year, upon a presumed agreement to subject that fund to maintenance.

Under peculiar circumstances, the insanity of the wife, but no commission issued, maintained in Scotland by the husband, an only child, an infant, entitled to the capital in the event of surviving his mother, upon the husband's application for an allowance inquiries were directed as to the past maintenance, & the husband's ability, with due regard to her comfort, etc.—*BRODIE v. BARRY* (1813), 2 Ves. & B. 36; 35 E. R. 232, L. C.

*Annotations:—*Consd. *Edwards v. Abrey* (1846), 2 Ph. 37. *Mentd.* *Howard v. Digby* (1834), 8 Bl. N. S. 224; *Cust v. Goring* (1854), 18 Beav. 383.

**947. Lunatic on trial for murder—Provision for maintenance & defence—Petition by committee.]—**Petition by committee of a lunatic to have certain sums allowed out of his estate for his support & the expense of his defence on trial for murder. The Lord Chancellor ordered the sums to be paid.—*Re BROOKE, Ex p. HILL* (1813), Coop. G. 54; 35 E. R. 475, L. C.

*Annotation:—**Mentd.* *Re Pearce* (1843), 2 L. T. O. S. 114.

**948. Allowance for horses & carriage.]—***Re POPHAM* (1844), 3 L. T. O. S. 258, L. C.

**949. Allowance for upkeep of establishment.]—***Re POPHAM* (1844), 3 L. T. O. S. 258, L. C.

**950. Application of whole income.]—***Re LEE* (1845), 5 L. T. O. S. 142, L. C.

**951. —.]—***Re DYCE SOMBRE* (1847), 10 L. T. O. S. 241, L. C.

**Application of trust funds.]—**See Sub-sect. 2, G., *post*.

**952. Order for payment to married woman—Committee of person—Undertaking for due application.]—**Order made for payment of lunatic's maintenance to a married woman, committee of the person, on her separate receipt, her solr. undertaking that the money should be duly applied.—*Re EDWARDS* (1850), 2 Mac. & G. 134; 42 E. R. 52, L. C.

**953. Care of person & estate—Pending traverse to inquisition.]—***Re CUMMING*, No. 735, *ante*.

**954. Insolvent estate—Payment for maintenance out of.]—**Payment of a sum of money for the maintenance of a lunatic in the asylum where he was lodged ordered, although it had been ascertained since the date of the master's report that his estate would be insolvent.—*Re LEESE* (1871), 19 W. R. 963, L. C.

**955. In pauper lunatic asylum—Property only sufficient for maintenance of family—Relief of rates.]—***Re TYE*, No. 529, *ante*.

#### (b) Increase and Reduction of Allowance.

**956. Increase of allowance—Estate having increased.]—***Re PRIDEAUX* (1844), 3 L. T. O. S. 317, L. C.

*FRIENDS* (1917), 40 O. L. R. 530.—CAN.

*e. —.]—**DUNLOP v. ELLIS* (1917), 13 O. W. N. 276; 41 O. L. R. 303.—CAN.

**1. Lunatic incapable of election under will—Maintenance from estate without prejudice to right of election.]—***MORISON'S CURATOR BONIS v. MORISON'S TRUSTEES* (1880), 8 R. (Ct. of Sess.) 205; 18 Sc. L. R. 160.—SCOT.

**957. —.]—***Re GROVE*, No. 994, *post*.

**958. —.]—***Re —* (1847), 8 L. T. O. S. 510, L. C.

**959. —.]—**The ct. will, without application to it for that purpose, where the estate of a lunatic has been increased, direct the Master in Lunacy to inquire whether, by an additional expenditure, any increase of comfort can be procured for the lunatic.—*Re MELHUISE, Re HARAN* (1853), 1 W. R. 236, L. JJ.

**960. — Recommendation of commissioners—When increase commences.]—***Re MOORE* (1847), 8 L. T. O. S. 510, L. C.

**961. Reduction of allowance—Lunatic's comforts must not be lessened.]—***Re BANNISTER* (1845), 4 L. T. O. S. 451, L. C.

#### B. Allowances for Family and Relations.

##### (a) Family and Direct Relations.

See, now, Lunacy Act, 1890 (c. 5), s. 116 (4).

**962. Additional allowance to daughter—On marriage—Necessity for settlement.]—**The allowance made out of a lunatic's estate, for the maintenance of himself & his daughters, was increased in consideration of the intended marriage of one of the daughters, & a portion of such increased allowance was appropriated to the joint establishment of her & her husband, & was directed to be settled to her separate use; & a sum of money approved by the master, was also ordered to be paid to her out of her father's estate, by way of outfit on her marriage.—*Re DRUMMOND* (1836), 1 My. & Cr. 627; 6 L. J. Ch. 58; 40 E. R. 516, L. C.; *subsequent proceedings* (1844), 4 L. T. O. S. 190, L. C.

*Annotation:—**Reid.* *Re Fowler, Ex p. Fowler* (1842), 6 Jur. 431.

**963. —.]—***Semble:* the ct. will not direct an advancement by way of outfit & additional annual allowance to be made out of a lunatic's property to his daughter upon her marriage, except upon the terms of the daughter making a settlement, to be approved by the master, of all the property that may eventually come to her as next-of-kin & heir-at-law of the lunatic.—*Re FOWLER, Ex p. FOWLER* (1842), 6 Jur. 431, L. C.

**964. — On ground of ill health.]—***Re DRUMMOND* (1844), 4 L. T. O. S. 190, L. C.

**965. Additional allowance to wife & children—Increase of lunatic's estate.]—***Re PRIDEAUX* (1844), 3 L. T. O. S. 317, L. C.

**966. Allowance to wife—Postponed to repairs to estate.]—***Re ADEY* (1844), 3 L. T. O. S. 177, L. C.

**967. — Out of deceased lunatic's estate.]—***Re ROBINSON* (1844), 4 L. T. O. S. 271, L. C.

**968. — Savings thereout separate property.]—**The savings of an annual allowance for her separate maintenance, paid to the wife of a lunatic living apart from her husband, under an order in lunacy, are her separate property, although the order does not expressly state that the allowance is for her separate use.—*In the Goods of THARP, THARP v. MACDONALD* (1878), 3 P. D. 76; 38 L. T. 867; 26 W. R. 770, C. A.

*Annotations:—**Mentd.* *Phillips v. Jenkins* (1880), 44 L. T. 281; *In the Goods of Tomlinson* (1881), 6 P. D. 209; *Harding v. Sutton* (1888), 59 L. T. 838; *Re Lambert's Estate, Stanton v. Lambert* (1888), 39 Ch. D. 626; *Re Parker's Trusts*, [1894] 1 Ch. 707; *In the Estate of Heys, Walker v. Gaskill*, [1914] P. 192.

#### PART X. SECT. 2, SUB-SECT. 2.—B. (a).

**g. Additional allowance for support of near relations.]—**The ct., on a proper case being made, will grant an

**969. — Not assignable.]**—On a decree for a judicial separation an order was made for payment of £60 a year to the wife as permanent alimony. The husband was afterwards found lunatic by inquisition, & by an order in Lunacy & Chancery the dividends of a sum of stock to which he was entitled in a Chancery suit were ordered to be carried to his account in the lunacy & £60 a year to be paid out of them to his wife in respect of her alimony till further order. The wife assigned the annuity to a purchaser, who presented a petition in Lunacy & in the suit to have the annuity paid to her:—*Held*: the petition must be refused, on the ground that whether the annuity was considered as alimony, or as an allowance made to the wife by the Ct. in Lunacy, it was not assignable.—*Re ROBINSON* (1884), 27 Ch. D. 160; 53 L. J. Ch. 986; 51 L. T. 737; 33 W. R. 17, C. A.

*Annotations*:—*Consd.* *Anderson v. Hay* (1890), 7 T. L. R. 113. *Expld.* *Smith v. Smith*, [1923] P. 191. *Reid.* *Watkins v. Watkins*, [1896] P. 222; *Walls v. Legge*, [1923] 1 K. B. 240. *Mentd.* *Linton v. Linton* (1885), 15 Q. B. D. 239; *Kerr v. Kerr* (1897), 77 L. T. 29; *Maclurcan v. Maclurcan* (1897), 77 L. T. 474.

**970. — Postponed to payment of creditors.]**—*Re WINKLE*, No. 1076, *post*.

**971. Advance of money to eldest son—Out of lunatic's capital.]**—Application for a reference as to the propriety of advancing a large sum of money out of the capital of a lunatic's estate, to enable his eldest son to purchase an estate, refused.—*Re THOMAS* (1846), 2 Ph. 169; 41 E. R. 906, L. C.

**972. Allowance to husband—Wife having separate estate—Husband's inability to maintain.]**—*EDWARDS v. ABREY*, No. 1081, *post*.

**973. — — Purchase of residence at wife's request.]**—*Re JOHNSON* (1846), 7 L. T. O. S. 485, L. C.

**974. — — Household expenses.]**—*Re HEWSON*, No. 979, *post*.

**975. Allowance to father—Past maintenance.]**—The ct. will not allow any past maintenance to a father of his infant lunatic son, after an order has been made for the lunatic's maintenance out of his own property.—*Re BOOTH* (1854), 22 L. T. O. S. 249, L. C.

**976. Allowance to brother & sisters—Brother committee of estate—Power to mortgage.]**—An order was made that the brother of a lunatic, who was committee of his estate, should be allowed to retain the family mansion & grounds & the heirlooms therein for his own occupation & use, & that of his unmarried sisters, & that £4,000 a year should be allowed him for his expenses in reference thereto. The committee with his sisters occupied the mansion accordingly, & incurred heavy &, as it was alleged, unreasonable expenses about the establishment. The income being insufficient to pay the allowance, it fell into arrear, & the committee mortgaged the arrears. He subsequently was removed from being committee & became bkpt., & a large amount of bills incurred in keeping up the establishment remained unpaid. A surplus having arisen applicable to payment of the arrears, the new committee presented a petition for direction as to its application:—*Held*: (1) although the allowance was made to the former committee without any obligation to account, & with an intention indirectly to confer a benefit on him & his sisters, still it was an allowance made

to a person in a fiduciary position for a particular purpose, & which he had no right to mortgage, & the mtgee. could stand in no better position than the committee himself; (2) the person to whom an allowance of this kind is made has no such right to arrears as will prevent the ct. from dealing with them in such way as it may consider just, &, if the ct. finds that the expenses incurred for the purposes for which the allowance was granted remain unpaid, it will stop the arrears, & make provision for payment of such expenses. An inquiry was, therefore, directed as to which of the debts of the committee were properly incurred in keeping up the establishment at the mansion.—*Re WELD* (1882), 20 Ch. D. 451; 51 L. J. Ch. 913; 46 L. T. 397; 30 W. R. 385, C. A.

*Annotation*:—*Generally, Mentd.* *Re Brown, Llewellyn v. Brown* (1900), 82 L. T. 83.

**977. Whether allowances to be treated as advancements—Discretion of court.]**—Testatrix made her will in 1913 & became of unsound mind in 1914, when a receiver was appointed under Lunacy Act, 1890 (c. 5), s. 116. From then until her death in 1922 the Master in Lunacy from time to time directed the receiver to make allowances out of her surplus income to various members of the family of testatrix including sons' wives & grandchildren with provisions for such allowances to be treated as advancements & to be brought into hotchpot against the respective shares, if any, under the will of testatrix of the recipients or of their husbands or issue. The directions were not made in the presence of the parties who were to be accountable. Some of such parties predeceased testatrix, others took only life interests, & others again were infants:—*Held*: the directions that the allowances should be treated as advancements & brought into hotchpot were only binding so far as they could affect the consciences of the recipients, & the ct. in administering testatrix's estate had a discretion not to enforce them, & would not do so, as by reason of the terms of testatrix's will, & the events which had happened the directions would not do equity.—*Re MERRAIL, GREENER v. MERRAIL*, [1924] 1 Ch. 45; 93 L. J. Ch. 162; 130 L. T. 312; 68 Sol. Jo. 209.

#### (b) Collateral Relations.

**978. Principle on which court acts—Presumed intention of lunatic.]**—Practice of making an allowance to the immediate relations of a lunatic, other than those whom the lunatic would be bound to provide for by law, extended to the case of brothers & sisters & their children, & founded not on any supposed interest in the property, which cannot exist during the lunatic's lifetime, but upon the principle that the ct. will act with reference to the lunatic, & for his benefit, as it is probable the lunatic himself would have acted if of sound mind. The amount & proportions of such an allowance are, therefore, entirely in the discretion of the ct.

For a long series of years the ct. has been in the habit, in questions relating to the property of a lunatic, to call in the assistance of those who are nearest in blood, not on account of any actual interest, but because they are most likely to be able to give information to the ct. respecting the situation of the property, & are concerned in its good administration. It has, however, become too much the practice that, instead of such persons confining themselves to the duty of assisting the

increased maintenance to the lunatic, in order that the same may be applied for the support of the near relations of the lunatic.—*Re CREAGH* (1838), 1

Dr. & Wal. 323.—IR.

*h. Allowance to wife & children—Before committee appointed.]*—Until a committee of lunatics' person be first

appointed, the ct. will not pay out any sum, even for the present maintenance of lunatic's wife & children.—*Re B*—(1839), 1 L. Eq. R. 181.—IR.



**Sect. 2.—Extent of powers of management and administration: Sub-sect. 2, B. (b), C., D., E. & F.]**

ct. with their advice & management, there is a constant struggle among them to reduce the amount of the allowance made for the lunatic & thereby enlarge the fund which, it is probable, may one day devolve upon themselves. Nevertheless, the ct., in making the allowance has nothing to consider but the situation of the lunatic himself, always looking to the probability of his recovery, & never regarding the interest of the next of kin. With this view only, in cases where the estate is considerable, & the persons who will probably be entitled to it hereafter are otherwise unprovided for, the ct., looking at what the lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons (LORD ELDON, C.).—*Re HINDE, Ex p. WHITBREAD* (1816), 2 Mer. 99; 35 E. R. 878, L. C.

**Annotations:—***Expld. Re Blair* (1836), 1 My. & Cr. 300. *Apld. Re Croft* (1862), 1 New Rep. 185. *Consd. Re Evans* (1882), 21 Ch. D. 297. *Expld. Re Sparrow* (1882), 20 Ch. D. 320; *Urquhart v. Butterfield* (1887), 36 W. R. 376. *Apld. Re Darling* (1888), 39 Ch. D. 208. *Refd. Re Crozier, Cooper v. Thorneycroft* (1906), 50 Sol. Jo. 206; *Re Bennett, Greenwood v. Bennett*, [1913] 2 Ch. 318.

**979. ———.]—***Re HEWSON* (1851), 17 L. T. O. S. 305, L. C.; *subsequent proceedings* (1852), 21 L. J. Ch. 825, L. JJ.

**980. ———.]—**The principle upon which annuities or allowances out of a lunatic's superfluous income are sometimes granted to the lunatic's next of kin is to be narrowed rather than extended, especially in cases of only collateral relationship.

An application for an allowance by one of a lunatic's next of kin, who was only a cousin, refused, though appct. was a very fit object of charity.—*Re EVANS* (1882), 21 Ch. D. 297; 46 L. T. 785; 30 W. R. 645, C. A.

**Annotations:—***Consd. Re Beridge* (1884), 50 L. T. 653. *Apld. Re Darling* (1888), 39 Ch. D. 208. *Refd. Re Crozier, Cooper v. Thorneycroft* (1906), 50 Sol. Jo. 206.

**981. ———.]—**The ct. will not make an allowance out of the surplus income of a lunatic to collaterals unless the evidence shows that the lunatic, if sane, would in all probability have made the proposed allowance himself.

Different considerations apply when the lunatic is entitled to landed property & the collateral is also the heir-at-law of the lunatic.

The ct. refused to make an allowance to some of the next-of-kin of a lunatic, first cousins, who were in indigent circumstances, although the lunatic was aged eighty-two, & there was a large surplus income beyond the proposed allowance, & the application was not opposed.—*Re DARLING* (1888), 39 Ch. D. 208; 57 L. J. Ch. 891; 59 L. T. 761; 4 T. L. R. 593, C. A.

**Annotation:—***Refd. Re Crozier, Cooper v. Thorneycroft* (1906), 50 Sol. Jo. 206.

**982. ———.]—****Date from which allowances payable.]—**Allowances were ordered to be paid out of the surplus income of a lunatic to certain poor members of her family & to certain other persons, the husband of the lunatic, & after his death the lunatic herself, having been accustomed to make them, though the surplus income after payment of them amounted to about £50 only. But such allowances were ordered to commence at the date when the lunatic was so found, & not when they stopped in consequence of her becoming of unsound mind.—*Re MACKENZIE* (1880), 43 L. T. 681, L. J.

**983. ———.]—****With jealousy & caution.]—***Re BLAIR*, No. 987, *post*.

**984. ———.]—***Re EVANS*, No. 980, *ante*.

**985. ———.]—***Re EVANS*, No. 980, *ante*.

**986. ———.]—***Re DARLING*, No. 981, *ante*.

**987. ———.]—****Sum must not exceed lunatic's allowance.]—**The jurisdiction of the ct. in making an allowance out of a lunatic's estate for his next of kin, will be exercised with great caution. No sum will be granted for such allowance, exceeding in amount the sum allowed for the maintenance & support of the lunatic himself.—*Re BLAIR* (1836), 1 My. & Cr. 300; 40 E. R. 390; *sub nom. Re ———, Ex p. BLAIR*, 5 L. J. Ch. 150, L. C.

**Annotations:—***Apld. Re Croft* (1862), 1 New Rep. 185. *Apprvd. Re Evans* (1882), 21 Ch. D. 297.

**988. ———.]—****Legal or moral obligation on lunatic.]—**Where a lady who had separate property married, & an agreement was made that out of her income certain domestic expenses should be defrayed, & the agreement was acted upon until her lunacy, & the husband continued the same expenses out of her property till his death, & where the lady was under a moral obligation to give her nephew £500, part of which she gave, & a further part her husband, after her lunacy, paid out of her property; the ct. allowed the exors. of the husband to deduct all the money paid for keeping up the establishment, after the lunacy, till his death, & also the money paid by him to the nephew, before paying over the separate income of the wife to her committees.—*Re HEWSON* (1852), 21 L. J. Ch. 825; 19 L. T. O. S. 224, L. JJ.; *previous proceedings* (1851), 17 L. T. O. S. 305, L. C.

**989. ———.]—***Re EVANS*, No. 980, *ante*.

**990. ———.]—****Only other next of kin consenting.]—**An allowance granted to a first cousin, one of two sole next of kin of the lunatic, under the special circumstances of the case; the other next of kin consenting.—*Re CROFT* (1862), 1 New Rep. 185; 32 L. J. Ch. 481, L. JJ.

**Annotations:—***Expld. Re Evans* (1882), 21 Ch. D. 297; *Re Darling* (1888), 39 Ch. D. 208.

**991. ———.]—****Expressed intention of lunatic while sane.]—**Weekly allowances ordered out of the surplus income of a wealthy lunatic to needy collateral relatives who were supposed to be her next of kin, though their title as such had not been established & for whom the lunatic, while sane, had expressed an intention to make some provision.—*Re FROST* (1870), 5 Ch. App. 699; 39 L. J. Ch. 808; 23 L. T. 233; 18 W. R. 986, L. J.

**Annotations:—***Distd. Re Evans* (1882), 21 Ch. D. 297. *Refd. Re Darling* (1888), 57 L. J. Ch. 891.

**992. ———.]—****Collateral being heir-at-law.]—***Re DARLING*, No. 981, *ante*.

**C. Allowances to Illegitimate Dependents.**

Bastardy generally, *see* BASTARDY, Vol. III., pp. 358 *et seq.*

**993. To whom made—Lunatic's children—Not their mother.]—**(1) An allowance will be made out of a lunatic's estate for his illegitimate children, but not for their mother. (2) The ct. will not direct property to be sold, which the lunatic, by a will made when he was of sound mind, has bequeathed specifically, though the master has reported that the sale of it will be beneficial to the estate.—*Re JONES, Ex p. HAYCOCK* (1828), 5 Russ. 154; 38 E. R. 985, L. C.

**994. ———.]—****Not children of lunatic's deceased brother.]—**(1) The ct. will not increase the allowance of a lunatic, on the ground of there being illegitimate children of a deceased brother of the lunatic, to whose support the lunatic would probably have contributed, if not in a state of incapacity.

(2) In this case as the present property of the lunatic is greater than when the former order was made, I think the allowance may be increased . . . although it must be understood that the increase is not made from any consideration of the illegitimate children of the lunatic's brother (LORD LYNDHURST, C.).—*Re GROVE* (1844), 13 L. J. Ch. 262 ; 3 L. T. O. S. 277, L. C.

#### D. Allowances to Other Dependants.

**995. Old personal servant—Retiring through infirmity.]—**An annuity allowed out of the income of the lunatic's estate as a retiring pension to an old personal servant of the lunatic, who was obliged to retire from his service by reason of age & infirmity.—*Re CARYSFORT (EARL)* (1840), Cr. & Ph. 76 ; 41 E. R. 418, L. C.

**996. Former mistress—Cohabitation having ceased at time of lunacy—& allowance having been paid.]—***Re PARRY* (1846), 7 L. T. O. S. 77, L. C.

**997. Increase of annuity to lady in India.]—***Re DYCE SOMBRE* (1848), 10 L. T. O. S. 362, L. C.

#### E. Allowances by Lunatic Tenant for Life.

**998. Increase of lunatic's allowance—Education of younger brother's sons—Younger brother being remainderman.]—***Re WARRINER* (1844), 4 L. T. O. S. 270, L. C.

**999. Allowance to nephew—Tenant in tail in remainder.]—**A lunatic, aged sixty-four, was tenant for life of certain real estates, of which his nephew, aged twenty-eight, was tenant in tail in remainder, producing a considerable yearly income. The nephew had been found heir-at-law, & one of the next of kin of the lunatic. The ct., upon the nephew's petition, directed an allowance of £500 *per annum* to be made to him out of the surplus income of the lunatic after providing for a yearly sum for the lunatic's maintenance, in spite of the opposition of some of the next of kin, upon the terms of petitioner charging the estate with the repayment of the sums received in respect of such allowance, the Lord Justices consenting, as protector of the settlement to petitioner, barring his estate tail, but only so far as to let in the charge.—*Re SPARROW* (1882), 20 Ch. D. 320 ; 51 L. J. Ch. 497 ; 46 L. T. 785 ; 30 W. R. 373, C. A.

*Annotation :—*Re *Darling* (1888), 57 L. J. Ch. 891.

**1000. ——— Increase of allowance.]—**A lunatic bachelor, who was insurable & aged sixty-four, was tenant for life, there being a large surplus income after providing for his maintenance. In 1882 the ct. made an allowance of £500 *per annum* to his nephew, the tenant in tail in remainder, who was then unmarried & in possession of an income of £220 *per annum*, &, as protector of the settlement, consented to the entail being barred to secure the allowance.

The remainderman having married & had a son who would take as tenant in tail in remainder if he survived his father, & having an income of £300 *per annum* without the allowance of £500 :—*Held* : the allowance ought to be increased by £200 to be charged in the same way as the £500.—*Re BERIDGE* (1884), 50 L. T. 653, L. JJ.

#### F. Application of Capital.

**1001. Fund in court—Sale of reversionary interest.]—**Order made, upon petition, for the sale of the reversionary interest in a fund in ct. belong-

ing to a person of unsound mind, there being no other fund out of which to provide for his past & future maintenance.—*WALKER v. SYMONS, Re WALKER* (1843), 8 Jur. 49, L. C.

**1002. ——— Order for payment of sum without reference—Small property.]—**The property being small, the Lord Chancellor reluctantly made an order for payment of a sum of money out of ct. for the benefit of the lunatic without reference.—*Re PALMER* (1844), 3 L. T. O. S. 237, L. C.

**1003. ——— Order for maintenance out of—At expense of creditors.]—***Re PLENDERLEITH*, No. 1072, *post*.

*See* Sub-sect. 3, A., *post*.

——— **Jurisdiction of Chancery Division.]—***See* Part V., Sect. 3, sub-sect. 2, *ante*.

**1004. Expenditure beyond income—Whether repayable out of capital.]—***Re* ——— (1844), 3 L. T. O. S. 353, L. C.

**1005. Debt due for maintenance—Sale of real estate.]—**On the petition of the committee of the person & estate of a lunatic, reference directed to inquire as to the expediency of raising a fund for his maintenance by sale of his reversionary interest in realty.—*Re BURBIDGE* (1850), 3 Mac. & G. 1 ; 42 E. R. 161, L. C. ; *previous proceedings* (1844), 4 L. T. O. S. 190, 270, L. C.

**1006. ——— Sale of wife's separate property.]—***EDWARDS v. ABREY*, No. 1081, *post*.

—.]—*See* Sub-sect. 3, E., *post*.

**1007. Purchase of estate for eldest son.]—***Re THOMAS*, No. 971, *ante*.

**Lunatic wife's separate estate.]—***See* *HUSBAND & WIFE*, Vol. XXVII., p. 148, No. 1202.

**1008. Purchase of government annuity.]—**Residue of a lunatic's property beyond his debts invested in a govt. annuity for his maintenance upon the master's report, that it was for his benefit.—*Ex p. STONARD* (1810), 18 Ves. 285 ; 34 E. R. 325, L. C.

*Annotation :—*Folld. *Re Dodsworth's Trust* (1852), 10 Hare, 16.

**1009. ———.]—***Re CHABOT* (1827), Shelford on Lunatics, 2nd ed. p. 272.

*Annotation :—*Folld. *Re Dodsworth's Trust* (1852), 10 Hare, 16.

**1010. ———.]—**Investment of a fund belonging to a lunatic in an annuity for his life.—*Re DODSWORTH'S TRUST* (1852), 10 Hare, 16 ; 68 E. R. 820, L. C.

**1011. ———.]—**Where a lunatic was upwards of sixty years of age, & her property was small, the ct. authorised the investment of the property in the purchase of a govt. annuity for the life of the lunatic.—*Re WARD, SCHULTES v. WARD, VALLANCE v. WARD* (1860), 29 L. J. Ch. 784 ; 2 L. T. 685 ; 24 J. P. 659 ; 6 Jur. N. S. 717, L. JJ.

**1012. ——— Income insufficient for maintenance.]—**(1) Where a deft. of unsound mind, not found so by inquisition, was entitled to a capital sum, the income of which was insufficient for her maintenance, the ct. directed nearly the whole of it to be laid out in deft.'s name in purchase of a govt. annuity, & that the income should be applied for her maintenance.

(2) A vice-chancellor has jurisdiction to make such an order.—*DAVIES v. DAVIES* (1852), 2 De G. M. & G. 51 ; 19 L. T. O. S. 81 ; 42 E. R. 790 ; *sub nom.* *DAVIES v. DAVIES, Re DAVIES*, 21 L. J. Ch. 419 ; 16 Jur. 419, L. JJ.

*Annotation :—*As to (2) Folld. *Re Bingley's Trust* (1853), 22 L. T. O. S. 166.



**Sect. 2.—Extent of powers of management and administration:** Sub-sect. 2, F., G. (a) & (b), H., I.

**1013. Insanity in dispute—Property below specified amount—Lunacy Regulation Acts, 1862 (c. 86), & 1882 (c. 82).—***Re LEES*, No. 528, *ante*.

*See, now, Lunacy Act, 1890 (c. 5), s. 116 (e).*

**1014. Income erroneously supposed to be deficient—Sale of Consols—Lunacy Act 1890 (c. 5), s. 123.]—**In pursuance of an Order in Lunacy, made under a misapprehension that the patient's current banking account was overdrawn, part of a sum of Consols belonging to the patient & specifically bequeathed by her will, made while she was of sound mind, was sold, & the proceeds of sale, amounting to £1,000, were paid into her account on Jan. 4, 1918. The misconception as to the overdraft arose from the fact that considerable dividends on funds in ct. belonging to the patient had been overlooked. These were paid to the credit of her account on Jan. 31, 1918, but in the interval the sum of £48 11s. 11d. had been drawn out of the £1,000 & duly applied by the receiver on behalf of the patient. The patient died on Mar. 27, 1918, her account being then in credit to the extent of £1,302 10s. 5d.:—*Held*: the specific legatees had no claim in respect of the sum of £48 11s. 11d. which had in fact been applied under the powers of above Act, within the meaning of above sect.—*Re HODGSON'S TRUSTS, PUBLIC TRUSTEE v. MILNE*, [1919] 2 Ch. 189; 121 L. T. 268.

#### G. Application of Trust Funds.

##### (a) Where One Fund Available.

*See, generally, TRUSTS & TRUSTEES.*

**1015. Discretion of trustees.]—***Re BOYS, BOYS v. HARDY* (1896), 41 Sol. Jo. 111.

**1016. Maintenance.]—**Part of the capital of a fund in ct., belonging to a married woman, who was deranged & had been deserted by her husband, ordered to be applied for her maintenance.—*PETERS v. GROTE* (1835), 7 Sim. 238; 2 Coop. temp. Cott. 192; 58 E. R. 828.

*Annotation:—Fold. Re Baker's Trusts* (1871), L. R. 13 Eq. 168.

**1017. — Credit to accounting trustee.]—***NELSON v. DUNCOMBE, DUNCOMBE v. NELSON*, No. 101, *ante*.

**1018. — Future maintenance.]—**The father & next friend of a lunatic, not so found by inquisition, having expended £700 on his past maintenance & undertaking to maintain him in future, obtained an order for a transfer of the whole fortune of the lunatic, amounting to £379 Consols.—*Re LAW* (1861), 30 L. J. Ch. 512; 7 Jur. N. S. 410.

**1019. — —.]—**(1) Applications relating to the property of persons of unsound mind not found lunatics by inquisition, which is in or under the administration of the Ct. of Ch., are entertainable by the Ct. in its ordinary jurisdiction.

(2) Where a person of unsound mind, not found lunatic by inquisition, had been wholly maintained by his father at an expense, since the attainment of his majority, greater than the value of a sum of stock belonging to him, which had been paid into ct. under the Trustee Relief Act, & which constituted his whole property, the stock was ordered to be sold & paid to the father, in part satisfaction of the moneys expended by him upon his son's past maintenance, upon his undertaking to continue the maintenance for the future.—*Re MACFARLANE* (1862), 2 John. & H. 673; 31 L. J. Ch. 225; 37 E. R. 369; 70 E. R. 1229.

**1020. — — Retention of legacy.]—**A person of unsound mind, not found so by inquisition, was kept by her brothers in a private asylum from 1838 to 1859, at a total expense of more than £700. The brothers having suffered losses in trade, & being unable further to support her, she was kept in a county asylum at the expense of the county, from 1859 to 1871, the total expense exceeding £300. In 1871 a legacy was paid to her brothers, which by a will was directed to be paid to them to be applied for her benefit. This legacy was ordered to be retained by the brothers for her past maintenance in preference to the claims of the county, the brothers undertaking to maintain her in future; *semble*: they would, even without giving this undertaking, have been entitled so to be repaid for past maintenance.—*Re GIBSON* (1871), 7 Ch. App. 52; 25 L. T. 551; 20 W. R. 107, L. JJ.

*Annotations:—Expld. Re Harris* (1880), 49 L. J. Ch. 327. *Refd. Re Weaver* (1882), 31 W. R. 224; *Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94.

**1021. — — —.]—***Re RYAN, RYAN v. RYAN*, [1911] W. N. 56.

*—See, also, Sub-sect. 2, A., ante.*

**Lunatic wife's income under marriage settlement.]—***See HUSBAND & WIFE*, Vol. XXVII., pp. 148, 149, Nos. 1199–1203.

**1022. Dividends of funds in court—Payment to relatives with whom lunatic residing—Undertaking for maintenance.]—***Re BURKE*, No. 515, *ante*.

**1023. Life interest in settled funds—Power of appointment—Lunacy Act, 1890 (c. 5), s. 116.]—**Where a person of unsound mind was entitled under a settlement to a life interest in certain funds, below the limit referred to in above sect., with a power of appointment in favour of her children or remoter issue, there being nothing in that statute enabling the ct. to release a power, the ct. made an order for a sale of the lunatic's interest in the funds, without prejudice to any question which might arise in the event of an appointment by her in favour of remoter issue should she ultimately recover, coupled with a declaration that the lunatic's interest should be charged with recouping to the trustees, to be held upon the trusts of the settlement, all sums raised & paid under the order, with interest & costs.—*Re HIRST* (No. 2) (1893), 68 L. T. 557; 2 R. 409, L. JJ.

##### (b) Where More than One Fund Available.

*See, generally, TRUSTS & TRUSTEES.*

**1024. Which fund first applied—Discretion of trustees.]—**Where there are two funds, both of them applicable to the maintenance of a lunatic, under the management of the Ct. of Ch., to one of which the lunatic would be absolutely entitled as her own property, the other of which, so far as she might not benefit by it, would pass away to different persons, the ct. might direct her maintenance to be provided for out of the latter fund. But where such latter fund is provided by a will which vests the fund in trustees, & gives them an absolute discretion & "uncontrollable authority" over its application, the ct. will not exercise its ordinary power. The fund so specially provided will be left to the exercise *bond fide* of the discretion of the trustees.—*GISBORNE v. GISBORNE* (1877), 2 App. Cas. 300; 46 L. J. Ch. 556; 36 L. T. 564; 25 W. R. 516, H. L.

*Annotations:—Distd. Re Weaver* (1882), 21 Ch. D. 615. *Id. Re Boys, Boys v. Hardy* (1896), 41 Sol. Jo. 111. *Id. Re Wakley, Vachell v. Wakley* (1920), 123 L. T. 150. *Mentd. Tabor v. Brooks* (1878), 10 Ch. D. 273; *Tempest v. Camoys* (1882), 21 Ch. D. 571; *Re Lofthouse* (1885), 29 Ch. D. 921; *Tempest v. Camoys* (1888), 58 L. T. 221; *Re Sanson, Sanson v. Turner* (1896), 12 T. L. R.

142; *Re Schneider*, Kirby v. Schneider (1906), 22 T. L. R. 223; *Re Raven*, Spencer v. National Assocn. for the Prevention of Consumption & other forms of Tuberculosis, [1915] 1 Ch. 673; *Re Charteris*, Charteris v. Biddulph, [1917] 2 Ch. 379.

1025. ———.]—*Re WEAVER*, No. 103, ante.

1026. ——— **Benefit of lunatic considered.**]—A mother, whose only daughter, a lunatic, was entitled to a large real & personal estate under her father's will, bequeathed the residue of her estate & effects to trustees, upon trust to apply the interest, amounting to about £1,600 a year towards the maintenance & support of her daughter, & otherwise for her comfort & advantage, as they should think proper, without being liable to account; & after her decease to pay the principal, & also such interest as should not have been actually so applied, to testatrix's nieces:—*Held*: the allowance of the lunatic ought to be borne exclusively by the maternal estate, as that arrangement, in the event of her recovery, would be most beneficial for her.—*Re ASHLEY* (1830), 1 Russ. & M. 371; 39 E. R. 144, L. C.

*Annotations*:—*Reid*. *Gisborne v. Gisborne* (1877), 2 App. Cas. 300; *Re Wakley*, *Vachell v. Wakley* (1920), 123 L. T. 150.

1027. ———.]—A father, by will, directed the income of his real & personal estate to be expended, as the trustees might think fit, in the maintenance of his son, a lunatic, & gave the corpus so that it vested in the lunatic absolutely. Afterwards, the mother of the lunatic gave her personal estate to trustees, upon trust, to apply a sufficient part of the income in his maintenance, with a direction to accumulate the surplus, & gave the corpus & accumulations over:—*Held*: the mother had dedicated the whole of the income of her estate for the benefit of her son, subject to a provision that the surplus should be added to the principal, & the question of contribution between the two estates to the lunatic's maintenance must be decided solely with reference to his interest; & the income of the mother's estate alone being insufficient for the lunatic's maintenance, the whole thereof must be applied for that purpose in the first instance, before any part of the income of the father's estate should be applied.—*METHOLD v. TURNER* (1851), 4 De G. & Sm. 249; 20 L. J. Ch. 201; 17 L. T. O. S. 208; 15 Jur. 810; 64 E. R. 818.

*Annotation*:—*Apld.* *Gisborne v. Gisborne* (1874), 31 L. T. 472 (see 2 App. Cas. 300).

1028. ———.]—Testator gave a fund to trustees in trust to pay the income to his sister for her life or "apply the same, or so much as may be necessary for her support & maintenance, in such manner as may be most to her comfort & advantage." He then directed the surplus, if any, to be accumulated & added to the capital of the fund, which was given over after her death. The sister, who was of unsound mind, was entitled to a life interest under a settlement of which testator was a trustee. After testator's death she was found lunatic, & the allowance for her maintenance was fixed at a sum exceeding the income of the bequeathed fund:—*Held*: this income was the primary fund for her maintenance, & therefore the whole of it must be so applied.—*RUDLAND v. CROZIER* (1858), 2 De G. & J. 143; 27 L. J. Ch. 261; 30 L. T. O. S. 330; 4 Jur. N. S. 675; 6 W. R. 305; 44 E. R. 942, L.JJ.

*Annotation*:—*Reid*. *Gisborne v. Gisborne* (1875), 32 L. T. 46.

#### H. Change of

1029. **Whether directed—Advantage of lunatic.**]—*Re BANNISTER* (1845), 4 L. T. O. S. 451, L. C.

**Application of capital—In purchase of annuity.**]—*See* Sub-sect. 2, F., ante.

#### I. Property in Bankruptcy.

**Funds in control of Bankruptcy Court—Power of Court of Lunacy.**]—*See* BANKRUPTCY, Vol. IV., p. 30, No. 250.

#### J. Lunatic Residing out of Jurisdiction.

*Sec* Lunacy Act, 1890 (c. 5), s. 134.

1030. **Funds in court—Payment to committee appointed abroad—Discretion of court to order.**]—A. being entitled to property under an English settlement, & being resident in Jersey, was found of unsound mind by a formal proceeding there, & his brother E. appointed his curator. The trustee of the settlement having paid the fund into ct. under Trustee Relief Act, E., the curator, petitioned to have the dividends paid to him, he undertaking to apply them for the benefit of A. Order made on production of official & verified copy of the proceedings in Jersey.—*Re ALBO'S TRUSTS* (1862), 7 L. T. 778; 11 W. R. 80.

1031. ———.]—An Englishman while resident in France was found a lunatic by the law of that country, & a *curator bonis* was appointed by the French Ct. A fund in this country to which the lunatic became entitled was paid into ct., under Trustee Relief Act. Upon petition by the *curator bonis* for payment of the fund to him as a matter of right:—*Held*: the ct. could exercise a discretion, & it appearing that the lunatic was sufficiently provided for, an order was made for retaining the corpus of the fund in ct., & the payment of the dividends only to the *curator*.—*Re GARNIER* (1872), L. R. 13 Eq. 532; 41 L. J. Ch. 419; 25 L. T. 928; 20 W. R. 288.

*Annotations*:—*Reid*. *Re Brown*, [1895] 2 Ch. 666; *Re Knight*, [1898] 1 Ch. 257; *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666; *Re Sanchez De Larragoiti* (1907), 96 L. T. 862.

1032. ———.]—A foreign committee of the property of a domiciled Englishman resident abroad & found to be a lunatic in the forum of his residence cannot as of right recover personal property of the lunatic in this country.

The widow of a domiciled Englishman, who & whose relatives resided in New York, was found on a New York inquisition to be insane. A New York tribunal appointed a co. committee of both the person & property of the lunatic.

The ct., in its discretion, though the lunatic's income was more than sufficient for her maintenance, ordered English trustees of personal property of the lunatic to pay accrued income, & gave the trustees liberty to pay future income to the committee.

The lady sues by a next friend as provided by R. S. C., Ord. 16, r. 17, which refers to the old practice of the Ct. of Ch. There is nothing in that Ord. or in the established practice of the Ct. of Ch. prior to that Ord. which entitles the next friend, who may be anybody, to receive & give a discharge for the lady's money. It is only on the footing that the action as for the benefit of the lady, & in so far as it is for her benefit, that the ct. allows such an action to proceed (*COZENS-HARDY, J.*).—

#### PART X. SECT. 2, SUB-SECT. 2.—J.

1030 i. **Funds in court—Payment to committee appointed abroad—Discretion**

*of court to order.*]—*Re THOMPSON*, *THOMPSON v. THOMPSON* (1900), 19 P. R. 304; 21 C. L. T. 34.—*CAN.*  
m. **Payment to committee ap-**

*pointed abroad—Discretion of court to order.*]—*MURRAY v. BAILLIE* (1849), 11 Dunl. (Ct. of Sess.) 710; 21 Sc. Jur. 239.—*SCOT.*



*Sect. 2.—Extent of powers of management and administration: Sub-sect. 2, J., K., L., M. & N.; sub-sect. 3, A.]*

**NEW YORK SECURITY & TRUST CO. v. KEYSER**, [1901] 1 Ch. 666; 70 L. J. Ch. 330; 84 L. T. 43; 49 W. R. 371; 17 T. L. R. 207; 45 Sol. Jo. 239.

*Annotation:—Reid. Re De Larragoiti*, [1907] 2 Ch. 14.

**1033.** ————.]—Where a curator of the estate of a person of unsound mind who was resident out of the jurisdiction, was duly appointed, in accordance with the law of the foreign country in which the lunatic was residing, the ct., in the exercise of the discretionary jurisdiction conferred upon it by Lunacy Act, 1890 (c. 5), s. 134, ordered the stock standing in the name of the lunatic in this country to be transferred to the curator, the same being required for the maintenance of the lunatic, notwithstanding that the lunatic was not a subject of the foreign country in which he was residing.—*Re DE LARRAGOITI*, [1907] 2 Ch. 14; 76 L. J. Ch. 483; *sub nom. Re SANCHEZ DE LARRAGORTI*, 96 L. T. 862, L. JJ.

**1034.** ———— **Payment to colonial master in lunacy—Jurisdiction of court to order.**—A lady detained in a lunatic asylum in New South Wales, but not found a lunatic by inquisition, was entitled for life to the income, about £30 a year, of one-third of a testator's residuary estate, & was absolutely entitled to a fund of about £2,000 which had arisen from accumulations of this income. She had for years been maintained by the colonial government at a total expense of £803. By the New South Wales Lunacy Act extensive powers of management of the property of "lunatic patients," i.e. persons detained as lunatics but not found so by inquisition, were given to the Master in Lunacy of New South Wales, & he was enabled to sue for & receive debts due to the patient, but the Act did not vest the patient's property in him. The Master claimed to have the accumulations, which were in England, paid to him, upon which the trustees paid them into ct. under Trustee Relief Act. The Master petitioned to have them paid out to him. The judge ordered payment to him of the £803, & also payment to him of the income of the remainder of the fund so long as the patient should be detained as an insane patient in New South Wales, & authorised the trustee to pay to him the patient's share of the income of the residuary estate, which the trustee undertook to do. The Master in Lunacy appealed:—*Held*: (1) although the Master could enforce payment in New South Wales of any sums due to the patient, still as the patient had not been found lunatic, & her property was not vested in the Master, he could not compel payment of any moneys due to the patient from persons in this country, & his claim as of right to have the whole of the accumulations made over to him could not be sustained; (2) a trustee here, or the ct. acting as trustee, was justified in paying over to the Master anything which the competent authority in New South Wales decided to be necessary for the maintenance or benefit of the patient, & the order therefore was right in ordering the payments which had been directed. It was also right in declining to go further, no case having been made to show that more was required for the comfort or benefit of the patient.

(3) The costs of an unsuccessful appeal ought not, except on very rare & special occasions, to be paid out of the fund which is the subject of the

appeal, but ought to be borne by the unsuccessful appellant.—*Re BARLOW'S WILL* (1887), 36 Ch. D. 287; *sub nom. Re BARLOW'S WILL TRUSTS, Re BARLOW, BARTON v. SPENCER*, 56 L. J. Ch. 795; 57 L. T. 95; 35 W. R. 737; 3 T. L. R. 695, C. A.

*Annotations:—As to (1) Distd. Re Brown*, [1895] 2 Ch. 666; *Re De Linden, Re Spurrier's Settlement, De Hayn v. Garland*, [1897] 1 Ch. 453. *Consd. Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15. *Distd. Re Selot's Trust*, [1902] 1 Ch. 488. *Reid. Re Chatard's Settlement*, [1899] 1 Ch. 712; *Thiery v. Chalmers, Guthrie*, [1900] 1 Ch. 80; *Re Carr's Trusts, Carr v. Carr*, [1904] 1 Ch. 792.

#### K. Moral Obligations.

**1035. Debts of honour—Discretion of court to order payment.**—The payee of a promissory note given without consideration is not, even in the administration of a solvent estate, in the same position as the payee of a voluntary bond, so as to be entitled to claim against the estate after creditors for value.

A lunatic, while sane, had given a promissory note for £50,000, payable in instalments of £5,000 each, in discharge of what he considered was a moral obligation, & had paid three of such instalments. Upon a claim made against his estate, which was a very large one, after he had been found lunatic, by the holder of the note for the sum of £35,000, being the amount of the unpaid instalments thereon, to which claim the next of kin consented:—*Held*: (1) although, as the gift was voluntary, the payee of the note was not entitled to claim as a creditor against the lunatic's estate, the ct. in the exercise of its discretion would order the payment to be made thereout, by way of bounty & as in discharge of a debt of honour on the part of the lunatic, which, under the circumstances, it ought to recognise; (2) the application should have been made by the committee & he must be joined as co-petitioner.—*Re WHITAKER* (1889), 42 Ch. D. 119; 58 L. J. Ch. 487; 61 L. T. 102; 37 W. R. 673; 5 T. L. R. 424, C. A.

#### L. Charitable Gifts.

*See, generally, CHARITIES, Vol. VIII., pp. 241 et seq.*

**1036. Lunatic accustomed to make—Continuation of contributions.**—*Re POPHAM* (1844), 3 L. T. O. S. 258, L. C.

**1037.** ————.]—*Re DYCE SOMBRE* (1844), 3 L. T. O. S. 157, L. C.

**1038. Subscription for building church & schools.**—A lunatic was tenant for life of about seventy houses in London, all situate in the same neighbourhood, & producing a gross rental of £2440. His surplus income, after providing him with every comfort, was about £900 a year. Three of the houses were sold to a church building committee as a site for a church to a new district parish, & the incumbent & the church committee solicited subscriptions for building a church & parochial schools in connection with it. Leave was given to the committee of the estate, who was also heiress-at-law & sole next of kin, to contribute out of the lunatic's income £250 towards building the church, & a like sum for the schools.—*Re STRICKLAND* (1871), 6 Ch. App. 226; 24 L. T. 530; 19 W. R. 515, L. JJ.

#### M. Maintenance and Repairs of Estate.

Repairs generally, *see* LANDLORD & TENANT, Vol. XXXI., pp. 310 et seq.

*See, now, Lunacy Act, 1890 (c. 5), s. 118.*

#### PART X. SECT. 2, SUB-SECT. 2.—L.

**1036 l. Lunatic accustomed to make—Continuation of contributions.**—*Re D.* (1917), 40 O. L. R. 365; 39 D. L. R. 368.—CAN.

**1039. Cutting down timber for repairs—Power of committee.]—**A committee of a lunatic's real estate may cut down timber for repairs.—*Ex p.* LUDLOW (1742), 2 Atk. 407; 26 E. R. 645, L. C.

**1040. New lease—Expenses payable out of personalty.]—***Ex p.* DEGGE (1764), 4 Bro. C. C. 236, n.; 29 E. R. 871.

*Annotation:—*Reid. A.-G. v. Allesbury (1887), 12 App. Cas. 672.

**1041. ——— Premium & sum for dilapidations.]—***Re* LIEBENWOOD (1844), 3 L. T. O. S. 177, L. C.

**1042. Permanent improvements—Chargeable on realty or personalty.]—***Re* HARRIS (1827), cited in Shelford on Lunatics, 2nd ed. at p. 276.

*Annotation:—*Reid. *Re* Gist, [1904] 1 Ch. 398.

**1043. ———.]—**Repairs & permanent improvements to a large amount upon an estate of which a lunatic was tenant in tail in possession were found to be expedient. There was in ct. a sufficient fund of personalty to which the lunatic was absolutely entitled, & his income was much more than sufficient for his requirements. The amount required for repairs & improvements was ordered to be raised by mtge. or charge of the settled estate.—*Re* GIST (1877), 5 Ch. D. 881; 26 W. R. 22, C. A.

*Annotation:—*Consd. *Re* Gist, [1904] 1 Ch. 398.

**1044. ——— Discretion of court.]—***Re* GIST, No. 1043, ante.

*See* Lunacy Act, 1890 (c. 5), s. 118.

**1045. ——— Drainage of estate.]—**(1) The modern practice of making allowances out of lunatics' estates for their collateral relations disapproved & to be kept within narrow limits.

This case is not to be drawn into a precedent; for I think this liberality out of the lunatic's estate to collateral relations, whom he is under no obligation to support has been carried much too far (LORD COTTENHAM, C.).

(2) A comparatively small sum, which the master had approved as proper to be allowed out of the surplus income of the lunatic, which was very considerable, for drainage of an estate of which the lunatic was tenant for life, with remainder to his brother, was disallowed by the Lord Chancellor, though no one objected to it.—*Re* CLARKE (1847), 2 Ph. 282; 41 E. R. 951, L. C.

**1046. ——— Expenditure on farm buildings.]—***Re* ——— (1845), 5 L. T. O. S. 189, L. C.

**1047. ——— Necessary to secure tenants.]—***Re* ——— (1846), 7 L. T. O. S. 525, L. C.

**1048. Ordinary repairs to realty—Payable out of personalty.]—***Re* BADCOCK, No. 1242, post.

**1049. ———.]—***Re* GIST, No. 1043, ante.

**1050. Expenditure without previous order.]—**Repairs made without a previous order, though reported necessary, not allowed to the committee of a lunatic's estate.—ANON. (1804), 10 Ves. 104; 32 E. R. 783.

**1051. ———.]—***Re* ——— (1846), 7 L. T. O. S. 525, L. C.

**1052. ——— Prior caution from master.]—**GARLAND v. GARLAND (prior to 1802), cited in 6 Ves. at p. 800.

**1053. Allowance to family postponed.]—***Re* ADEY (1844), 3 L. T. O. S. 177, L. C.

**1054. Repairs to lunatic wife's residence—Expenditure by husband at her request.]—***Re* JOHN-SON (1846), 7 L. T. O. S. 485, L. C.

#### N. Incidence of Income Tax.

*See, generally,* INCOME TAX, Vol. XXVIII., pp. 4 et seq.

#### PART X. SECT. 2, SUB-SECT. 3.—A.

**10571. General rule—Rights of creditors postponed.]—**Although the general

rule of the ct. is, that no course will be taken that will prejudicially affect the interests or the comfort of a lunatic, even for the benefit of creditors; still

**1055. Allowance already fixed—Continued without deduction.]—**The allowance for the maintenance of a lunatic previously directed to be paid, ordered to be continued by the Accountant-General, without any deduction in respect of income tax.—*Re* LIEBENROOD (1842), 6 Jur. 721, L. C.

**1056. ——— Repayment of amount deducted—Increase of allowance to meet tax.]—***Re* COOPER (1843), 1 L. T. O. S. 34.

#### SUB-SECT. 3.—PAYMENT OF CREDITORS.

##### A. Where Affecting Lunatic's Maintenance.

*See, now,* Lunacy Act, 1890 (c. 5), ss. 117, 120.

**1057. General rule—Rights of creditors postponed.]—**(1) Lunatic's comfort considered in exclusion to the presumptive rights of his next of kin, etc.

(2) Lunatic not stripped of support by act of Lord Chancellor even for creditors.—*Ex p.* WRIGHT (1750), 2 Ves. Sen. 25; 28 E. R. 17, L. C.

**1058. ———.]—**(1) The Lord Chancellor cannot by an order in lunacy make an absolute title to the lunatic's leasehold estate.

(2) The Lord Chancellor will not even for creditors make an order in lunacy, the effect of which must be to put the lunatic in a state of absolute want.—*Ex p.* DIKES (1802), 8 Ves. 79; 32 E. R. 282, L. C.

*Annotation:—*As to (1) *Reid. Re* Colton (1844), 2 L. T. O. S. 305.

**1059. ———.]—**No order upon petition in lunacy for payment of the lunatic's debts out of funds, not within the reach of his creditors, except for his accommodation, & it clearly appears, that he will have a sufficient maintenance.—*Ex p.* HASTINGS (1807), 14 Ves. 182; 33 E. R. 490, L. C.

*Annotations:—*Consd. *Horne v. Pountain* (1889), 23 Q. B. D. 264. *Reid. Re* Clarke, [1898] 1 Ch. 336; *Re* Brown, *Llewellyn v. Brown*, [1900] 1 Ch. 489.

**1060. ———.]—**The Lord Chancellor will not aid creditors of a lunatic in obtaining payment of their debts, if such a proceeding will place the lunatic & his family in a state of want.—*Re* RAILTON (1837), 1 Jur. 574.

**1061. ———.]—**No order for satisfaction of a liability of a lunatic until information furnished, showing that enough will still be left for his maintenance.—*Re* ADEY (1846), 1 Coop. temp. Cott. 225; 47 E. R. 831.

**1062. ———.]—***Re* WINKLE, No. 1076, post.

**1063. ———.]—**Although the judges in lunacy have jurisdiction to apply moneys of a lunatic which are under their control in the lunacy for maintenance of the lunatic notwithstanding that he may have creditors who are unpaid, yet they have no jurisdiction to order the trustee in bkpcy. of a lunatic who has been adjudicated bkpt. to pay into ct. to the credit of the lunacy moneys received by or in the possession, or under the control of the trustee in bkpcy. for the purpose of enabling the committee to apply the same for the maintenance of the lunatic.—*Re* FARNHAM (No. 2), [1896] 1 Ch. 836; 65 L. J. Ch. 456; 74 L. T. 214; 60 J. P. 389; 44 W. R. 465; 12 T. L. R. 287; 40 Sol. Jo. 371; 3 Mans. 123, C. A.

*Annotation:—*Reid. *Re* Clarke, [1898] 1 Ch. 336.

**1064. ———.]—***Re* CLARKE, No. 1077, post.

the ct. will assist creditors where that can be done without prejudice to the lunatic.—*Re* SHAW (1868), 14 Gr 524. —CAN.



**1065.** ———.]—The judge in lunacy, in dealing with the creditors of the lunatic, always considers what is for the benefit of the lunatic first, so far as the property under the control of the judge is concerned. That is part of the law of the land, & is of so long standing that no judge in lunacy nor this Ct. can alter it. It is our duty as the law stands to look to the interest of the lunatic, but, when we have done that & when we have provided for the lunatic to the extent to which the judge in lunacy thinks right, there is nothing which justifies the Ct. in withholding a creditor from exercising his legal rights & getting paid if he can (LINDLEY, M.R.).—*Re SEAGER HUNT*, [1900] 2 Ch. 54, n.; 69 L. J. Ch. 450, n.; 82 L. T. 741, n., C. A.

*Annotation*.—*Reid*. *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

**1066.** ———.]—(1) An action brought in a proper case in the name of a lunatic not so found by his next friend, for the recovery of his property may, in the absence of any lunacy proceeding be maintained without the sanction of the Ct. in Lunacy.

(2) The Ct. in Lunacy, having property of a lunatic under its control, will, as between the lunatic & his creditors, see that proper provision is made out of the property for his maintenance, as the first & paramount consideration; but, subject to that, the Ct. will not withhold a creditor from exercising his legal rights.

(3) A foreign curator or *administrateur provisoire* of a lunatic, not so found judicially, domiciled & resident abroad, is not necessarily an improper person to sue in this country as next friend for the recovery of the lunatic's personal property here, though, if such next friend is resident abroad, he may be required to give security for costs.

(4) The Ct. in Lunacy has no jurisdiction under Lunacy Act, 1890 (c. 5), s. 134, to order the transfer of securities in this country standing in the name of or vested in a person of unsound mind, not so found, residing out of the jurisdiction of the High Ct., unless his status has been altered by his being judicially declared lunatic according to the law of the place where he is residing.

G., domiciled & resident in Belgium, deposited with an English bank for safe custody, in his name, certificates & scrip for securities of great value. On his death in 1892 his widow, then also domiciled & resident in Belgium, took out administration in England to his estate, & had the securities then standing to his account, & also a sum of cash representing dividends thereon collected by the bank on his account, transferred to a new account opened by her at the bank in her own name.

In 1897 she became lunatic, though she was not so declared judicially, & was placed in a foreign lunatic asylum. D., a Belgian, was appointed by the Belgian Ct. her *administrateur provisoire*, with power to collect & get in her personal estate, & subsequently D. obtained in England letters of administration *de bonis non* to G.'s estate, whereupon he brought an action in England against the bank in the names of himself & of Madame G., the writ not stating that she was of unsound mind or that he was suing as her next friend, claiming, in his double capacity of legal personal representative of G. & of *administrateur provisoire* of Madame G., to have the certificates, scrip & cash standing in her name delivered up to him. Pltf. D. appealed, having first obtained from the Belgian Ct. an order giving him leave to appeal with a view to

*ad* recovering the property:—*Held*: (5) as D.

property sought to be recovered, D. was entitled suing in his own name & as next friend of Madame G., to demand the delivery of her property to him & could give the bank a good discharge; (6) in the absence of lunacy proceedings in this country the Ct. was bound, on general principles of private international law, to recognise the order of the Belgian Ct. giving D. leave to prosecute the appeal & to obtain & give a good discharge for the property.

(7) In Chancery it had long been the settled practice to institute suits in the names of lunatics not so found by inquisition, by a next friend. Applications to stay such suits were also frequently made with success. . . . The alleged lunatic could make such application himself if he asserted his sanity (LINDLEY, M.R.).—*DIDISHEIM v. LONDON & WESTMINSTER BANK*, [1900] 2 Ch. 15; 69 L. J. Ch. 443; 82 L. T. 738; 48 W. R. 501; 16 T. L. R. 311, C. A.

*Annotations*.—*As to* (1) *Reid*. *Re Carr's Trusts*, *Carr v. Carr* (1904), 90 L. T. 592. *As to* (3) *Reid*. *Re De Larrogoiti* [1907] 2 Ch. 14. *As to* (4) *Distd.* *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666. *As to* (6) *Appld.* *Pélégriin v. Coutts*, *Pélégriin v. Messel*, [1915] 1 Ch. 696. *Reid*. *Thiery v. Chalmers*, *Guthrie*, [1900] 1 Ch. 80.

**1067.** ——— *Although estate insolvent.*—*Re PINK*, No. 1093, *post*.

**1068.** ——— *Lunacy Regulation Act 1862 (c. 86), ss. 12, 13.*—The power given by above Act, s. 12, of making orders for the purpose of rendering the small property of a lunatic available for his maintenance or benefit, is to be exercised only for his benefit, & not for the purpose of enabling his creditors to obtain payment. A person of small means was confined as a criminal lunatic in Broadmoor Asylum, & there appeared no reasonable prospect of his ever being released. His mother & brother applied for an order that his property, along with some property in which they were interested together with him, might be applied in payment of moneys for which the lunatic had given security, the mother undertaking to pay his other debts:—*Held*: the application must be refused as not being for his benefit.—*Re PRICE* (1887), 34 Ch. D. 603; 56 L. J. Ch. 292; 56 L. T. 77; 35 W. R. 340; 3 T. L. R. 292, C. A.

*See, now*, Lunacy Act, 1890 (c. 5).

*Creditor obtaining charging order.*—*See* Subsect. 3, B., *post*.

*Creditor issuing execution, see C., post.*

### B. Charging Orders.

Charging orders, generally, *see* EXECUTION, Vol. XXI., pp. 647 *et seq.*

*See, now*, Lunacy Act, 1890 (c. 5), s. 117.

**1069. Funds in lunacy—Order obtained under Judgments Acts, 1838 (c. 110), 1840 (c. 82).**—*Form of order.*—On an application at chambers, under above Acts, by the judgment creditor of a debtor found lunatic by inquisition, for a charging order on funds standing in the books of the Paymaster-General of the Ch. Div. to the credit of the debtor, who was described in such books as "a person of unsound mind," the judge ordered that "so much of debt.'s interest in the fund so standing as aforesaid should stand charged with the payment of the . . . amount due on the judgment as the Lords Justices sitting in Lunacy might deem applicable to payment of the judgment debt":—*Held*: the Acts gave the judge no power to make an order providing that the amount to be charged should be determined by the Lords Justices & the creditor was entitled to an unconditional order on



a specified amount of the fund.—*HORNE v. POUNTAIN* (1889), 23 Q. B. D. 264; 58 L. J. Q. B. 413; 61 L. T. 510; 54 J. P. 37; 38 W. R. 240, D. C.

*Annotations*:—*Folld. Re Leavesley*, [1891] 2 Ch. 1. *Refd. Re Plenderleith*, [1893] 3 Ch. 332; *Re Farnham* (No. 1) (1896), 3 Mans. 109.

**1070. — Validity of order—Priority to representative of lunatic.**—The effect of a charging order made by a judge in favour of judgment creditor under Judgment Act, 1838 (c. 110), does not depend upon the capacity of judgment debtor to give a valid charge, but upon the validity of the judgment; & sect. 14 of that Act, & the proviso in Judgments Act, 1840 (c. 82), s. 1, must be read as meaning that judgment creditor is to have the same remedies, & the order of the judge the same effect, as if judgment debtor had made a valid & effective charge in favour of the judgment creditor.

Creditors of a lunatic, whose debts were incurred before the lunacy, after the lunacy obtained judgments against him, & also orders charging a fund in ct. in the lunacy with the amounts of their respective judgments, which orders were not in terms enforceable until the death of the lunatic or further order.

The lunatic died insolvent, & upon an application by his administratrix for payment out of the fund:—*Held*: the charging orders were valid & effective, & judgment creditors were entitled to be paid the several amounts due thereon respectively out of the fund before transfer of any part thereof to the administratrix.—*Re LEAVESLEY*, [1891] 2 Ch. 1; 60 L. J. Ch. 385; 64 L. T. 269; 39 W. R. 276, C. A.

*Annotation*:—*Consd. Re Plenderleith*, [1893] 3 Ch. 332.

**1071. — Made after death of lunatic.**—Judgment was given in an action in the Q. B. Div. against deft. for a certain sum. Def. shortly after died, & his will was proved by his exor. Within a week of the probate being granted, an action was commenced to administer deft.'s estate, & an order in lunacy made affecting a sum in ct., deft. having been of unsound mind. On the day following this order a charging order was made that pltf. be at liberty to issue execution against the exor., & that deft.'s interest in the sum in ct. should stand charged with the payment of the sum due. Judgment was then given in the administration action, & this action was transferred to this division:—*Held*: the order charging deft.'s interest in the sum in ct. was invalid; the order must be construed strictly, & could not be set right on the ground of accidental slip or omission under R. S. C. Ord. 28, r. 11.—*STEWART v. RHODES*, [1900] 1 Ch. 386; 81 L. T. 807; 48 W. R. 233; 44 Sol. Jo. 195.

**1072. — Insufficiency of fund to provide maintenance—Power of court to apply fund for lunatic's benefit.**—The ct. will order a proper allowance for the maintenance of a lunatic to be made out of the income & capital of a fund in ct. belonging to him, though the effect may be to make the capital insufficient for the payment of creditors of the lunatic who have obtained charging orders on the fund, & such creditors are not entitled to have impounded an amount of capital sufficient to meet their demands.—*Re PLENDERLEITH*, [1893] 3 Ch. 332; 62 L. J. Ch. 993; 69 L. T. 325; 58 J. P. 164; 42 W. R. 224; 37 Sol. Jo. 699; 2 R. 625, C. A.

*Annotations*:—*Distd. Re Brown, Llewellyn v. Brown*, [1900] 1 Ch. 489. *Refd. Re Winkle* (1894), 63 L. J. Ch. 541; *Re Farnham* No. 2 (1896), 74 L. T. 214; *Re Clarke*, [1898] 1 Ch. 336; *Davies v. Thomas* (1900), 83 L. T. 11.

**1073. Funds in Chancery—Order obtained with**

**knowledge of pending lunacy proceedings—Order valid as against surplus property of lunatic.**—*Re SEAGER HUNT*, [1900] 2 Ch. 54, n.; 69 L. J. Ch. 450, n.; 82 L. T. 741, n., C. A.

*Annotation*:—*Refd. Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

**1074. — Charging order satisfied—Before fund transferred to lunacy.**—The rule of administration in Lunacy that the obligations of a lunatic are postponed to the needs of the lunatic does not affect funds in the High Ct.

A judgment creditor of a lunatic obtained a charging order on funds of the lunatic in ct. The balance only of the funds, after satisfying the charge, was transferred to Lunacy.—*Re BROWN, LLEWELLYN v. BROWN*, [1900] 1 Ch. 489; 69 L. J. Ch. 234; 82 L. T. 83; 64 J. P. 327; 48 W. R. 461.

**1075. Stamp duty.**—PRACTICE NOTE, [1922] W. N. 75.

### C. Execution Creditors.

Execution generally, see Vol. XXI., pp. 415 *et seq.*

**1076. Whether rights postponed to lunatic's maintenance—Execution levied before receiver appointed.**—(1) Where the property of a lunatic has become subject to the control of the ct. in lunacy by the appointment of a receiver, it cannot be seized under a writ of *fi. fa.* by an execution creditor of the lunatic; & the ct. will make an order for bringing the lunatic's property into ct., & for payment thereof of costs & of an allowance for the maintenance of the lunatic, though not of his wife also, in priority to any claim of the execution creditor; but, subject to such allowance & to the costs incurred in relation to the lunatic's property, the order will be made without prejudice to any charge or priority which the creditor may have acquired by lodging his writ of *fi. fa.* with the sheriff.

(2) Form of order for maintenance of a lunatic where a judgment creditor has obtained execution.—*Re WINKLE*, [1894] 2 Ch. 519; 63 L. J. Ch. 541; 70 L. T. 710; 42 W. R. 513; 38 Sol. Jo. 455; 7 R. 255, C. A.

*Annotations*:—*As to (1) Distd. Re Clarke*, [1898] 1 Ch. 336. *Expld. & Distd. Davies v. Thomas*, [1900] 2 Ch. 462.

489.

**1077. —**—(1) The Ct. in Lunacy will not allow property of a lunatic in its custody to be applied in paying his creditors without first providing for his maintenance; but it has no jurisdiction to interfere with the rights of creditors to seize & sell by legal process property of the lunatic which at the time of seizure is not in the custody of the ct.

(2) The issuing of a summons in lunacy does not withdraw the property of the lunatic from legal process by a creditor until an order is made showing that the Crown has actually taken the property under its protection.

A judgment creditor of a person not found lunatic by inquisition, after receiving notice of the pendency of a summons in lunacy for the appointment of a receiver under Lunacy Act, 1890 (c. 5), s. 116, issued a *fi. fa.* under which the goods of debtor were seized before any order was made upon the summons. A receiver was afterwards appointed while the goods were in the possession of the sheriff:—*Held*: the Ct. had no jurisdiction to order a sale of the goods under Lunacy Act, 1890 (c. 5), s. 117, for the maintenance of the alleged lunatic in priority to the claims of



**Sect. 2.—Extent of powers of management and administration: Sub-sect. 3, C., D., E. (a) & (b), F., G., H., I., J. & K. Sect. 3.]**

the creditor.—*Re CLARKE*, [1898] 1 Ch. 336; 67 L. J. Ch. 234; 78 L. T. 275; 46 W. R. 337; 14 T. L. R. 274; 42 Sol. Jo. 324, C. A.

*Annotations*:—As to (1) *Consd.* *Davies v. Thomas*, [1900] 2 Ch. 462. As to (2) *Refd.* *Re Brown, Llewellyn v. Brown*, [1900] 1 Ch. 489. *Generally, Refd.* *Re E. G.*, [1914] 1 Ch. 927. *Mentd.* *The James W. Elwell*, [1921] P. 351.

**D. Vendor's Lien for Unpaid Purchase-Money.**

*See, generally*, Part VIII., *ante*; SALE OF LAND.

**1078. Effect of appointment of receiver—Lunacy Act, 1890 (c. 5).]**—An order in Lunacy under above Act, s. 116, authorising a person therein specified in the name & on the behalf of the lunatic to receive & give a discharge for all sums of money due to him, does not affect rights enforceable against the lunatic's property at law or in equity, such as a vendor's lien for unpaid purchase-money, previously acquired by third persons. Such an order deals only with the lunatic's equitable interest in his property.—*DAVIES v. THOMAS*, [1900] 2 Ch. 462; 69 L. J. Ch. 643; 83 L. T. 11; 49 W. R. 68; 44 Sol. Jo. 608, C. A.

*Annotation*:—*Mentd.* *Re Stucley, Stucley v. Kekewich*, [1906] 1 Ch. 67.

**E. Payment for Maintenance.**

(a) *During Lunatic's Lifetime.*

**1079. Petition by committee.]—Re — (1844),** 3 L. T. O. S. 353, L. C.

**1080. Petition for sale of lunatic's real estate—Direction for inquiry.]—Re BURBIDGE (1844),** 4 L. T. O. S. 190, 270, L. C.; *subsequent proceedings* (1850), 3 Mac. & G. 1, L. C.

**1081. Claim by husband—Wife having separate estate—Repayment out of income.]—Where a lunatic, whose husband had expended upon her support & attendance sums which his own income was insufficient to meet, became entitled to some property for her separate use, the ct. refused to order a sale of any portion of the principal of her property, for the purpose of repaying the expenses of her past maintenance; but ordered these expenses to be repaid out of the moneys arising from past dividends, so far as they would extend, & the residue of those expenses to be repaid out of so much of the future income as would remain after providing thereout in the first place for the future maintenance of the lunatic.—*EDWARDS v. ABREY* (1846) 2 Ph. 37; 2 Coop. temp. Cott. 177; 15 L. J. Ch. 404; 7 L. T. O. S. 485; 10 Jur. 650; 15 L. C.**

*Annotation*:—*Refd.* *Vane v. Vane* (1876), 45 L. J. Ch. 381.

**1082. Claim by brothers—Retention of legacy to lunatic in satisfaction—Preference over claim by county asylum.]—Re GIBSON, No. 1020, ante.**

**1083. Insolvent estate—Maintenance in asylum.]—Re LEESE, No. 954, ante.**

**1084. ———.]—Re PINK, No. 1093, post.**

**1085. ——— Maintenance of wife & children.]—Re PINK, No. 1093, post.**

Necessaries, *see* Part II., Sect. 1, sub-sect. 4, *ante*.

(b) *After Death of Lunatic.*

**1086. Personal estate exhausted—Liability of real estate.]—Upon a reference in lunacy, it was found & reported that the sum of £413 14s. was due to A. for the maintenance of the lunatic, & necessities supplied by him to the lunatic during his lunacy. The heir-at-law & next of kin of the lunatic had**

notice of & was present at the proceedings under the reference.

Before A. received payment of the sum of £413 14s., or any part of it, the lunatic died intestate, & it having been ascertained that his personal estate had been exhausted, A. instituted a creditor's suit against the heir-at-law for payment of his debt out of the real estate of the lunatic:—*Held*: the heir-at-law was bound by the proceedings in lunacy, & A. had established a sufficient *prima facie* case to entitle him to a reference to the master to inquire & find whether any debt was due to him from the estate of the lunatic.—*WENTWORTH v. TUBB* (1842), 12 L. J. Ch. 61; 6 Jur. 980, L. C.

*Annotations*:—*Consd.* *Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94. *Refd.* *Re Rutter, Chester v. Rolfe* (1853), 4 De G. M. & G. 798; *Re Newbegin's Estate, Eggleton v. Newbegin* (1887), 36 Ch. D. 477.

**1087. Personal representatives consenting—Necessity for consent of parties beneficially interested.]—On the death of a lunatic, where there had been no order for a maintenance, the personal representative offered to consent to an order for payment of liquidated sum to the interim committee for past maintenance, in order to avoid the expense of a reference, the estate being inconsiderable. But the Lord Chancellor refused to sanction the payment, unless on the consent of the parties beneficially interested in the surplus of the estate.—*Re PATRICK* (1847), 2 Ph. 394; 41 E. R. 995, L. C.**

**F. Parliamentary Election Expenses.**

*See, generally*, ELECTIONS, Vol. XX., pp. 7 *et seq.*

**1088. Member unseated on petition—Subsequently becoming insane—Expenses of agent.]—Re DYCE SOMBRE (1846),** 7 L. T. O. S. 221, L. C.; *subsequent proceedings, sub nom.* *Re DYCE SOMBRE, Ex p. COPPOCK* (1847), 9 L. T. O. S. 470, L. C.

**1089. ——— Expenses of solicitor.]—Upon a petition to allow the expenses of an election petition, which the solr. of the lunatic had incurred in defending the lunatic's seat in Parliament, it appeared that before the election a sum of £3,000 had been paid to the same solr., for which he had given an accountable receipt to the lunatic, upon which a reference was made to the Master in Lunacy to take a general account of all transactions between the lunatic & his solr. On that reference the Master had examined the solr. *viva voce*, who stated that he had paid the money to a person named, at the place of election, & that such person had been in communication with the lunatic during the election, & had expended the whole of the money for the purposes of the election; that a written account of the mode of expending it had been, after the election, shown to the lunatic, who had approved of it, & paid some additional expenditure. When the paper had been shown to the lunatic, it was destroyed. The person who had actually expended the money was not examined, because the money having been confessedly spent in bribing the electors, would have been amenable to the law. The Master reported these circumstances:—*Held*: this was not a proper taking of the account, but only assigning a reason why it was not taken, & did not comply with the order of reference; & it was referred to the Master to review his report at the cost of petitioner, the solr.—*Re DYCE SOMBRE, Ex p. COPPOCK* (1847), 9 L. T. O. S. 470, L. C.; *previous proceedings, sub nom.* *Re DYCE SOMBRE* (1846), 7 L. T. O. S. 221, L. C.**

**PART X. SECT. 2, SUB-SECT. 3.—E. (a).**

n. *Petition for sale of lunatic's property—Direction for inquiry.]—Re ROBINSON* (1884), 5 N. S. W. L. R. (Eq.) 77.—**AUS.**

*G. Death of Lunatic before Payment.*

**1090. Petition in lifetime of lunatic—Inquisition relating back.]**—Order after the death of a lunatic for payment of a debt, viz. an attorney's bill upon a retainer, over-reached by the lunacy; & no report of debts: if the petition is presented in the life of the lunatic. But the debt must be established at law.—*Ex p. M'DOUGAL* (1806), 12 Ves. 384; 33 E. R. 145.

**1091. Order in lunacy—Administration in Chancery—Lunacy Act, 1890 (c. 5), ss. 116, 117.]**—H. was a person not detained as or found lunatic, but found to be incapable of managing his affairs through mental infirmity arising from disease. In 1898 a Master in Lunacy made an order under above Act, sect. 116, that H.'s wife should be authorised to do such things as the Masters should approve of for the purpose of protecting his estate & to exercise the powers of a committee of his estate. In 1902 an order was made in lunacy that H.'s wife should apply certain funds in payment to his creditors of a dividend of 6d. in the pound on their debts. In 1904 an order was made in lunacy that B. & co., who had not previously claimed, should be admitted as creditors in respect of a certain debt, & should participate in future dividends out of H.'s estate, & should rank in priority to other creditors to the extent of 6d. in the pound upon that debt. Before effect could be given to the order of 1904 H. died, & proceedings for the administration of his estate were taken in the Ch. Div. of the High Ct.:—*Held*: the jurisdiction in lunacy ended at the death of H.; the order of 1904 did not bind the High Ct. when administering his estate; on the death of H. his creditors were entitled to have his assets collected & distributed according to their rights as creditors on the estate of a deceased person irrespective of the fact that up to his death his estate was subject to the jurisdiction in lunacy; & the claim of B. & co. to priority therefore failed.—*Re SEAGER HUNT, SILICATE PAINT CO. & ORR (J. B.) & CO., LTD. v. HUNT*, [1906] 2 Ch. 295; 95 L. T. 606; *sub nom. Re HUNT, SILICATE PAINT CO. & ORR (J. B.) & CO., LTD. v. HUNT*, 75 L. J. Ch. 801.

*H. Negligence of Committee.*

**1092. In passing creditors' accounts—Chargeable with interest.]**—*Re LEGARD, Ex p. HALL*, No. 917, *ante*.

*I. Insolvency of Estate.*

*See* Sub-sect. 3, A., B. & C., *ante*.

**1093. Lunatic's maintenance first provided for.]**—In managing the estates of lunatics the ct. will have regard to the maintenance & comfort of the lunatic in preference to the claims of his creditors, although the estate be insolvent. The Master in Lunacy made a certificate finding that the property of a lunatic produced an income of £163, & that his debts amounted to £7,000, including £250 for his past maintenance in an asylum, & £374 for the past maintenance of his wife & children expended by the committee. On a summons taken out under Lunacy Orders, 1883, Ord. 45, on which some of the ordinary creditors appeared & claimed payment of their debts:—*Held*: (1) the expenses of past maintenance of the lunatic, his wife & children, must be paid in full; (2) capital producing £110 a year should be set aside for the lunatic's future maintenance; (3) the residue should be divided among the ordinary creditors *pro rata*, who were to have a charge on the reserved capital, with liberty to apply on the lunatic's

death.—*Re PINK* (1883), 23 Ch. D. 577; 52 L. J. Ch. 674; 49 L. T. 418; 31 W. R. 728, C. A.

*Annotations*:—*Expld. Horne v. Pountain* (1889), 23 Q. B. D. 264. *Reid. Re Plenderleith*, [1893] 3 Ch. 332; *Re Farnham* (No. 2) (1896), 65 L. J. Ch. 456.

*J. Bankruptcy of Lunatic.*

*See* BANKRUPTCY, Vol. IV., pp. 30, 163, Nos. 238–250, 1523; Vol. V., p. 652, No. 5826.

**1094. Undertaking by solicitor for payment of money—Death of bankrupt lunatic—Application by official solicitor to enforce.]**—*Re AYTOUN, Ex p. OFFICIAL SOLICITOR OF SUPREME COURT* (1904), 20 T. L. R. 252.

*Insolvency of estate.]*—*See* Sub-sect. 3, I., *ante*.  
*Death of lunatic before payment, see G., ante.*

*K. Effect of Statute of Limitations.*

*See* LIMITATION OF ACTIONS, Vol. XXII., pp. 320, 321, 517, 518, Nos. 60–62, 1750–1757.

## SECT. 3.—POWER TO RAISE MONEY.

*See, now, Lunacy Act, 1890 (c. 5), s. 117 (1).*

**1095. By mortgage—Discharge of solicitor's lien on title deeds.]**—Where the committees of a lunatic had been authorised by the ct. to raise money by a mtge. of his estate, but were unable to do so, in consequence of some of the title deeds being in the hands of solrs. who claimed a lien upon them, but the items of their accounts were disputed, the ct. ordered that the mtgee. should be at liberty to pay to the committees a sufficient sum to discharge the lien on the title deeds, without prejudice to their right to have the accounts investigated.—*Re DAVIES* (1843), 12 L. J. Ch. 456; 7 Jur. 589, L. C.

**1096. — Reduction of income—Undertaking by committee to maintain lunatic.]**—*Re DAVIS* (1844), 3 L. T. O. S. 353, L. C.

**1097. — To pay costs of partition action—Jurisdiction in lunacy.]**—A lunatic being tenant in tail of an undivided share of an estate, a decree for partition was made, which directed that the lunatic's costs should be raised by mtge. of the land allotted to her in severalty. On the completion of the partition the lands allotted to the lunatic were conveyed to her simply in tail, without any provision for raising the costs:—*Held*: they had no jurisdiction to authorise the committee to mortgage the land for the purposes of raising the costs.—*Re BLOOMER* (1860), 2 De G. F. & J. 154; 45 E. R. 581, L. C.

**1098. — Payment of debts of ancestor.]**—A lunatic was entitled in fee to one moiety of real estate as one of the two co-heiresses of an ancestor who had died intestate. The real estate was liable as assets for payment of a considerable amount of simple contract debts of the ancestor which his personal estate was insufficient to pay. The ct. authorised the committee to concur with the other co-heiress in a mtge. of the entirety to raise the amount of the debts, the mtge. being so framed that the lunatic's moiety was only liable for one moiety of the mtge. debt & interest, & could not be made liable for any default of the other co-heiress in payment of the other moiety of the principal & interest, but the ct. declined to authorise the committee to enter into any covenant on behalf of the lunatic.—*Re FOX* (1886), 33 Ch. D. 37; 55 L. T. 39; 35 W. R. 81, C. A.

*Annotation*:—*Expld. Re Ray*, [1896] 1 Ch. 468.

**1099. By sale of leaseholds.]**—*Re COLTON* (1844), 2 L. T. O. S. 305, L. C.



**Sect. 3.—Power to raise money. Sect. 4: Sub-sects. 1 & 2.]**

**1100. By sale of advowson—Lunatic tenant in tail in possession.]**—1 Will. 4, c. 65, s. 28, confers no power to sell the right to the next presentation to a rectory of the advowson of which a lunatic is tenant in tail in possession, except for one of the purposes specified in the section.—*Re VAVASOUR* (1851), 3 Mac. & G. 275; 20 L. J. Ch. 619; 42 E. R. 266, L. C.

**1101. By sale of reversion—Payment of costs of commission.]**—An application for the sale of a reversion to which a lunatic was entitled, subject to a life interest, refused, where it appeared that the sale was required for the payment of the costs of the commission, & not for the purpose of benefiting the lunatic.—*Re BURRIDGE* (1852), 19 L. T. O. S. 25, L. C.

**1102. By charge on interest in remainder—For maintenance of lunatic—Family competent to maintain.]**—On the petition of the lunatic's father, tenant for life of large landed estates, the Lord Chancellor declined to make an order under 16 & 17 Vict. c. 70, charging the estate of the lunatic tenant in tail in remainder with a sum found by the master to be proper for the lunatic's maintenance, there being no special circumstances nor any evidence that the state of petitioner's family was such as to make the charge just or reasonable.—*Re PUGH* (1853), 3 De G. M. & G. 416; 22 L. T. O. S. 93; 17 Jur. 979; 2 W. R. 22; 43 E. R. 163, L. C.

**1103. Lunatic tenant for life of A. estate—Tenant in tail in possession of B. estate—No power to charge B. estate with cost of repairs to A. estate.]**—A lunatic was tenant for life of the A. estate, & tenant in tail in possession of the B. estate. Expenses were incurred by the committee in improvements on both estates but chiefly on the former:—*Held*: no jurisdiction to charge B. estate with expenses incurred on the A. estate.—*Re VAVASOUR* (1885), 29 Ch. D. 306; 53 L. T. 412, C. A.

*Annotation*:—*Reid. Re Gist*, [1904] 1 Ch. 398.

**Redemption of land tax.]**—See LAND TAX, Vol. XXX., p. 312, Nos. 125–127.

#### SECT. 4.—PARTNERSHIP.

##### SUB-SECT. 1.—EFFECT OF INSANITY.

See Lunacy Act, 1890 (c. 5), s. 119; Partnership Act, 1890 (c. 39), s. 35, & generally, PARTNERSHIP.

**1104. Not dissolution per se.]**—Lunacy does not dissolve the partnership, even as to the party incapacitated, much less as to the rest; & though in partnerships the parties rely upon the mutual skill & assistance of each other, yet that is to be understood subject to the common accidents of life, as lunacy is (LORD TALBOT, C.).—*WREXHAM v. HUDLESTON* (1734), 1 Swan. 514, n.; 36 E. R. 491, L. C.

*Annotations*:—*Expld.* *Pearce v. Chamberlain* (1750), 2 Ves. Sen. 33. *Consd.* *Sayer v. Bennet* (1784), 1 Cox, Eq. Cas. 107; *Milne v. Bartlet* (1839), 8 L. J. Ch. 254. *Expld.* *Anon.* (1856), 2 K. & J. 441. *Reid.* *Waters v. Taylor* (1813), 2 Ves. & B. 299.

**1105. —.]**—Dissolution of partnership on the lunacy of a partner, if to be obtained, only by decree; not by the act of the survivors; not determined where they had carried on the business with his capital. *Qu.*: how far the lunacy of a

partner is a ground of dissolution depending on the degree & probable duration of the disorder affecting the capacity to fulfil his contract.—*WATERS v. TAYLOR* (1813), 2 Ves. & B. 299; 35 E. R. 333, L. C. *Annotations*:—*Consd.* *Ogilvy v. Gregory*, *Gregory v. Ogilvy* (1856), 4 W. R. 221. *Reid.* *Jones v. Lloyd* (1874), L. R. 18 Eq. 265. *Mentd.* *Aspinall v. L. & N. W. Ry.* (1853), 11 Hare, 325; *Automatic Self Cleansing Filter Syndicate Co. v. Cuninghame*, [1906] 2 Ch. 34.

**1106. —.]**—(1) The lunacy of a partner is not *ipso facto* a dissolution of the partnership, but is a ground for the dissolution, if the other partner or partners come to the ct. for a decree of dissolution on the ground of such lunacy.

(2) One of two partners having continued the partnership business for some time after the lunacy of the other, & having then sold the business, the representative of the deceased lunatic partner was held to be entitled to his share of the partnership profits up to the period of sale.—*JONES v. NOY* (1833), 2 My. & K. 125; 3 L. J. Ch. 14; 39 E. R.

**1107. —.]**—*ANON.* (1856), No. 394, *ante*.

**1108. As ground for dissolution—Recovery of partner before hearing.]**—If a partner is so far disordered in his mind as to be incapable of conducting the business according to the terms of the articles of co-partnership a ct. of equity will dissolve the partnership.

I think I may say that if it were clearly established that B. had recovered his senses, & there were no probability of a relapse, it would be too much to dissolve the partnership, nor, if it were otherwise, could this ct. dissolve it with a retrospect to the time of the disorder commencing; for as his capital has been embarked during all that time, he must have the profits of it (*KENYON, M.R.*).—*SAYER v. BENNET* (1784), 1 Cox, Eq. Cas. 107; 29 E. R. 1084.

*Annotations*:—*Expld.* *Waters v. Taylor* (1813), 2 Ves. & B. 299. *Foll.* *Patey v. Patey* (1836), 5 L. J. Ch. 198; *Kirby v. Carr* (1838), 3 Y. & C. Ex. 184. *Consd.* *Ogilvy v. Gregory*, *Gregory v. Ogilvy* (1856), 4 W. R. 221.

**1109. —.]**—A. having been rendered incapable of performing his partnership duties, his partner filed a bill against him, for a dissolution. Afterwards & before the hearing, A.'s health improved:—*Held*: there was not sufficient ground for dissolving the partnership, & all proceedings were stayed, with liberty to apply.—*WHITWELL v. ARTHUR* (1865), 35 Beav. 140; 55 E. R. 848.

**1110. — Business carried on with lunatic's capital.]**—*WATERS v. TAYLOR*, No. 1105, *ante*.

**1111. — Mere diminution of capacity insufficient.]**—Difficulty in holding a partner who ostensibly takes an active part in the conduct of the business free from responsibility on the ground of insanity, in respect of the acts of the firm. Confirmed & incurable insanity is a ground for dissolving a partnership, but a mere diminution of capacity in attending to it is insufficient for that purpose.—*SADLER v. LEE* (1843), 6 Beav. 324; 12 L. J. Ch. 407; 7 Jur. 476; 49 E. R. 850.

*Annotations*:—*Mentd.* *Blair v. Bromley* (1847), 2 Ph. 354; *Davenport v. Stafford*, *Frisby v. Stafford*, *Charlesworth v. Manners* (1851), 14 Beav. 319; *Bishop v. Jersey* (1854), 2 Drew. 143; *St. Aubyn v. Smart* (1867), L. R. 5 Eq. 183; *Moore v. Knight*, [1891] 1 Ch. 547.

**1112. — Incapacity to conduct business—Mere temporary incapacity insufficient.]**—*PEARCE v. CHAMBERLAIN* (1750), 2 Ves. Sen. 33; 28 E. R. 23.

*Annotation*:—*Reid.* *Anon.* (1856), 2 K. & J. 441.

**1113. —.]**—*WATERS v. TAYLOR*, No. 1105, *ante*.

#### PART X. SECT. 4, SUB-SECT. 1.

**1104 i. Not dissolution per se.]**—Lunacy of a partner does not *ipso*

*facto* dissolve the partnership.—*JAGAT CHANDRA BHATTACHARJEE v. GUNNY HAJEE AHMED* (1925), I. L. R. 53 Calc.

214.—IND.

*o. As ground for dissolution—When dissolution takes effect—Remu-*

—]—Decree made for the dissolution of a partnership in consequence of the lunacy of one of the partners.

It must be understood that it is not every temporary illness or incapacity that should warrant an application for a dissolution of a partnership. Where, however, . . . the evidence shows a reasonable ground for supposing a recovery to be hopeless, or at least very improbable, during the remainder of the time for which the partnership contract is to endure, I think the application for a dissolution very proper (LORD TRURO, C.).—*Re COLES, LEAF v. COLES* (1851), 1 De G. M. & G. 171; 42 E. R. 517, L. C.; *subsequent proceedings* (1852), 1 De G. M. & G. 417, L. C.

1115. ——— Right to share of profits.]—*SAYER v. BENNET*, No. 1108, *ante*.

1116. ——— Nature of evidence required.]—This ct. will entertain a bill for the dissolution of a partnership on the ground of the insanity of one of the partners; but as such a bill proceeds on the principle that the insane partner is incapable of receiving notice of dissolution, strict evidence of insanity, & not merely evidence of incapability, will be required.—*KIRBY v. CARR* (1838), 3 Y. & C. Ex. 184; 2 Jur. 741; 160 E. R. 666; *sub nom. KIRBY v. COX*, 8 L. J. Ex. Eq. 31.

Annotation:—*Consd. Anon.* (1856), 2 K. & J. 441.

1117. ——— Confirmed & incurable insanity.]—*SADLER v. LEE*, No. 1111, *ante*.

1118. ———]—*Re COLES, LEAF v. COLES*, No. 1114, *ante*.

1119. ———]—(1) A person who has become permanently insane, but has not been so found by inquisition, may maintain a suit by his next friend for the protection of property in which he is interested as partner. (2) The jurisdiction of the Ct. of Ch. with respect to suits instituted by persons of unsound mind, not so found by inquisition, by next friends, considered.

(3) Permanent lunacy of a partner is a ground of dissolution at the instance of the lunatic as well as of the other partner. (4) A bill was filed by a next friend on behalf of a person of unsound mind not so found by inquisition, against the partner in business of pltf. alleging that pltf. had for some time past been suffering from softening of the brain, & was of unsound mind, & that it would be for his benefit that the partnership should be dissolved; & praying that the partnership might be dissolved & accounts taken, & the share of pltf. in the assets secured for his benefit, & for a receiver:—*Held*: the suit could be maintained. (5) *Qu.*: whether a decree for final dissolution can be made in such a suit without the appointment of a committee in lunacy. (6) The arts. of partnership between pltf. & deft. provided that either partner should be at liberty to determine the partnership at the end of the first seven years of the term, on giving previous notice to the other partner of his intention to do so. Pltf. having become insane, deft. served on him notice of his intention to determine the partnership at the end of the first seven years of the term:—*Held*: the notice could not be withdrawn without the consent of pltf.—*JONES v. LLOYD* (1874), L. R. 18 Eq. 265; 43 L. J. Ch. 826; 30 L. T. 487; 22 W. R. 785.

Annotations:—*As to* (1) *Consd. Porter v. Porter* (1888), 37 Ch. D. 420. *Refd.* *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666. *As to* (2) *Consd. Wilder v. Pigott* (1882), 22 Ch. D. 263. *Refd.* *Didisheim v. London & Westminster Bank* [1900] 2 Ch. 15. *As to* (4) *Refd. Porter v. Porter* (1888), 37 Ch. D. 420.

neration of sane partner till dissolution.]—*GREGORY v. WELCH* (1872), 3 V. R. (Eq.) 6.—*AUS.*

p. Application for dissolution—

plication on behalf of lunatic partner.]—The ct. has not jurisdiction under Lunacy Statute, No. 309, s. 164, to dissolve a partnership upon an applica-

1120. ——— Insanity existing when relief sought.]—*ANON.* (1856), No. 394, *ante*.

1121. ——— Possibility of recovery.]—In an action for dissolution of partnership against a lunatic not so found, the ct. refused to decree an immediate dissolution, the evidence showing that there was a possibility of deft.'s ultimate recovery, but directed the cause to stand over till after the Long Vacation, in order that a better conclusion might then be arrived at.—*J. v. S.*—(No. 1) (1894), 70 L. T. 757; *subsequent proceedings, sub nom. J. v. S.*, [1894] 3 Ch. 72.

1122. ——— Effect of allowing partnership to continue—Right to share of profits.]—*JONES v. NOY*, No. 1106, *ante*.

1123. ——— Commissioner's finding of lunacy—Reference to Master.]—During a partnership for twenty-one years, one of the parties became & was found a lunatic. On a bill by the other partner to dissolve the partnership on account of the lunacy, to which the committee was made a party, & admitted the lunacy, a reference was made to the master, as to the competency of the partner to conduct the business according to the arts.—*PATEY v. PATEY* (1836), 5 L. J. Ch. 198.

1124. ———]—Upon the lunacy of one member of a partnership firm being found by commission, the ct. will decree a dissolution as against him, & an account, with a reference to the master as to the lunacy.—*MILNE v. BARTLET* (1839), 8 L. J. Ch. 254; 3 Jur. 358.

1125. ——— Court will not compel continuance with lunatic or committee.]—*ROWLANDS v. EVANS, WILLIAMS v. ROWLANDS*, No. 1143, *post*.

1126. Partner taking active part—Responsibility for acts of firm.]—*SADLER v. LEE*, No. 1111, *ante*.

1127. Execution by sheriff—Purchase by other partner at undervalue—Sale set aside.]—During the temporary unsoundness of mind of pltf., who was a partner with deft., the sheriff levied execution against his "chattel interest" in the partnership upon three judgments which had been obtained against him. At a sale by auction by the sheriff, deft. himself bought the interest for a sum very much below its actual value, & an assignment of the interest was executed by the sheriff to deft. The purchase-money was paid to the sheriff by a cheque drawn by deft. on the partnership banking account, & the amount was debited to pltf. in the partnership books. Pltf. on recovering his health brought an action to set aside the sale on the ground of undervalue & undue advantage, for a declaration that the partnership was still subsisting, for a dissolution, & for the usual accounts:—*Held*: (1) the purchase was void & must be set aside; (2) under the circumstances of the present case there was no dissolution of the partnership by the seizure & sale.—*HELMORE v. SMITH* (1) (1887), 35 Ch. D. 436; 56 L. T. 535; 36 W. R. 3, C. A.

Dissolution of partnership.]—*HELMORE v. SMITH* (1), No. 1127, *ante*.

#### SUB-SECT. 2.—NOTICE OF DISSOLUTION.

1129. Notice in accordance with articles—Effectual though partner receiving insane.]—By arts. of partnership between A. & B. the partnership was to be dissolved on either party giving the other six months' notice. A. gave the required notice:—

tion on behalf of a lunatic partner, but only upon the application of the other partners.—*Re ANDERSON* (1878), 4 V. L. R. (Eq.) 103.—*AUS.*



**Sect. 4.—Partnership: Sub-sects. 2, 3, 4, 5, 6, 7, 8 & 9. Sect. 5: Sub-sect. 1, A.]**

**Held:** it was effectual notwithstanding B. was insane when it was given.—**ROBERTSON v. LOCKIE** (1846), 15 Sim. 285; 15 L. J. Ch. 379; 10 Jur. 533; 60 E. R. 627.

**Annotation:**—**Apld.** *Mellersh v. Keen* (1859), 27 Beav. 236.

**1130.** ———.]—When parties enter into a partnership at will, notice to one by the others that they wish to dissolve the partnership must be considered as an overture for an effectual dissolution. For this purpose, a notice to a person of unsound mind, not found a lunatic by inquisition, held good, & dissolution decreed from the date of the notice.—**MELLERSH v. KEEN** (1859), 27 Beav. 236; 7 W. R. 629; 54 E. R. 92.

**Annotation:**—**Folld.** *Jones v. Lloyd* (1874), L. R. 18 Eq. 265.

**1131.** ——— **Cannot be withdrawn without consent.]**—**JONES v. LLOYD**, No. 1119, *ante*.

#### SUB-SECT. 3.—DATE OF DISSOLUTION.

**1132. Date when decree made.]**—**JONES v. NOY**, No. 1106, *ante*.

**1133.** ———.]—Where the ct. decrees the dissolution of a partnership in consequence of the lunacy of one of the partners, the dissolution will take place from the date of the decree.—**BESCH v. FROLICH** (1842), 1 Ph. 172; 12 L. J. Ch. 118; 7 Jur. 73; 41 E. R. 597, L. C.

**Annotations:**—**Apld.** *Lyon v. Tweddell* (1881), 17 Ch. D. 529. **Consd.** *Helmere v. Smith* (1) (1887), 35 Ch. D. 436.

**Refd.** *Robertson v. Lockie* (1846), 15 Sim. 285; *Jones v. Welch* (1855), 1 Jur. N. S. 994.

**1134.** ———.]—Decree for a dissolution of partnership, on the ground of insanity, as from the date of the decree.—**SANDER v. SANDER** (1845), 2 Coll. 276; 63 E. R. 733.

**1135. From date of notice.]**—**MELLERSH v. KEEN**, No. 1130, *ante*.

#### SUB-SECT. 4.—EVIDENCE OF INSANITY.

**1136. Suit for dissolution—Strict proof of insanity required—Not merely incapacity.]**—**KIRBY v. CARR**, No. 1116, *ante*.

#### SUB-SECT. 5.—INTERIM INJUNCTION TO RESTRAIN PARTNER.

Injunction generally, *see* INJUNCTION, Vol. XXVIII., pp. 361 *et seq.*

**1137. What are sufficient grounds—Previous insanity—Recovery at time of motion.]**—**ANON.** (1856), No. 394, *ante*.

**1138.** ——— **Injury to partnership business—Pending suit for dissolution.]**—Where an action is pending for the dissolution of a partnership on the ground that deft. partner is of unsound mind, the ct. will grant an injunction to restrain deft. from interfering in the conduct of the partnership affairs so as to injure the business & assets of the firm.—**J. v. S.**, [1894] 3 Ch. 72; 63 L. J. Ch. 615; 70 L. T. 758; 42 W. R. 617; 10 T. L. R. 507; 38 Sol. Jo. 531; 8 R. 436.

#### SUB-SECT. 6.—DISSOLUTION INDUCED BY FRAUD.

**1139. Disadvantageous terms to lunatic—Inquiry as to mental condition.]**—**FISHER v. MELLES** (1870), 43 L. J. Ch. 827, n.; 22 W. R. 786, n.

**Annotation:**—**Mentd.** *Jones v. Lloyd* (1874), 43 L. J. Ch.

#### SUB-SECT. 7.—PAYMENT OUT OF FUNDS IN COURT.

**1140. Complete recovery of lunatic partner.]**—

In a case where the dissolution of a partnership had been decreed in consequence of the lunacy of one of the partners, & large sums had been paid into ct. to the separate account of the lunatic in respect of his share of the capital & profits of the business, the Lord Chancellor, on being subsequently satisfied of the complete recovery of the lunatic, ordered the fund to be paid out to him.—**Re COLES, LEAF v. COLES** (1852), 1 De G. M. & G. 417; 19 L. T. O. S. 356; 42 E. R. 613, L. C.

#### SUB-SECT. 8.—EXERCISE OF OPTIONS IN ARTICLES.

**1141. Option of pre-emption—Notice to exercise—Subsequent lunacy of partner receiving notice.]**—

**ROWLANDS v. EVANS, WILLIAMS v. ROWLANDS**, No. 1143, *post*.

**1142.** ——— **Given on behalf of insane partner.]**—Arts. of partnership provided that on the death of either partner, the survivor should have the option of purchasing deceased partner's share, upon giving notice in writing of his intention so to do within three months from the death, & that in ascertaining the value of deceased partner's share after such notice, nothing should be allowed for the goodwill of the business. The surviving partner was of unsound mind, but notice of his intention to purchase was given on his behalf by his solr. within three months from the death. An order was subsequently made under the Lunacy Act authorising a notice being given on his behalf & a second notice was given accordingly, but after the three months had expired:—**Held:** as the option to purchase had not been exercised within the time limited there was no contract which could be confirmed by the second notice & consequently, the committee of the surviving partner was not entitled to the benefit of the provision in the arts.—**DIBBINS v. DIBBINS**, [1896] 2 Ch. 348; 65 L. J. Ch. 724; 75 L. T. 137; 44 W. R. 595; 40 Sol. Jo. 599.

**Annotation:**—**Mentd.** *Reynolds v. Atherton* (1921), 125 L. T. 690.

#### SUB-SECT. 9.—POSITION OF COMMITTEE.

**1143. Partners not compelled to carry on partnership with committee.]**—(1) The ct. will not compel a person to carry on a partnership with the committees of a lunatic, or to have the share of a lunatic partner ascertained by an inquiry what a stranger would give for it.

(2) Three persons mutually agreed to carry on & work together certain mineral property; the deed of partnership providing that each party should be at liberty to sell his share after giving notice to the others, who were to have a right of pre-emption. One of the partners became a lunatic, & committees of his estate were appointed. On a bill filed by pltf., who had purchased the shares of the other two partners, against the committees of the lunatic, praying a dissolution of the partnership & the usual accounts:—**Held:** the partnership must be dissolved, & the property offered for sale as a going concern by some person to be appointed other than the parties.

(3) Notice to the lunatic partner before his lunacy of the intention of another partner to sell his share:—**Held:** to bind the committees afterwards appointed, & they had no right of pre-emption under the deed.—**ROWLANDS v. EVANS**

**WILLIAMS v. ROWLANDS** (1861), 30 Beav. 302 ; 31 L. J. Ch. 265 ; 5 L. T. 658 ; 8 Jur. N. S. 88 ; 10 W. R. 186 ; 54 E. R. 905.

*Annotation* :—*As to* (2) **Reid. Pawsey v. Armstrong** (1881), 50 L. J. Ch. 683.

**1144. Notice of intention to sell given to partner—Subsequent lunacy of partner—Notice binding on committee.]—ROWLANDS v. EVANS, WILLIAMS v. ROWLANDS**, No. 1143, *ante*.

## SECT. 5.—POWERS EXERCISABLE WITH LEAVE OF JUDGE.

### SUB-SECT. 1.—SALE.

#### *In General.*

*See Lunacy Acts*, 1890 (c. 5), s. 120 (a) ; 1908 (c. 47), s. 1 ; *Law of Property Act*, 1925 (c. 20), s. 22 ; *Settled Land Act*, 1925 (c. 18), s. 28.

**1145. What property will be directed to be sold—Property bequeathed—By lunatic when of sound mind.]—Re JONES, Ex p. HAYCOCK**, No. 993, *ante*.

**1146. — Shares—Precarious property.]—Re MITCHELL** (1844), 3 L. T. O. S. 69, L. C.

**1147. — Stock—Fluctuating property—Confirmation of report in favour of sale.]—Re TINNEY** (1844), 3 L. T. O. S. 177, L. C.

**1148. — Land subject to charge—Petition for sale—Whether lunatic a party.]—A person of unsound mind, not found lunatic by inquisition, was entitled to a charge of £200 *per annum* upon property proposed to be dealt with under 19 & 20 Vict. c. 120 :—*Held* : such person was not a necessary party to a petition under the Act, as the ct. would direct that what was done under the petition should be subject to that charge.—*Re TARBUTT'S ESTATE* (1863), 8 L. T. 603.**

**1149. — Land of married woman lunatic—Order binding beneficial interest.]—A freehold estate in fee simple was vested in a married woman of unsound mind, & in her husband in her right :—*Held* : (1) 16 & 17 Vict. c. 70, ss. 2, 116, & 25 & 26 Vict. c. 86, s. 13, did not enable the Lord Chancellor to order the committee, or any person on behalf of the lunatic, to convey the legal estate vested in her ; (2) an order by the Lord Chancellor for the sale of the lunatic's estate bound the entire beneficial interest of the married woman.—*Re STABLES* (1864), 4 De G. J. & Sm. 257 ; 3 New Rep. 620 ; 33 L. J. Ch. 422 ; 10 L. T. 1 ; 10 Jur. N. S. 245 ; 12 W. R. 513 ; 46 E. R. 917, L. C.**

**1150. — Property owned by others in common with lunatic.]—Re ADAMS**, No. 827, *ante*.

**1151. — Land of lunatic tenant in tail—Order of Court of Chancery—Necessity for permission of Court of Lunacy.]—The committee of a lunatic must obtain the permission of the Ct. of Lunacy before he consents to an application to the Ct. of Ch. under 19 & 20 Vict. c. 120.—*Re WOODCOCK'S TRUSTS* (1868), 3 Ch. App. 229 ; 16 W. R. 469, 532, L. JJ.**

**1152. — Real estate below £500 in value.]—(1) The Ct. of Ch. will not entertain a suit by his next friend of a person of unsound mind, not so found by inquisition, for the sale of his real estate.**

**(2) Where the value of such real estate does not exceed the sum of £500, & the person of unsound**

mind has no other property, the Lords Justices will make an order for its sale under 16 & 17 Vict. c. 70, s. 120, & will order the proceeds of sale to be paid to the next friend, on his undertaking to maintain the person of unsound mind.—**HALF-HIDE v. ROBINSON** (1874), 9 Ch. App. 373 ; 43 L. J. Ch. 398 ; 30 L. T. 216 ; 22 W. R. 448, L. JJ.

*Annotations* :—*As to* (1) **N.F. Watt v. Leach** (1878), 26 W. R. 475. **Distd. Porter v. Porter** (1888), 37 Ch. D. 420. **Reid. Howell v. Lewis** (1891), 40 W. R. 88.

**1153. — Undivided share—To owner of other shares.]—The ct. will give leave to the committee of a lunatic tenant in tail to take proceedings under the Settled Land Act, 1882 (c. 38), for the sale of the lunatic's undivided shares to the owner of the other shares.—*Re GAITSKELL* (1889), 40 Ch. D. 416 ; 58 L. J. Ch. 262, L. JJ.**

**1154. — Land of lunatic tenant for life—Notice to trustees of settlement—Necessity for.]—The committee of a lunatic tenant for life cannot give a valid notice under Settled Land Act, 1882 (c. 38), s. 45, unless he has previously obtained authority from the Ct. of Lunacy to do so.—*Re RAY'S SETTLED ESTATES* (1884), 25 Ch. D. 464 ; 53 L. J. Ch. 205 ; 50 L. T. 80 ; 32 W. R. 458.**

**1155. — Who may sell.]—Where a person has been appointed to exercise the powers of a committee of the estate of a tenant for life of settled estate, who is lawfully detained as a lunatic, the ct. has no power to authorise him to exercise on behalf of the lunatic the power of sale vested in the latter by Settled Land Act, 1882 (c. 38). To enable this to be done it is necessary that the lunatic should be so found by inquisition.—*Re BAGGS*, [1894] 2 Ch. 416, n. ; 63 L. J. Ch. 612 ; 71 L. T. 138 ; 38 Sol. Jo. 127, L. JJ.**

*Annotations* :—**Distd. Re X.**, [1894] 2 Ch. 415 ; *Re Salt*, [1896] 1 Ch. 117. **Appld. Re S. S. B.**, [1906] 1 Ch. 712. **Folld. Re De Moleyns' & Harris's Contract**, [1908] 1 Ch. 110. **Reid. Re A.**, [1904] 2 Ch. 328.

**1156. — Lunacy Act, 1890 (c. 5), s. 116, does not empower the Judge in Lunacy to authorise the quasi-committee appointed under that sect., with regard to the estate of a person of unsound mind not so found by inquisition to exercise, on behalf of that person, in respect of land of which he is only tenant for life, the power of sale given by s. 7 of the Lands Clauses Consolidation Act, 1845 (c. 18), s. 7.—*Re S. S. B.*, [1906] 1 Ch. 712 ; 75 L. J. Ch. 522 ; 94 L. T. 599 ; 54 W. R. 429 ; 22 T. L. R. 461, L. JJ.**

*See, now, Lunacy Act*, 1908 (c. 47), s. 1.

**1157. Consideration—Mortgage—As to part of purchase-money—Purchase by committees.]—*Re BRANKS* (1844), 3 L. T. O. S. 177, L. C.**

**1158. — Perpetual rentcharge.]—Under Lunacy Act, 1890 (c. 5), ss. 117, 120, the ct. has power to sanction the sale of a lunatic's estate in consideration of a perpetual rentcharge, & will exercise such power if satisfied that sale will be for the benefit of the lunatic.—*Re WARE*, [1892] 1 Ch. 344 ; 61 L. J. Ch. 279 ; 66 L. T. 389 ; 8 T. L. R. 136, L. JJ.**

*Annotation* :—**Reid. Scarborough Corpn. v. Cooper**, [1910] 1 Ch. 68.

**1159. — Shares in a company.]—*Re A. B.*, [1899] W. N. 233, L. JJ.**

**1160. For what purposes sale will be directed—Payment of debts.]—There is no power to order**

### PART X. SECT. 5, SUB-SECT. 1.—A.

**q. What property will be directed to be sold—Land of lunatic held as tenant in tail or tenant in common.]—*Re D.*, [1917] 1 L. R. 344.—**IR.****

**r. For what purposes sale will be J.—VOL. XXXIII.**

*directed—Discretion of court.]—The ct. will exercise a wide discretion as to the disposition of a lunatic's estate ; & when it appears to be necessary, will order its sale & disposition, & authorise the committee to collect rents, etc.—*

*Re KEENAN* (1869), 2 Ch. Ch. 492.—**CAN.**

**t. Lunatic resident in England—Order for sale—Approval of English court.]—*Re ANNAND* (1888), 14 V. L. R. 1009.—**AUS.****



*Sect. 5.—Powers exercisable with leave of judge: Sub-sect. 1, A. & B.; sub-sects. 2 & 3, A. & B.]*

the sale of a lunatic's estate, except for the purpose of paying debts (LORD LYNDHURST, C.).—*Re LEE* (1845), 5 L. T. O. S. 142, L. C.

**1161. — Redemption of land tax.]**—Notwithstanding the provisions contained in the Land Tax Redemption Act, 1802 (c. 116), it is the duty of the committee of a lunatic to obtain the sanction of the Lord Chancellor before proceeding to a sale of any part of the lunatic's estate, for the purpose of raising moneys wherewith to redeem the land tax.—*Re WADE* (1849), 1 H. & Tw. 202; 47 E. R. 1384, L. C.

**1162. Sale in lieu of partition—Lunatic tenant in tail in possession—Parts only of lands sold—Mode of conveyance.]**—*Re BOLTON*, [1888] W. N. 243, L. JJ.

**1163. Sale of leaseholds—Vesting order.]**—M., by writing, agreed to sell his leasehold premises & his business to T. & G. for a sum of which £2,535 was to be paid at once, the residue, £3,050, at the end of five years. Possession was given, & the £2,535 duly paid. After this, M., who resided abroad, was found lunatic abroad, & a curator was appointed, with authority to receive the £3,050. T. & G., & the curator, petitioned that on payment of the £3,050 & interest to the curator the leasehold premises might be ordered to vest in T. & G.:—*Held*: under Lunacy Act, 1890 (c. 5), s. 135, an order could be made vesting the leasehold in T. & G., such order to be dated & drawn up after payment of the £3,050 to the curator.—*Re PAGANI, Re PAGANI'S TRUST*, [1892] 1 Ch. 236; 66 L. T. 244; 36 Sol. Jo. 152, L. JJ.

#### *B. Sale of Land Purchased under Compulsory Powers.*

See Lunacy Acts, 1890 (c. 5), s. 120 (a); 1908 (c. 47), s. 1; Law of Property Act, 1925 (c. 20), s. 22.

**1164. Necessity for sanction of court.]**—The sanction of the Lord Chancellor ought to be obtained in all cases, by the committees of a lunatic, to a contract for sale of any portion of a lunatic's land to a railway co.—*Re TAYLOR* (1849), 1 H. & Tw. 432; 47 E. R. 1480, L. C.; *subsequent proceedings*, 6 Ry. & Can. Cas. 741, L. C.

**1165. Land subject to rentcharge—Authorisation of release of rentcharge—Purchase of government annuity for lunatic by purchasers of land.]**—Lands

acting under Land Clauses Consolidation Act, 1845 (c. 18). The ct. authorised the committee of the lunatic to release the lands from the rentcharge upon the corp'n. purchasing in the name of the lunatic a government annuity of the same yearly amount for his life.—*Re BREWER* (1875), 1 Ch. D. 409; 34 L. T. 466; 24 W. R. 465, L. JJ.

**1166. Application of purchase-money — How ordered.]**—(1) Land belonging to a lunatic having been purchased by a railway co. under the powers of its Act, an order was made for payment of the purchase-money to the credit of the lunacy, & for its investment to the joint account of the lunatic & the co. without its being first paid into ct. under Land Clauses Consolidation Act, 1845 (c. 18), s. 69.

(2) The application for such an order must not

be made in the Lunacy only, but also in the Ch. Div.—*Re MILNES* (1875), 1 Ch. D. 28; 34 L. T. 46; 24 W. R. 98, L. JJ.

**1167. — Order for—To what court application made.]**—*Re MILNES*, No. 1166, *ante*.

**1168. — By whom application made—Joinder of next of kin.]**—Where land belonging to a lunatic is taken under Land Clauses Consolidation Act, 1845 (c. 18), the next of kin of the lunatic have a right to attend the sale, & will have their costs of appearing upon a petition for investment of the purchase-money.—*Re BRISCOE* (1864), 2 De G. J. & Sm. 249; 4 New Rep. 311; 10 Jur. N. S. 859; 46 E. R. 371, L. JJ.

**1169. — Order for investment in guaranteed railway stock—Omission of name of purchaser from title of account.]**—The purchase-money of a lunatic's land taken by a public body under Land Clauses Consolidation Act, 1845 (c. 18), was, under the circumstances, ordered to be invested in guaranteed railway stock; but the name of the public body was directed to be omitted from the title of the account, an investment of this nature being treated as equivalent to a reinvestment in land.—*Re BUCKINGHAM* (1876), 2 Ch. D. 690, L. JJ.

**1170. Payment of income arising from purchase—To committees.]**—At the time of the death of one of the two joint committees of a lunatic, under an order made in 1885 in the matter of this lunacy & in the matter of the Land Clauses Consolidation Act, 1845 (c. 18), the dividends on a sum of consols to the credit of those two matters, representing purchase-moneys of lands belonging to the lunatic & taken by the Metropolitan Board of Works, were payable to the two joint committees. The joint grant being vacated by the death, the survivor of the joint committees applied to be appointed sole committee, & asked that the order of 1885 might be varied & the dividends be ordered to be paid to him alone. The Master appointed him sole committee, but declined to make any order as to the dividends. The sole committee then presented a petition entitled in the matter of the lunacy & also in the matter of Land Clauses Consolidation Act, 1845 (c. 18), & Board of Works, praying that the dividends both past & future might be paid to him, & served the Board of Works. At the hearing the Board contended that they were not liable for the cost of successive orders for the payment of dividends unless there had been a change in the beneficial interest. The ct. ordered the past & future dividends to be carried to the credit of the matter paid

petitioner, intimated that any future order appointing a new committee might direct payment to him of the dividends, & that as such dividends would be standing to the credit of the lunacy, the Board need not be served on the application, & ordered the Board to pay the costs of the present petition.—*Re RYDER* (1887), 37 Ch. D. 595; 57 L. J. Ch. 459; 58 L. T. 783, L. JJ.

#### SUB-SECT. 2.—PURCHASE OF LAND.

**1171. Contract by lunatic subsequently so found—Purchase being for benefit of lunatic's estate—Power of committee to complete—Form of conveyance.]**—*Re WALKER* (1845), 5 L. T. O. S. 141, L. C.

#### PART X. SECT. 5, SUB-SECT. 1.—B.

a. *Application of purchase-money—As real or personal estate.]*—*Re X.* (1919), 53 I. L. T. 53.—IR.

## SUB-SECT. 3.—LEASING.

## A. Grants of Leases.

See Lunacy Acts, 1890 (c. 5), s. 124; 1908 (c. 47), s. 1.

1172. Necessity for leave of court.]—*FOSTER v. MARCHANT*, No. 871, *ante*.

1173. — General order giving power to execute deeds—Whether separate consent for each lease necessary.]—(1) A private Act, passed for managing the partnership business of a lunatic, authorised the Lord Chancellor “from time to time” to make orders with respect to the business, & (*inter alia*) with respect to the disposal of any real or personal estate belonging to the business. An order was made empowering the committees, with the approbation of the Master, to execute all such deeds as should be required for the management of the business:—*Held*: it was not necessary that a separate order should be made for each deed, & a lease executed under the general order was valid.

(2) A deed to which a lunatic is expressed to be a party by his committees is sufficiently executed by the committees affixing seals & signing their own names.

By a deed expressed to be made between B., a lunatic, so found by inquisition, by D. & F., the committees of his estate, & X. & Z., the said B., X., & Z. carrying on business in co-partnership & thereafter called the lessors, of the one part, & H. of the other part, the lessors, the said B. acting by the said D. & F. as such committees, demised to H. certain premises. The deed concluded, “In witness whereof the parties to these presents have hereunto set their hands & seals,” etc. D. signed his name opposite one seal & F. opposite another, & the attestation clause was “Signed, sealed, & delivered by the within-named D. & F. in the presence of,” etc.:—*Held*: the deed was well executed on behalf of B.—*LAWRIE v. LEES* (1881), 7 App. Cas. 19; 51 L. J. Ch. 209; 46 L. T. 210; 30 W. R. 185, H. L.

*Annotations*:—*Mentd. Re Swire, Mellor v. Swire* (1885), 53 L. T. 205; *Re Highett and Bird's Contract*, [1902] 2 Ch. 214; *Re Gist* (1904), 90 L. T. 35.

1174. What leases may be granted—Mineral leases.]—Agreement by the committee of a lunatic, that coal under the lunatic's estate should be worked by the owner of the adjoining land, established under the circumstances.—*Ex p. TABBERT* (1801), 6 Ves. 428; 31 E. R. 1127, L. C. See, further, MINES.

1175. Jurisdiction of court to authorise—Lunatic tenant in tail in possession—Twenty-one years—Binding remaindermen.]—The ct. has no jurisdiction under Infants Property Act, 1830 (c. 65), & Fines & Recoveries Act, 1833 (c. 74), to authorise the committee of the estate of a lunatic tenant in tail in possession to grant leases of the lunatic's estate for a term of twenty-one years, so as to bind the remaindermen.—*Re STARKIE, Ex p. CLAYTON* (1834), 3 My. & K. 247; 40 E. R. 94.

*Annotation*:—*Reid. Re Gaskell & Walters' Contract*, [1906] 1 Ch. 440.

1176. Term for which lease may be granted—Twenty-one years—Determinable on lunatic's death.]—An application was made under Infants Property Act, 1830 (c. 65), s. 23, for a lease of property belonging to a lunatic for life, with

remainder to an infant, at rack rent, for a term of twenty-one years. The ct. refused to make such order, but directed a lease to be granted for twenty-one years, determinable on the lunatic's death, & without a covenant for quiet enjoyment.—*Re WHITE* (1853), 21 L. T. O. S. 82; 1 W. R. 294, L. JJ.

1177. Arrangement for lease—Without sanction of court—Adoption of arrangement by court.]—A gentleman entered into an arrangement by letter with the land agent who acted for the committee of a lunatic's estate, to take a lease of part of the estate for a term of three years. No formal agreement was entered into, nor was the sanction of the Master in Lunacy applied for, but the tenant was let into possession, & expended a considerable sum in repairs & improvements. After he had been nearly eighteen months in possession, the committee gave him six months' notice to quit, upon which he applied by petition to have the terms of his arrangement with the agent carried into effect:—*Held*: the ct. had jurisdiction to make an order giving effect to that arrangement.—*Re WYNNE* (1872), 7 Ch. App. 229; 26 L. T. 406; 20 W. R. 348, L. JJ.

1178. Validity of lease—By committee—Agency apparent on face of deed.]—*LAWRIE v. LEES*, No. 1173, *ante*.

1179. Lease under power—Tenant for life lunatic—Settled Land Act, 1882 (c. 18)—Appointment of new trustees.]—Where a tenant for life is a lunatic, & his committee desires to exercise the powers of leasing given by Settled Land Act, 1882 (c. 18), & no trustees of the settlement are in existence, new trustees must be appointed for the purposes of the Act.—*Re TAYLOR* (1883), 52 L. J. Ch. 728; 49 L. T. 420; 31 W. R. 596, L. JJ.

1180. — — — Who may exercise power.]—The person appointed to act, under Lunacy Act, 1890 (c. 5), s. 116, as committee of the estate of a person lawfully detained as a lunatic though not so found by inquisition may by leave of a judge exercise the power of leasing vested in the lunatic as tenant for life under Settled Land Act, 1882 (c. 18).—*Re SALT*, [1896] 1 Ch. 117; 65 L. J. Ch. 152; 73 L. T. 598; 44 W. R. 146; 40 Sol. Jo. 113, L. JJ.

*Annotations*:—*Consd. Re A.*, [1904] 2 Ch. 328; *Re S. S. B.*, [1906] 1 Ch. 712.

1181. Lease of glebe lands—Consent of patron—Patron a lunatic.]—An Act of Parliament having authorised the vicar of C. to grant leases of the glebe lands, with the consent of the patron in writing, the patron being lunatic, a petition by the committees of his person & estate, for a reference to the Master to inquire whether it would be fit that they, on his behalf, should consent to a lease, was refused.—*Re SMYTH, Ex p. SMYTH* (1818), 2 Swan. 393; 36 E. R. 666, L. C.

## B. Taking of Leases.

1182. Renewal of lease—For benefit of lunatic's estate—Who may take renewal.]—A lease renewed for the benefit of the lunatic's estate ought to be taken in the name of the lunatic if it were so at the time of the lunacy, but if originally in trust for the lunatic, then to the committee.—*Ex p. JERMYN* (1788), 3 Swan. 132, n.; 36 E. R. 801, L. C.

## PART X. SECT. 5, SUB-SECT. 3.—A.

b. Principle on which lease granted.]—The ct. possesses the discretion of a landlord in the management of the real estate of lunatics & infants, & should exercise it in making lettings, to give a preference to the old tenant.

It ought not to be governed solely by the highest bidding.—*Re BALL* (1828), 1 Mol. 141.—IR.

## PART X. SECT. 5, SUB-SECT. 3.—B.

c. Renewal of lease—Petition to grant by receiver—Necessity of concur-

rence of committee.]—A petition to grant a renewal to a tenant under a lease, with covenant of a renewal, presented by the receiver in a lunacy matter without the concurrence of the committee of the estate, will be dismissed with costs.—*Re KILKENNY (EARL)* (1845), 7 I. Eq. R. 594.—IR.



*Sect. 5.—Powers exercisable with leave of judge: Sub-sect. 3, C.; sub-sects. 4, 5, 6 & 7.]*

*C. Incidents in Leases.*

**1183. Breach of covenant to repair—By tenant of lunatic's estate—Relief against forfeiture.]—**Tenant of a lunatic's estate relieved against an ejectment founded on a forfeiture by breach of covenant to repair.—*Re EDRIDGE, Ex p. VAUGHAN* (1823), Turn. & R. 434; 37 E. R. 1168, L. C.

**1184. Abatement of rent—Application of committee—Direction without a reference.]—**An abatement in the rent paid by the tenant of a lunatic's estate directed without a reference, under the circumstances, on the application of the committee.—*Re FITCH* (1830), 1 Russ. & M. 354; 39 E. R. 137, L. C.

**SUB-SECT. 4.—EXCHANGE OR PARTITION.**

*See Lunacy Act, 1890 (c. 5), ss. 120 (b), 121; 1908 (c. 47), s. 1.*

**1185. Exchange of land—Retention of minerals under land.]—**The ct. has power under 16 & 17 Vict., c. 70, s. 124, to make an exchange of the land of the lunatic without the minerals under it.—*Re DICCONSON* (1880), 15 Ch. D. 316; 29 W. R. L. JJ.

*As to partition.]—See PARTITION.*

**SUB-SECT. 5.—CARRYING ON LUNATIC'S BUSINESS.**

*See Lunacy Acts, 1890 (c. 5), s. 120 (c); 1908 (c. 47), s. 1.*

**1186. Jurisdiction of court to authorise—For benefit of lunatic's estate—Limited period.]—***Re BLOOR* (1845), 6 L. T. O. S. 82, L. C.

**1187. Effect of authorisation—Liability of person authorised for trade contracts.]—**A committee appointed by the ct. to carry on the business of a lunatic cannot be made personally liable on contracts entered into in the course of trading, unless it can be shown that the goods were supplied on his credit. He is therefore in a different position as regards personal liability to that of a manager & receiver appointed by the ct., being in fact merely a bailiff or trustee of the business. In the event of the assets of the business not being for a time available to pay the creditors the committee cannot be compelled to pay them out of his own pocket repaying himself at a later time from the funds of the business when the assets come to hand.—*ISAACS v. CHINERY* (1896), 74 L. T. 320; 12 T. L. R. 302, N. P.

**1188. ——— Agency.]—**By an order made by a Master in Lunacy under Lunacy Act, 1890 (c. 5), ss. 116, 120, deft. was authorised to exercise the powers of a committee of the estate of a lunatic not so found by inquisition as in the case of a person of unsound mind so found by inquisition, & to carry on his business, which had been carried on by the lunatic in the name of a firm of which he was the sole partner. While carrying on the business under the order, deft. ordered goods in the name of the firm, & the goods were supplied by plts. for the purposes of the business. Plts. having sued deft. personally for the price of the goods supplied by them:—*Held*: the effect of the order made under Lunacy Act, 1890 (c. 5), was to make deft. the agent of the lunatic for the purpose of carrying on his business, & in the absence of evidence that deft. intended to pledge his

personal credit, the mere fact that he carried on the business under the order did not make him personally liable to plts. for the goods supplied by them.—*PLUMPTON v. BURKINSHAW*, [1908] 2 K. B. 572; 77 L. J. K. B. 961; 99 L. T. 415; *sub nom. PLIMPTON v. BURKINSHAW*, 24 T. L. R. 642; 52 Sol. Jo. 533, C. A.

*Annotations:—Refd. Whinney v. Moss S.S. Co.* (1910), 15 Com. Cas. 316; *Re E. G.*, [1914] 1 Ch. 927.

**SUB-SECT. 6.—PERFORMANCE OF CONTRACTS MADE BEFORE LUNACY.**

*See, now, Lunacy Act, 1890 (c. 5), s. 120 (i).*

**1189. Sale of reversion.]—**Specific performance of an agreement [for sale of a reversion] decreed against one who afterwards became a lunatic.

There is no imputation by any of defts. as to the value of the contract & the consideration, which is agreed to be reasonable & delivers the ct. from a great difficulty (*LORD HARDWICKE, C.*).—*OWEN v. DAVIES* (1748), 1 Ves. Sen. 82; 27 E. R. 905, L. C.

*Annotations:—Consd. Stanton v. Percival* (1855), 5 H. L. Cas. 257. *Refd. Hall v. Warren* (1804), 1 Ves. 605. *Mentd. Maddison v. Alderson* (1883), 8 App. Cas. 467.

**1190. Covenant to exercise power of jointuring.]—**A previous covenant by a person of sound mind must prevail against any subsequent mental incapacity.

Covenant by G., on his marriage that if he came into possession, he would exercise the power of jointuring, which, by the terms of the will, could only be exercised by a tenant for life in possession. G., before coming into possession, became of unsound mind:—*Held*: the covenant was a defective execution of the power, which this ct. would enforce against the remainderman.—*AFFLECK v. AFFLECK* (1857), 3 Sm. & G. 394; 26 L. J. Ch. 358; 29 L. T. O. S. 37; 3 Jur. N. S. 326; 5 W. R. 425; 65 E. R. 709.

*Annotations:—Apld. Johnson v. Touchet* (1867), 37 L. J. Ch. 25. *Distd. Re Anstis, Chetwynd v. Morgan, Morgan v. Chetwynd* (1886), 31 Ch. D. 596. *Consd. Charlton v. Charlton*, [1906] 2 Ch. 523.

**Lunacy of solicitor—Effect on articles of clerk.]—***See SOLICITORS.*

**SUB-SECT. 7.—CONSENT TO EXERCISE OF BENEFICIAL POWERS.**

*See Lunacy Acts, 1890 (c. 5), s. 120 (e); 1903 (c. 47), s. 1; Rules in Lunacy, 1892, r. 19.*

**1191. Extent of jurisdiction—Whether confined to cases enumerated in Lunacy Act, 1890 (c. 5), Part IV.]—***Re SEFTON (EARL)*, No. 1207, *post*.

**1192. Disposition under Fines & Recoveries Act, 1833 (c. 74)—Court protector of settlement—Principle guiding court.]—**Principles by which the Lord Chancellor, when protector of a settlement in the place of a lunatic, will be guided, in giving or withholding his consent to a deed of disposition under above Act.

As protector of the settlement, the only duty of the ct. is to see what, with reference to the interests of the family, it would be proper for the tenant for life to do; & the object must be rather to protect the objects of the settlement, than to give any benefit to one member of the family to the exclusion of the others (*LORD COTTENHAM, C.*).—*Re NEWMAN* (1837), 2 My. & Cr. 112; 40 E. R. 583.

*Annotation:—Refd. Re Graydon* (1850), 1 Mac. & G. 655.

**1193.** — — — — —.]—Under above Act the Lord Chancellor is not the protector of the settlement in the place of a lunatic, when the lunatic is tenant in tail in possession.

*Semble* : where a lunatic has a particular estate, in respect of which the Lord Chancellor is protector of the settlement, & has also the remainder or reversion in fee, subject only to an intervening estate tail, his Lordship will not concur in any deed for barring the estate tail.—*Re WOOD* (1838), 3 My. & Cr. 266 ; 7 L. J. Ch. 144 ; 2 Jur. 201 ; 40 E. R. 927, L. C.

*Annotation* :—*Refd. Re Blewitt* (1856), 6 De G. M. & G. 187.

**1194.** — — — — —.]—Under above Act, the Lord Chancellor of Great Britain has jurisdiction, as protector, to consent to the enlargement, by the tenant in tail, of a base fee in lands in England, the tenant for life being a lunatic, so found in Ireland, & resident there. The Lord Chancellor, however, refused his consent in the absence of the remainderman, & where the effect of such consent would have been to vest the estates in the husband of the tenant for life to the exclusion of her issue, & also of the brother of the lunatic, that brother being the remainderman.—*Re GRAYDON* (1850), 1 Mac. & G. 655 ; 2 H. & Tw. 182 ; 14 Jur. 157, 211 ; 41 E. R. 1419, L. C.

**1195.** Power to bar lunatics estate tail—Purposes for which exercise authorised.]—*Re YAW* (1844), 3 L. T. O. S. 353, L. C.

**1196.** — — — — —.]—*Re SPARROW*, No. 999, *ante*.

**1197.** — — — — —.]—*Re BERIDGE*, No. 1000, *ante*.

**1198.** — — — — —.]—By tenant in tail in remainder.]—Order made by the Lord Chancellor as protector under the Fines & Recoveries Act, 1833 (c. 74), to enable a quasi tenant in tail in remainder of a sum of stock, of which the tenant for life was a lunatic, to dispose of the fund.—*GRANT v. YEA* (1834), 3 My. & K. 245 ; 40 E. R. 93, L. C.

*Annotation* :—*Consd. Re Newman* (1837), 2 My. & Cr. 112.

**1199.** — — — — —.]—Fines & Recoveries Act, 1833 (c. 74), does not authorise the Lord Chancellor, when the tenant in tail in possession is in a state of hopeless lunacy, to consent to the first tenant in tail in remainder barring the subsequent limitations, even for the purpose of preventing the settled estate from going over to collateral relations.—*Re BLEWITT* (1834), 3 My. & K. 250 ; 40 E. R. 95.

*Annotations* :—*Consd. Re Newman* (1837), 2 My. & Cr. 112 ; *Re WOOD* (1838), 3 My. & Cr. 266 ; *Re Blewitt* (1856), 6 De G. M. & G. 187.

**1200.** — — — — —.]—Where the tenant in tail in possession is a lunatic, the Lord Chancellor has authority under Fines & Recoveries Act, 1833 (c. 74), to consent to the first tenant in tail in remainder barring the subsequent limitations on a proper case being made out for the exercise of that authority.—*Re BLEWITT* (1856), 6 De G. M. & G. 187 ; 25 L. J. Ch. 393 ; 26 L. T. O. S. 189 ; 2 Jur. N. S. 217 ; 4 W. R. 195 ; 43 E. R. 1203, L. C. & L. JJ.

*Annotation* :—*Refd. Re E. D. S.* (1914), 83 L. J. Ch. 505.

**1201.** — — — — —.]—No interference to benefit collateral.]—A lunatic was tenant for life of the advowson of a rectory & other real estate. Under the order of the ct. a lease of the property for ninety-nine years, if the lunatic should so long live, had been made to two persons at a large rent. This lease had become vested in the administrator of the survivor of the two lessees, the administrator being also the first tenant in tail in remainder expectant on the death of the lunatic without issue male. The lunatic was aged eighty-two, & had never had any issue. The administrator

wished to sell the next presentation to the rectory, & petitioned the ct., as protector of the settlement, to consent to the barring of the entail of the advowson so far as might be necessary for effecting the proposed sale :—*Held* : as the application was not for the benefit of the lunatic's estate, but only for the benefit of a collateral, the ct. ought not to interfere.—*Re THARP* (1876), 3 Ch. D. 59 ; *sub nom. Re THORP*, 35 L. T. 293, L. JJ.

**1202.** — — — — —.]—Preservation of rights of remaindermen.]—A lunatic was tenant in tail of an estate, subject to a charge for portions. In a suit in the Ct. of Ch. a decree had been made ordering the charge to be raised by a sale or mtge. of the estate. On a petition by the committee, asking that he might execute a disentailing deed on behalf of the lunatic for the purpose of raising the charge by a mtge. :—*Held* : the interest of the remainderman ought not to be barred further than was necessary, & the mtge. should be made for a term of years, & without a power of sale.—*Re PARES* (1876), 2 Ch. D. 61 ; 24 W. R. 619, L. JJ.

*Annotation* :—*Consd. Re E. D. S.*, [1914] 1 Ch. 618.

**1203.** — — — — —.]—The ct., under its Lunacy jurisdiction, has power to bar the estate tail of a lunatic tenant in tail ; but it is the duty of the ct. so to exercise it as not to affect the rights of the persons entitled in remainder to the estate.

Where a lunatic was tenant in tail of an undivided share of an estate, & an action was brought for the partition of the estate, the ct., under Partition Act, 1868 (c. 40), s. 6, authorised the committee of the lunatic to request a sale & to join in conveying the estate to the purchaser, but directed that the proceeds of the sale should be subject to the same uses as the lunatic's estate was subject to before the sale.—*Re PARES, LILLINGSTON v. PARES* (1879), 12 Ch. D. 333 ; 41 L. T. 574 ; 28 W. R. 193, L. JJ.

*Annotations* :—*Folld. Caswell v. Sheen* (1893), 69 L. T. 854. *Consd. Re E. D. S.*, [1914] 1 Ch. 618. *Refd. A.-G. v. Ailesbury* (1885), 14 Q. B. D. 895.

**1204.** — — — — —.]—The chief clerk's certificate made in a partition action found that a person of unsound mind not so found was entitled as tenant in tail to a share of land in England in respect of which an order for sale had been obtained. The lunatic was confined in an asylum in Virginia, U.S.A., under an order of the ct. of that State, & a committee of his property had been appointed by that ct., but the committee, who was resident in Virginia, declined to act in conveying the lunatic's property in this country, although he was willing to abide by any order of the English ct. The lunatic was one of defts. in the partition action by his guardian *ad litem*. Upon a summons taken out in the action by the guardian *ad litem* asking that the lunatic might be declared a trustee of his one-third share in the land within the meaning of the Trustee Acts, & that appct. might be appointed to convey the fee of the lunatic's share to a purchaser of the land :—*Held* : the lunatic might be declared a trustee of his share, & the chief clerk was appointed to convey the fee of the lunatic's share of the land to a purchaser, but the proceeds of the sale of the lunatic's share were ordered to be paid into ct. & remain subject to the same uses to which the lunatic's share was subject before the sale of the land.—*CASWELL v. SHEEN* (1893), 69 L. T. 854.

**1205.** — — — — —.]—The estate tail of a lunatic cannot be sold under Lunacy Act, 1890 (c. 5), s. 120 (a), but a lunatic's power to bar the entail is a power vested in him for his own benefit within Lunacy Act, 1890 (c. 5), s. 120 (1), & the judge, or the Master under Lunacy Act, 1891 (c. 65), s. 27,



**Sect. 6.—Conversion. Sects. 7 & 8: Sub-sect. B., C. & D.]**

transmissible under 16 & 17 Vict. c. 70, s. 135, upon his death intestate, in precisely the same manner as the descended moiety if the same had not been sold.—*Re MATSON, JAMES v. DICKINSON*, [1897] 2 Ch. 509; 66 L. J. Ch. 695; 77 L. T. 69.

**1230. ——— Sale of mortgagee under power of sale—Trust of surplus for mortgagee his heirs & assigns.]**—The trust of the surplus proceeds of sale provided that they should be paid to the mtgor., "his heirs or assigns." The mtged. property was sold in 1900 under the power of sale contained in the mtge., & there was a considerable surplus. The mtgor. became a lunatic after the mtge. but before the sale, & continued in that condition until his death intestate in 1906:—*Held*: the surplus proceeds of sale must be treated as personalty notwithstanding the language of the trust.—*Re GRANGE, CHADWICK v. GRANGE*, [1907] 2 Ch. 20; 76 L. J. Ch. 456; 96 L. T. 867, C. A.

*Annotation*:—*Reid. Burgess v. Booth*, [1908] 2 Ch. 648.

**1231. ——— Effect of second lunacy.]**—A sum of stock standing in ct. in lunacy to the credit of "*Re W. a person of unsound mind*" represented the proceeds of sale of realty which had been devised in fee to J. the elder brother of W. who was also of unsound mind. Both of the brothers were bachelors & died intestate. The land was sold in 1898 in the lunacy of J. under the provisions of Lunacy Act, 1890 (c. 5), & the purchase money was paid into ct. to the credit of "*Re J. a person of unsound mind*. Proceeds of real estate," & was invested. After the death of J. in 1904, leaving W. his heir-at-law, the fund was transferred to the credit of W. in his lunacy:—*Held*: but for the transfer of the fund to the credit of the second lunacy, the fund would have still retained the character of realty; the transfer did not alter this character; & on the death of W. the fund belonged to the heir-at-law, of J.—*Re ALSTON, SINCLAIR v. WILLES*, [1917] 2 Ch. 226; 86 L. J. Ch. 564; 117 L. T. 222; 33 T. L. R. 410; 61 Sol. Jo. 525.

—*See, further, EQUITY*, Vol. XX., pp. 355, 360–364, Nos. 937, 988, 989, 1004–1008, 1014.

**1232. Principles governing exercise of power—Paramount interest of lunatic.]**—*Ex p. GRIMSTONE*, No. 542, *ante*.

—*See EQUITY*, Vol. XX., p. 402, No. 1410; Lunacy Act, 1890 (c. 5), s. 116 (4).

**1233. Will prior to lunacy—Sale of property specifically bequeathed—How proceeds of sale will pass.]**—After testator, who was a shopkeeper, had made a will, bequeathing his leasehold house & shop & the stock-in-trade therein to his wife, subject to certain trusts, which failed, & giving his residuary estate in another manner, he became insane. No commission of lunacy was taken out, but his wife, not being disposed or competent to carry on the trade, joined with the persons whom he had named exors., & also with the residuary legatees, in an agreement for the sale of the leasehold premises & stock-in-trade therein for a gross sum, to be paid by instalments. After this agreement was made, & possession of the property delivered to the purchaser, testator died. The ct., in an administration suit, approved of the agreement as beneficial to the estate, & directed it to be carried into effect:—*Held*: notwithstanding the agreement for sale, & the transfer of the possession of the property specifically bequeathed, none of

the parties having any lawful authority to effect such a sale, both the leasehold estate & the stock-in-trade must be taken as unconverted at the death of testator, & passed to the specific legatee.—*TAYLOR v. TAYLOR* (1853), 10 Hare, 475; 1 W. R. 198; 68 E. R. 1014.

*Annotation*:—*Folld. Jenkins v. Jones* (1866), L. R. 2 Eq. 323.

**1234. ———.]**—Testator bequeathed farming stock which should be in his possession at his decease. He became of unsound mind, & so remained till his death; but two years before the latter event, the specific legatee, who was named as exor., with the concurrence of his mother, who was named as extrix., converted the stock into money, which they deposited in their own & a third person's names at a bank, where it remained till after testator's death:—*Held*: there had been no ademption, & the specific legatee was entitled.—*JENKINS v. JONES* (1866), L. R. 2 Eq. 323; *sub nom. Re JONES, JENKINS v. JONES*, 35 L. J. Ch. 520; 14 L. T. 540; 14 W. R. 665.

*Annotation*:—*Mentd. Re Slater, Slater v. Slater* (1907), 76 L. J. Ch. 472.

**1235. ———.]**—A testator, by will, bequeathed the income of certain shares specifically, & bequeathed the shares to his residuary legatee. After the date of the will, he was found a lunatic, & by an order in the lunacy, the shares were directed to be sold, & the proceeds were invested in consols:—*Held*: as the provisions of 16 & 17 Vict. c. 70, whereby the rights of owners of property sold by order of the Lord Chancellor in Lunacy, are preserved, extend only to land, the gift of income was adeemed by the sale, & the sum of consols fell into the residue.—*JONES v. GREEN* (1868), L. R. 5 Eq. 555; 37 L. J. Ch. 603; 16 W. R. 603.

*Annotations*:—*Reid. Re Freer, Freer v. Freer* (1882), 22 Ch. D. 622; *Re Slater, Slater v. Slater*, [1907] 1 Ch. 665.

**1236. — Bank balance of testator—Paid into court & invested in stock—Application of Lunacy Act, 1890 (c. 5), s. 123 (1).]**—Above sub-sect. does not apply to the case of a bank balance of a testator, which under an order in lunacy has been paid into ct. & invested in stock.—*Re WALKER, GOODWIN v. SCOTT*, [1921] 2 Ch. 63; 90 L. J. Ch. 433; 125 L. T. 764; 65 Sol. Jo. 534.

**1237. Redemption of land tax—Out of proceeds of sale of timber.]**—Land tax on a lunatic's estate redeemed by order out of the produce of decaying timber, ordered to be cut for payment of debts under the master's report, that it was for his benefit.—*Ex p. PHILLIPS* (1812), 19 Ves. 118; 34 E. R. 463, L. C.

*Annotation*:—*Reid. A.-G. v. Ailesbury* (1885), 16 Q. B. D. 408.

**1238. Payment off of mortgage—Out of personal property.]**—Where a charge on a lunatic's real estate is paid off out of her personal property by order of the ct., the securities are to be assigned, without prejudice to the conflicting claims of the real & personal representatives of the lunatic to the benefit of the payment.—*Re NORFOLK (DUCHESS DOWAGER), Ex p. DIGBY (EARL)* (1820), 1 Jac. & W. 640; 37 E. R. 512, L. C.

**1239. ——— Fund remains personalty.]**—*Ex p. HINDE* (1825), Amb. 706, n.; 27 E. R. 459, L. C.

**1240. ———.]**—Real estate, subject to a mtge., descended upon a lunatic. By an order made in the lunacy the mtge. was paid off out of the lunatic's personal estate, without prejudice to the question how it should ultimately be borne. The

**1238 i. Payment off of mortgage—Out of personal property.]**—*WELD v. TEW* (1828), Beat. 266; 2 Ir. L. Rec. 1st

ser. 206.—IR.

**i. Redemption of charge — Out of surplus rents.]**—*NEWCORBE v. NEW-*

*COMBE* (1841), 3 I. Eq. R. 414.—IR.

**i. ———.]**—*LEITRIM (LORD) v. ENERY* (1844), 6 I. Eq. R. 357.—IR.

lunatic afterwards died intestate:—*Held*: the amount ought to be raised out of the real estate & paid to the administratrix as personalty.—*Re LEEMING* (1861), 3 De G. F. & J. 43; 30 L. J. Ch. 263; 3 L. T. 686; 7 Jur. N. S. 115; 9 W. R. 403; 45 E. R. 794, L. JJ.

*Annotations*:—*Expld.* *Re Freer, Freer v. Freer* (1882), 22 Ch. D. 622. *Foll.* *Re Melly* (1883), 53 L. J. Ch. 248. *Refd.* *A.-G. v. Ailesbury* (1887), 12 App. Cas. 672.

**1241. ——— Uncertainty as to existence of will made prior to lunacy—Form of order.]—**Form of order when it is desired to pay off a mtge. on property of a lunatic, & it is not known whether he has or has not made a will prior to his lunacy.

Where part of a lunatic's estate was subject to a mtge. which it was desired to pay off, an order was made that the mtge. be paid off without prejudice to the question how the debt should ultimately be borne, & that the mtge. must be kept on foot by transferring it to the committee to be disposed of as the ct. might direct.—*Re MELLY* (1883), 53 L. J. Ch. 248; 49 L. T. 429; 31 W. R. 898, C. A.

**1242. Money expended on repairs—Extraordinary outlay.]—**The ordinary repairs upon a lunatic's real estate will be directed to be borne by the personal estate; but any extraordinary outlay of the personal estate on the land should retain its character of personalty.—*Re BADCOCK* (1839), 4 My. & Cr. 440; 8 L. J. Ch. 283; 3 Jur. 694; 41 E. R. 170, L. C.

*Annotations*:—*Refd.* *A.-G. v. Ailesbury* (1887), 12 App. Cas. 672; *Re Gist*, [1904] 1 Ch. 398.

**Reconversion—Property of lunatic converted by court.]—**See EQUITY, Vol. XX., p. 402, Nos. 1406–1410.

**Election to reconvert.]—**See EQUITY, Vol. XX., pp. 396, 397, Nos. 1350–1352.

#### SECT. 7.—COPYHOLDS.

See, now, Law of Property Act, 1922 (c. 16), ss. 128–144, 189, Schedules 12–14.

#### SECT. 8.—STOCK.

##### SUB-SECT. 1.—ORDER FOR TRANSFER.

###### A. Necessity for.

**1243. Lunatic resident abroad—Curator authorised by foreign court to receive—Whether sufficient—Costs.]—**PÉLÉGRIN v. COURTTS & Co., PÉLÉGRIN v. MESSEL (L.) & Co., No. 1651, post.

###### B. What Court has Jurisdiction.

**1244. County court.]—**A county ct. judge has no jurisdiction under Lunacy Act, 1890 (c. 5), s. 132, to make an order for the transfer of stock standing in the name of a lunatic.—*Re NOYCE*, [1892] 1 Q. B. 642; 61 L. J. Q. B. 628; 66 L. T. 331; 56 J. P. 564; 40 W. R. 371; 8 T. L. R. 431; 36 Sol. Jo. 345, C. A.

*Annotation*:—*Refd.* *Re Shortridge*, [1895] 1 Ch. 278.

**1245. Court in Lunacy.]—***Re BROWNE*, No. 1290, post.

###### C. Who may Apply.

**1246. Curator—Lunatic outside jurisdiction.]—**A lunatic resident abroad, was entitled to £600 consols, which, by reason of the dividends not having been received for thirteen years, had been transferred to the Commissioners for the Reduction of the National Debt. On the petition of the curator of the lunatic, the fund was ordered to be transferred into the name of the Accountant-General in trust, & the dividends paid to him.—

*Re SARGAZURIETA* (1853), 20 L. T. O. S. 299; 1 W. R. 171.

**1247. ——— Joinder of lunatic.]—**THIERY v. CHALMERS, GUTHRIE & Co., No. 1278, post.

###### D. In What Cases Jurisdiction Exercisable.

**1248. Stock in name of another—Lunatic entitled as administrator.]—**Construction of 36 Geo. 3, c. 90, s. 3, directing the transfer, in certain cases, of stock standing in the name of a lunatic or of his committee; not to extend to stock standing in the name of another, to which the lunatic is entitled as administrator.—*Exp. ADAMS* (1817), 2 Mer. 112; 35 E. R. 883, L. C.

**1249. Stock in name of lunatic trustee—On what evidence court will act.]—**Upon an application, under 11 Geo. 4 & 1 Will. 4, c. 60, for a transfer of stock standing in the name of a lunatic trustee, the Lord Chancellor will not adopt the facts as found in the proceedings in a suit in the Ct. of Exch., but will require them to be ascertained by the usual reference.—*Re PRIDEAUX* (1837), 2 My. & Cr. 640; 7 L. J. Ch. 82; 40 E. R. 784, L. C.

See, now, Lunacy Act, 1890 (c. 5).

**1250. ———.]—***Re CHORLEY* (1852), 19 L. T. O. S. 25; 16 Jur. 233, L. C.

**1251. Stock in name of deceased trustee—Declaration of trust by trustee.]—***Re JENNINGS* (1845), 4 L. T. O. S. 389, L. C.

**1252. Lunatic outside jurisdiction—Corpus.]—**Order made on the application of the curator of a lunatic resident in Holland for the transfer to him of the corpus of funds in England to which the lunatic was entitled.—*Re ELIAS* (1851), 3 Mac. & G. 234; 42 E. R. 251, L. C.

*Annotations*:—*Consd.* *Re Garnier* (1872), L. R. 13 Eq. 532.

*Refd.* *Re Brown*, [1895] 2 Ch. 666.

**1253. ——— Discretion of court.]—***Re GARNIER*, No. 1031, ante.

**1254. ——— Fund relative to real estate subject to laws of this country—Consols.]—**A fund of upwards of £13,000 consols, representing the proceeds of sale of real estate, the absolute property of a foreign lunatic, which had been sold by order of the ct. under the powers of Partition Act, 1868 (c. 40), was standing in ct. to the credit of the lunatic. The curator *ad bona* of the lunatic, duly appointed according to the law of the country in which the lunatic resided, & who according to that law had the fullest powers & control over the lunatic's real & personal estate, petitioned for the transfer of the fund to him:—*Held*: the fund, as representative of real estate sold under special legislation, was subject to the laws of this country relative to real estate, & must remain in ct. as a fund which might devolve upon the heir-at-law of the lunatic, & the curator *ad bona* was only entitled to receipt of the dividends.—*GRIMWOOD v. BARTELS* (1877), 46 L. J. Ch. 788; 25 W. R. 843.

**1255. ——— Discretion of court.]—***Re WHITE* (1898), 42 Sol. Jo. 198, L. JJ.

**1256. ———.]—***Re KNIGHT*, No. 1282, post.

**1257. ———.]—**NEW YORK SECURITY & TRUST Co. v. KEYSER, No. 1032, ante.

**1258. ———.]—**A lady, who was of unsound mind but not so found by inquisition, had been for some years in an asylum in Germany. Under the will of her father she was absolutely entitled to a trust fund. An originating summons was taken out in her name as pltf. by a next friend, the trustees being defts., asking for directions as to the maintenance of pltf. out of the income, & as to the application of the residue of the income & of so much, if any, of the capital as the ct. should think fit for the comfort & benefit of pltf. The fund was invested partly in India stock & partly on mtge.



Sect. 8.—Stock: Sub-sect. 1, D., E., F. & G.]

On the hearing of the summons the judge declined to give any directions as to the maintenance of pltf., being of opinion that, having regard to Lunacy Act, 1890 (c. 5), s. 116, that matter would be more properly dealt with in the Lunacy jurisdiction. Upon the undertaking of the trustees to transfer the stock into ct. & to deposit in ct. the mtge. deed & other deeds in their hands relating to the mtged. property, the Ct. of Appeal ordered that the interest on the stock & on the mtge. should, during pltf.'s life or until further order, be paid to pltf.'s sister, one of the trustees, she undertaking to apply the same for the maintenance, comfort, & benefit of pltf. General liberty to apply was reserved.—*Re CARR'S TRUSTS, CARR v. CARR*, [1904] 1 Ch. 792; 73 L. J. Ch. 459; 90 L. T. 592; 52 W. R. 595; 48 Sol. Jo. 395, C. A.

**1259. — Foreign judicial declaration of lunacy.]—***THIERY v. CHALMERS, GUTHRIE & Co.*, No. 1278, *post*.

**1260. Lunatic trustee of part of stock—Beneficially entitled to remainder—Order as to arrears of dividends.]—**A sum of stock was standing in the name of a person of unsound mind, part of such stock being his own beneficially & part of it being vested in him as trustee. The ct. had made an order appointing new trustees, & vested in them the right to call for a transfer of the trust stock & to receive the arrears of dividends. It was found that an order in this form could not be acted on as to the arrears of dividend, since the bank could not pay arrears on part of a sum. The ct. therefore varied the order so as to enable the new trustees to receive the past dividends on the whole sum of stock & to retain for the purposes of the trust that portion which had accrued due in respect of the trust stock.—*Re STEWART* (1860), 2 De G. F. & J. 1; 8 W. R. 425; 45 E. R. 521, L. JJ.

*Annotation:—Refd. Re Bignold's Settlement. Trusts* (1872), 26 L. T. 176.

**1261. Stock in name of joint trustees—Lunacy of one.]—***JEFFREYS v. DRYSDALE, Re DRYSDALE*, No. 1361, *post*.

**1262. — — — — —.]—**One of three trustees of a sum of stock had been found lunatic. The fund having become divisible, a petition intituled both in Lunacy & in Ch. was presented for the appointment of a new trustee & a vesting order:—*Held*: the appointment of a new trustee was unnecessary, & the petition ought to be intituled in Lunacy only. Order made vesting the right to call for a transfer of & to transfer the stock in the two trustees who were not under disability.—*Re WATSON* (1881), 19 Ch. D. 384; 45 L. T. 513; 30 W. R. 554, L. JJ.

**1263. Stock in name of testator—One of several executors lunatic.]—**Where one of three exors. of the surviving exor. of a testator was of unsound mind an order was made under Trustee Act, 1850 (c. 60), s. 5, giving the right to transfer a sum of stock belonging to the estate of the original testator, although the stock still remained standing in the name of the original testator.—*Re WACHER* (1882), 22 Ch. D. 535; 48 L. T. 552, L. JJ.

**1264. Lunatic donee of power of appointing new trustees of settlement.]—***Re SHORTRIDGE*, No. 1363, *post*.

*E. To Whom Transfer directed.*

**1265. Dividends on Bank of England stock—General practice — Payment into court.]—***Re BROWNE*, No. 1290, *post*.

**1295, *post*.**

*AUCHMUTY*, No.

**1267. — Past dividends—Receiver.]—**1 Will. 4, c. 65, does not render it imperative on the Lord Chancellor, on the application of a *curator bonis* of a lunatic appointed by the Court of Session in Scotland, to order a transfer of stock standing in the lunatic's name in the Bank of England, the property of the lunatic, into the curator's name.

The Lord Chancellor will order payment by the bank to the *curator bonis*, of the past dividends due on the stock, but not future dividends.—*Re MORGAN* (1849), 1 H. & Tw. 212; 47 E. R. 1389, L. C.

*Annotations:—Apld. Re Stark* (1850), 2 Mac. & G. 174. *Consd. Re Garnier* (1872), L. R. 13 Eq. 532. *Refd. Re Browne*, [1894] 3 Ch. 412; *Re Sanchez de Larragoiti* (1907), 96 L. T. 862.

**1268. — — — — —.]—***Re SARGAZURIETA*, No. 1246, *ante*.

**1269. — — — — —.]—**Where a curator of the property of a lunatic residing in Malta had been appointed by the ct. there, & such curator had authorised a person residing in England to receive dividends of shares in companies & of consols belonging to the lunatic, which had theretofore been received by an attorney appointed by the lunatic, the ct., no opposition being made by the cos. or the Bank of England, made an order that they should respectively be at liberty to pay the accrued & future dividends to the curator's attorney.—*Re BAYNES* (1880), 44 L. T. 322, L. J.

**1270. — — — — —.]—***Re SHEWELL* (1904), cited in [1909] 1 Ch. at p. 201; 78 L. J. Ch. at p. 199.

*Annotation:—Folld. Re Spurling*, [1909] 1 Ch. 199.

**1271. — — — — —.]—**Where an order is made by a Master in Lunacy under Lunacy Act, 1890 (c. 5), s. 116, appointing a receiver, on completing his security, to receive all dividends & arrears thereof to which a person suffering from "mental infirmity" is or may become entitled, "including dividends accrued & to accrue due before lodgment upon the funds to be lodged pursuant to the lodgment schedule," & directing the lodgment in ct. of certain Bank of England securities, the Bank must pay all arrears of dividends accrued before lodgment direct to the receiver & not into ct. The Bank may safely act upon an order in this form, & in so doing is clearly within the indemnity provided by Lunacy Act, 1890 (c. 5), ss. 146, 333.—*Re SPURLING*, [1909] 1 Ch. 199; 78 L. J. Ch. 198; 99 L. T. 898, L. JJ.

**1272. — Future dividends—Receiver.]—***Re MORGAN*, No. 1267, *ante*.

**1273. — — — — —.]—***Re BAYNES*, No. 1269, *ante*.

**1274. Transfer of stock—Stock in name of lunatic trustee.]—**Where stock is standing in the names of trustees, one of whom becomes a lunatic, & new trustees are appointed in his place, the ct. will not order a transfer of the stock to be made to the *cestui que trust*, but it must be transferred to the old & new trustees.—*Re SMITH* (1848), 17 L. J. Ch. 415; 11 L. T. O. S. 409, L. C.

**1275. — Lunatic outside jurisdiction of court—Discretion of court—Security.]—**Application by the *curator bonis* of a Scotch lunatic for the transfer of stock standing in the lunatic's name in the Bank of England refused; the Lord Chancellor not being satisfied that the security given by the curator in Scotland was sufficient, & holding that it was a matter of discretion to refuse or accede to the application.—*Re STARK* (1850), 2 Mac. & G. 174; 2 H. & Tw. 467; 42 E. R. 67, L. C.

*Annotations:—Consd. Re Garnier* (1872), L. R. 13 Eq. 532. *Refd. Re Browne*, [1894] 3 Ch. 412; *Re Brown*, [1895] 2 Ch. 666; *Re Knight*, [1898] 1 Ch. 257; *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15.



**1276. — Funds held by trustees—One trustee curator.]**—A bill was filed by an English lunatic resident in Scotland, & by his *curator bonis* duly appointed in Scotland, praying the transfer by one of two trustees into the name of the curator, who was the other trustee, of English government stock standing in the name of the curator & his co-trustee. The ct., upon motion that deft. might be at liberty to make a transfer, after requiring the bill to be amended, by making pltf. sue by his "curator & next friend," made an order, by consent, as upon a motion for a decree.—*HESSING v. SUTHERLAND* (1856), 25 L. J. Ch. 687; 27 L. T. O. S. 280; 4 W. R. 820, L. JJ.

*Annotations:—Distd. Re Garnier* (1872), L. R. 13 Eq. 532. *Consd. Didlsheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

**1277. — —.]—Re SARGAZURIETA**, No. 1246, *ante*.

**1278. — —.]—(1)** Where there has been a foreign judicial declaration of the status of lunacy of a lunatic resident & domiciled abroad, & the *tuteur* of the estate appointed in pursuance of that declaration is entitled under the foreign law to take possession thereof, & to give valid discharges for all moneys, stocks, funds, & securities forming part thereof, an application by the lunatic & the *tuteur* for the transfer or payment of the lunatic's English property to the *tuteur* may be & generally ought to be granted, & that whether the property is a trust fund under the control of the ct. or is merely a debt due to the estate.

(2) *Semble*: the *tuteur* may apply in his own name without joining the lunatic.—*THIERY v. CHALMERS, GUTHRIE & Co.*, [1900] 1 Ch. 80; 69 L. J. Ch. 122; 81 L. T. 511; 48 W. R. 148; 44 Sol. Jo. 59.

*Annotation:—Consd. Didlsheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

#### F. For what Purposes made.

**1279. Payment of debts of lunatic—Stock in joint names of lunatic & another.]**—Investment of stock by the father, since deceased, in the joint names of the lunatic & his sister, not within either of the recent statutes relating to lunatics' estates. Ct. declined to order a moiety of the stock to be transferred for payment of lunatics' debts, costs of commission, etc.—*Re LYNN* (1838), 2 Jur. 200.

**1280. Payment of costs—Of inquiry into mental condition.]**—An inquiry instituted on the petition of a husband as to the state of his wife's mind resulted in a finding that she was of sound mind & capable of managing herself & her affairs. The Lords Justices sitting as Judges in Lunacy made, on the application of petitioner, an order that two-thirds of his costs of the inquiry & also his costs of the application should be paid by the wife. Subsequently an order was made by a judge charging the costs on certain consols belonging to the wife & standing in her name, & directing the transfer by her of a sufficient amount to meet such costs; & as she neglected to make the transfer, a further order was made by the judge that the official solr. should execute the necessary transfer. On appeal against these orders:—*Held*: (1) an appeal would lie in such a case to the Ct. of Appeal, & no leave to appeal was necessary; (2) the Lords Justices had authority under Lunacy Act, 1890 (c. 5), s. 109, to direct that the costs should be paid out of the wife's estate, including those incurred after the finding that she was of sound mind; (3) the procedure under R. S. C., Ord. 46, r. 1, which deals with charging orders, was not applicable to such an order, & the subsequent orders to enforce the charge were proper to carry it into effect.

(4) An urgency order is what its very name indicates. The safeguards for personal freedom, which the Legislature had provided were obviously considered inappropriate to cases where instant intervention was required, either for the sake of the alleged lunatic, or for the sake of the public; & accordingly exceptional provisions were made for such a contingency (LORD HALSBURY).

(5) I cannot concur in considering the means of the respective parties as a topic that ought to enter into the question [of costs], though as to the latter part of the fifth head of the learned judges' analysis I entirely concur. It is quite true that either party may by his conduct render an inquiry much more expensive than it might otherwise have been, & undoubtedly had there in this case been a cross-appeal that consideration might have been a very serious one indeed (LORD HALSBURY).—*Re CATHCART*, [1893] 1 Ch. 466, C. A.

**1281. Maintenance of lunatic—Lunatic resident outside jurisdiction.]—Re BROWN**, No. 1288, *post*.

**1282. — —.]**—The foreign curator of the property & person of a lunatic resident out of the jurisdiction is not entitled as of right to an order under Lunacy Act, 1890 (c. 5), s. 134, for the transfer to him of English stocks or shares standing in the name of the lunatic, although "vested" in the curator under that sect. The ct. has, under that sect. & its general jurisdiction in Lunacy over the personal property of a lunatic, a discretion as to making or refusing the order, & therefore, as a condition for obtaining the order, the curator must first satisfy the ct. by evidence that the property is required for the maintenance or other purposes of the lunatic.—*Re KNIGHT*, [1898] 1 Ch. 257; 67 L. J. Ch. 136; 77 L. T. 773; 46 W. R. 289, C. A.

*Annotations:—Refd. Didlsheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *Re De Larragoiti*, [1907] 2 Ch. 14.

**1283. — —.]—Re WHITE** (1898), 42 Sol. Jo. 198, L. JJ.

**1284. — —.]—Re CARR'S TRUSTS, CARR v. CARR**, No. 1258, *ante*.

**1285. — — Special circumstances.]**—Order made under Lunacy Act, 1890 (c. 5), s. 134, upon the application of the curator of a lunatic resident in France, & under the special circumstances of the case, for the transfer of stocks & shares in England to which the lunatic was entitled, although the same were not required for his maintenance.—*Re DE LARRAGOITI*, [1907] 2 Ch. 14; 76 L. J. Ch. 483; *sub nom. Re SANCHEZ DE LARRAGOITI*, 96 L. T. 862, L. JJ.

#### G. Conditions Precedent to Order.

**1286. Declaration of lunacy—Lunacy Regulation Act, 1853 (c. 70), s. 141.]**—On an application by the curator of T., a person resident in Scotland, for the transfer of stock standing in his name to the curator, it appeared that the petition on which the Scottish ct. had appointed the curator stated that T. had been for several years of unsound mind, & was at that time incapable of managing his affairs. The only ground for the petition stated in the affidavits annexed was that T. was of unsound mind. By a memorandum indorsed on the petition the Scottish ct. appointed the curator, but the order contained no express declaration that T. was of unsound mind. It was shown that curators were appointed in Scotland, not only in cases of unsoundness of mind, but also when persons were by illness or absence abroad, incapable of managing their affairs:—*Held*: the memorandum indorsed on the petition amounted to a declaration, within above sect. that T. was of



*Sect. 8.—Stock: Sub-sect. 1, G. & H.; sub-sects. 2 & 3. Sect. 9: Sub-sects. 1 & 2.]*

unsound mind.—*Re TARRATT* (1884), 51 L. T. 310; 32 W. R. 909, C. A.

*Annotation:—Refd. Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

*See, now*, Lunacy Act, 1890 (c. 5), s. 342.

**1287. — Foreign judicial declaration—Lunatic resident abroad.]—***DIDISHEIM v. LONDON & WESTMINSTER BANK*, No. 1066, *ante*.

**1288. Vesting of personal estate in person appointed to manage—Lunacy Act, 1890 (c. 5), s. 134—Meaning of vesting.]—**Under above sect. the Ct. in Lunacy has jurisdiction to order funds in this country standing in the name of a person resident abroad, & found lunatic by a foreign or colonial ct., to be transferred to the committee, curator or other person duly appointed by that ct. to manage the lunatic's personal estate, although such personal estate is not actually "vested" in such committee, curator or other person according to the law of this country. "Vested" in above sect. includes the right to obtain & deal with, without being actual owner of, the lunatic's personal estate.

A lady residing in the colony of Victoria, was declared lunatic by the Supreme Ct. of the colony sitting in Lunacy, & the Master in Lunacy in the colony was appointed to manage her property which consisted of English stocks standing in her name:—*Held*: under above sect. the ct. in Lunacy in this country had jurisdiction to order a transfer of the stocks to the Master in Lunacy in Victoria, & the ct. being satisfied that all the stocks were required for the maintenance & support of the lunatic, made the order accordingly, prefaced with a statement that the personal estate of the lunatic was "vested" in the Master within that sect.—*Re BROWN*, [1895] 2 Ch. 666; 64 L. J. Ch. 808; 73 L. T. 375; 44 W. R. 17; 12 R. 587, C. A.

*Annotations:—Consd. Re Knight*, [1898] 1 Ch. 257; *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *Thiery v. Chalmers, Guthrie*, [1900] 1 Ch. 80. *Expld. Re De Larragoiti*, [1907] 2 Ch. 14. *Refd. Re White* (No. 2) (1898), 42 Sol. Jo. 198. *Mentd. Re De Linden, Re Spurrier's Settlement, De Hayn v. Garland*, [1897] 1 Ch. 453.

**1289. Proof that capital required for maintenance Lunatic resident abroad.]—***Re BROWN*, No. 1288, *ante*.

#### *H. Form of Order.*

**1290. How order entitled.]—**The judge or Master in Lunacy has jurisdiction to make an order appointing a receiver of dividends on stock standing in the Bank of England in the name of a person incapable "through mental infirmity arising from disease or age," & the Bank may safely act on such an order; but as it is unusual to appoint a receiver of dividends on bank stock, the better course is to bring the stock into ct. Such an order should not be entitled "in Lunacy."—*Re BROWNE*, [1894] 3 Ch. 412; 63 L. J. Ch. 729; 71 L. T. 365; 43 W. R. 175; 10 T. L. R. 656; 38 Sol. Jo. 679; 7 R. 580, C. A.

*Annotations:—Consd. Re Langdale*, [1901] 1 Ch. 3; *Re Anshutz* (1902), 66 L. T. 402. *Agm. Re Spurrin* Ch. 199. *Refd. Re Belton* (1913), 108 L. T. 344

**1291. —.]—**An order in lunacy directing a transfer of stock under Lunacy Act, 1890 (c. 5), s. 133, should be entitled in the matter of the Lunacy Acts, 1890 & 1891, as well as in the matter of the particular lunacy; but this is not to apply to a case under Lunacy Act, 1890 (c. 5), s. 116 (1) (d), of a person who through mental infirmity arising from disease or age is incapable of managing his affairs, where the title contains a

reference to the statutes "53 Vict. c. 5, & 54 & 55 Vict. c. 65."—*Re PURVIS*, [1904] 1 Ch. 373; 73 L. J. Ch. 281; 90 L. T. 394, L. J.

**1292. Houses & stock—Producing sum greater than sum allowed for maintenance.]—***Re JACKSON* (1844), 3 L. T. O. S. 373.

**1293. Government stock—Or stock with no liability for calls—To be held by trustees.]—**Where the stock or shares with reference to which a vesting order is being made under Lunacy Act, 1890 (c. 5), s. 136, are Government or stock or shares upon which there is no liability for calls, & which are to be held by trustees, the order should as a rule go on to direct the persons in whom the right to transfer, or call for a transfer & to receive the dividends or income, is vested, to transfer the stock or shares into their own names. Where shares have a liability for calls, directions should be omitted.—*Re GREGSON*, [1893] 3 Ch. 233; 62 L. J. Ch. 764; 69 L. T. 73; 41 W. R. 641; 37 Sol. Jo. 542; 2 R. 513, L. JJ.

*Annotation:—Consd. Re C. M. G.*, [1898] 2 Ch. 324.

**1294. Consols—Necessity for appointment of officer of Bank of England to make transfer.]—**A person of unsound mind not so found being sole trustee of a sum of consols, the Judge in Lunacy, upon the application of B., made an order under the Acts of 1890 & 1891, that the right to call for a transfer of, & to transfer into his own name the consols standing in the name of the lunatic, & to receive the dividends thereon, should vest in B., & that he should transfer the consols into his own name to be held by him upon the trusts applicable thereto. The Bank of England refused to act upon an order in this form upon the ground that under Lunacy Act, 1890 (c. 5), s. 137, some proper officer of the Bank should have been appointed to make the transfer:—*Held*: the order made by the Judge in Lunacy was right, & the Bank must act upon it, & must allow the consols to be transferred accordingly.—*Re C. M. G.*, [1898] 2 Ch. 324; 67 L. J. Ch. 468; 78 L. T. 669, C. A.

**1295. Stock in books of Bank of England—Necessity for schedule—Detailing stocks to be dealt with.]—**By an order made under Lunacy Act, 1890 (c. 5), s. 116, by the Master in Lunacy, a receiver was authorised, in the name & on behalf of a lady who had been found through mental infirmity to be incapable of managing her affairs, "to receive & give a discharge for all dividends, interest, & income & all arrears thereof respectively to which she is or may become entitled"; & it was ordered that the securities & bonds belonging to her then deposited with her bankers were not to be dealt with until further order. Among the securities belonging to the lady were certain stocks registered in her name in the books of the Bank of England; but the officials of the Bank declined to act upon the order until it had been amended by the insertion in the body thereof of particulars of the stocks in the bank books which were sought to be dealt with thereby:—*Held*: (1) although there was jurisdiction to do so, the practice was not to appoint a receiver of the dividends only of stocks standing in the books of the Bank of England, but to order the stocks to be transferred into ct. in the name of the Paymaster-General, & then to let the receiver obtain the dividends from him: (2) the officials of the Bank of England were perfectly justified in declining to act upon so vague & general a direction as was contained in the order; & the practice had always been to have a schedule to an order of this nature detailing the stocks which were sought to

be dealt with thereby.—*Re AUCHMUTY* (1908), 99 L. T. 462, C. A.

*Annotations*:—*As to* (1) *Expld. Re Spurling*, [1909] 1 Ch. 199. *As to* (2) *Distd. Re Spurling*, [1909] 1 Ch. 199.

**1296. — Permissive order—Whether Bank may safely act.]—***Re SPURLING*, No. 1271, *ante*.

#### SUB-SECT. 2.—FORM AND MODE OF TRANSFER.

**1297. Railway stock—Requiring deed for transfer.]—**The stock of a railway co. is within 16 & 17 Vict. c. 70, s. 142, notwithstanding Companies Clauses Consolidation Act, 1845 (c. 16), s. 14, requiring a deed of transfer.—*Re IVES* (1863), 3 De G. J. & Sm. 453; 2 New Rep. 2; 32 L. J. Ch. 673; 8 L. T. 266; 9 Jur. N. S. 611; 11 W. R. 578; 46 E. R. 710, L. JJ.

**1298. Debenture of registered limited company—Transferable by deed.]—**A debenture bond of a limited co. according to the constitution of which debentures were transferred by deed, & the deeds of transfer upon presentation to the co. were registered in the co.'s book of mtges., order to be transferred under 16 & 17 Vict. c. 70, s. 141.—*Re MITCHELL* (1881), 17 Ch. D. 515; 45 L. T. 60, C. A.

*Annotation*:—*Reid. Re Brown*, [1895] 2 Ch. 666.

*See, now*, Lunacy Act, 1890 (c. 5), s. 341.

**1299. "To the account" of Paymaster-General—On behalf of Court of Chancery.]—**The proper form of transfer of railway stock ordered to be transferred into ct. since the passing of Court of Chancery Funds Act, 1872 (c. 44), is "to the account" of the Paymaster-General for the time being, on behalf of the Ct. of Ch.—*Re STEPHENS* (1873), 8 Ch. App. 465; 29 L. T. 7; 21 W. R. 494, L. C. & L. J.

#### SUB-SECT. 3.—EFFECT OF TRANSFER.

**1300. Transfer to Accountant-General—Reduction into possession of lunatic.]—**A married woman, who was the committee of the estate & person of her lunatic husband, was entitled to stock, which was standing in the name of a trustee for her; this stock was, under an order made in the lunacy, transferred into the name of the Accountant-General, in the matter of the lunacy, & part of it was afterwards sold out & applied in payment of costs; the lunatic died, leaving his wife him surviving:—*Held*: the stock had been reduced into the possession of the lunatic, & the wife was not entitled to it by right of survivorship.—*Re JENKINS* (1828), 5 Russ. 183; 38 E. R. 996, L. C.

**1301. Sale of stock—Proceeds of sale invested in consols—Ademption.]—**A testator made a specific bequest of stock in the G. railway co. After the date of his will he was found a lunatic. Under an order in the lunacy, the stock was sold & the proceeds were invested in a sum of consols, which was carried to the credit of the lunatic to an account entitled "Proceeds of the sale of stock in the G. railway co." In an action for the administration of testator's estate:—*Held*: the

specific legacy was adeemed by the sale in the lunacy, & the consols therefore fell into the residue.—*Re FREER, FREER v. FREER* (1882), 22 Ch. D. 622; 52 L. J. Ch. 301; 31 W. R. 426.

*Annotations*:—*Consd. Re Walker, Goodwin v. Scott*, [1921] 2 Ch. 63. *Reid. A.-G. v. Ailesbury* (1885), 14 Q. B. D. 895; *Re Alston, Sinclair v. Willes*, [1917] 2 Ch. 226. *Mentd. Re Slater, Slater v. Slater*, [1907] 1 Ch. 665.

**1302. Transfer of stock into court—Standing in name of lunatic testator—Ademption.]—**The transfer under an Order in Lunacy of stock into the name of the Paymaster-General out of the name of a testatrix who had become of unsound mind:—*Held*: not to adeem a bequest of all stock "standing in my name & belonging to me at the time of my decease."—*Re WOOD, ANDERSON v. LONDON CITY MISSION*, [1894] 2 Ch. 577; 63 L. J. Ch. 772; 8 R. 817.

*As to ademption generally, see EQUITY*, Vol. XX., pp. 449 *et seq.*

### SECT. 9.—MORTGAGES.

#### SUB-SECT. 1.—IN GENERAL.

*See, generally*, MORTGAGE.

**1303. Power of court—To invest property of lunatics on mortgage.]—***Ex p. CATHORPE* (1785), 1 Cox, Eq. Cas. 182; 29 E. R. 1119.

**1304. — — —.]—**In general the ct. will not lay out the money of infants & lunatics upon mtge.—*Re FUST* (1817), 1 Coop. temp. Cott. 160, n.; 47 E. R. 794.

**1305. — — —.]—***Ex p. ELLICE* (1821), Jac. 234, 37 E. R. 838.

**1306. — To authorise receiver to raise sum—Out of lunatic's estate—To defray commission on transfer of mortgage.]—**R. S. C., Ord. 50, r. 3 is not confined to administration, but extends to every case in which the ct. sees that as between the parties there is something which ought to be done for the security of the property in question. Under this order the ct. authorised the receiver of the estate of a lunatic to raise by a charge on the estate a sum of money to pay a commission to an insurance co. for taking over a transfer of a mtge. on the property, the principal sum under which being due & payment being pressed for by the mtgee.—*CHAPLIN v. BARNETT* (1912), 28 T. L. R. 256, C. A.

**Payment off of mortgage—Whether debt ultimately borne by realty or personalty.]—***See Sect. 6*,

#### SUB-SECT. 2.—LUNACY OF MORTGAGOR.

*See, generally*, Trustee Act, 1925 (c. 19), ss. 52–55.

**1307. Foreclosure suit—Order appointing person to convey for mortgagor.]—**In a suit by an equitable mtgee. against the mtgor., who, subsequently to the mtge., had become of unsound mind, the estate was sold under the direction of the ct., & all proper parties were ordered to join in conveying it:—*Held*: the mtgor. was a trustee within 11 Geo. 4 & 1 Will. 4, c. 60, & an order, appointing

#### PART X. SECT. 9, SUB-SECT. 1.

**1303.1. Power of court—To invest property of lunatics on mortgage.]—***Re RIDGWAYS* (1825), 1 Hog. 309.—*IR*.

**g. — To mortgage land of lunatic not so found.]—***Re M'MULLEN* (1878), 4 V. L. R. (Eq.) 198.—*AUS*.

**h. Mortgage to raise funds to increase estate to facilitate sale.]—***Re MADDEN* (1902), 2 S. R. N. S. W. (Eq.)

17; 19 N. S. W. W. N. 7.—*AUS*.

**k. Fraudulent transfer by committee—Title of innocent transferee.]—**The transfer of a mtge. by the committee of a lunatic's estate was held to be, though a fraudulent abuse of, yet within, his powers under the order appointing him, so as to give a good title to the transferee who took the transfer innocently as security for an advance made by him to the com-

mittee personally.—*NORTHERN TRUST Co. v. LYNDE* (Man.), [1923] 3 W. W. R. 1397; [1924] 1 D. L. R. 95.—*CAN*.

#### PART X. SECT. 9, SUB-SECT. 2.

**1. Foreclosure suit—Order for sale without deposit.]—**A lunatic mtgor. in an action for foreclosure is entitled to have a sale without the usual deposit.—*WOODRY v. WOODRY*, 7 C. L. T. Occ. N. 267.—*CAN*.



*Sect. 9.—Mortgages: Sub-sects. 2 & 3, A. & B.; sub-sect. 4. Sect. 10: Sub-sect. 1, A. & B. (a), (b) i. & ii., & (c).]*

some one to convey in his stead, should be made without a reference.—*BARFIELD v. ROGERS, Re ROGERS* (1844), 13 L. J. Ch. 262; 2 L. T. O. S. 417; 8 Jur. 229, L. C.

**1308. — Value of property below mortgage debt—Immediate order—On payment of costs.]—**On a claim for foreclosure against a mtgor. who was of unsound mind, but not found so by inquisition, it appearing that the value of the property was much below the amount of the mtge. debt & interest, the ct., upon pltf.'s undertaking to pay deft.'s guardian, his costs, declared that it was for the benefit of deft. that an absolute decree of foreclosure should be made immediately.—*BACKHURST v. KING* (1851), 17 L. T. O. S. 175.

**1309. — Order for sale by consent—Property vested in trustee for purchasers—Without petition under Trustee Act, 1850 (c. 60).]**—This was a foreclosure suit against a mtgor. of unsound mind, not so found by inquisition. A decree for a sale having been taken by consent, the ct. saw no objection to making an order vesting the property in pltf. as trustee for the purchasers, without requiring a petition to be presented under above Act.—*HARRISON v. SMITH* (1869), 17 W. R. 646.

**1310. Application to stay distribution of estate—Neglect of mortgagee to assert claim earlier.]—**(1) A mtgee. of the life interest of a person afterwards found lunatic from a period several years antecedent to the date of his mtge., having allowed many years to pass without asserting his claim as mtgee. with effect:—*Held*: not entitled to stay the distribution of the lunatic's estate after his death.

(2) A receiver had been appointed of the lunatic's estate, but that would not have prevented the mtgee. from asserting his legal right, if any, on a proper application made to the ct. for that purpose.—*Re FRANKS* (1851), 16 L. T. O. S. 529, L. C.

#### SUB-SECT. 3.—LUNACY OF MORTGAGEE.

##### A. Appointment of Person to Reconvey or Transfer.

*See, now, Lunacy Act, 1890 (c. 5), s. 135 (4).*

**1311. To reconvey—Interim committee.]—**An *ad interim* committee will not be ordered to execute a reconveyance of an estate vested in the lunatic as mtgee.—*Re POULTON* (1849), 1 Mac. & G. 100; 1 H. & Tw. 476; 47 E. R. 1498, L. C.

**1312. — Committee.]—**Where committees of a lunatic mtgee. called in the mtge. money, & presented a petition praying that they might reconvey the property instead of the lunatic, the costs of the mtgor. on that petition were ordered to be paid out of the lunatic's estate.—*Re ROWLEY* (1863), 1 De G. J. & Sm. 417; 1 New Rep. 251; 32 L. J. Ch. 158; 7 L. T. 702; 11 W. R. 297; 46 E. R. 166, L. JJ.

*Annotation:—Refd. Re Phillips* (1869), 4 Ch. App. 629.

**1313. — Jurisdiction of master in lunacy.]***Re CARNABY GRAY* (1900), July 26th, Registrars' Library, Lunacy Office; cited in Halsbury's Laws of England, Vol. XIX., p. 454, n., L. J.

**1314. To transfer.]—**The Lords Justices sitting in Lunacy have power to order a transfer to be executed of a mtge. vested in a mtgee. who has been found a lunatic.—*Re PEEL* (1886), 55 L. T. 554; 35 W. R. 81, C. A.

**1315. —.]—**Where a person of unsound mind is possessed of an estate by way of mtge., the ct. can, under above sect., appoint a person to convey the estate for the purpose of effectuating a transfer of the mtge.—*Re NICHOLSON* (1887), 34 Ch. D. 663; 56 L. J. Ch. 1036; 56 L. T. 770 35 W. R. 569, C. A.

**Costs of reconveyance.]—***See* Part XII., Sect. 11, sub-sect. 1, *post*.

#### B. Vesting Order.

*See, now, Trustee Act, 1925 (c. 19), ss. 54–56.*

**1316. Jurisdiction of High Court—Lunatic entitled to mortgage money as trustee.]—**The effect of Lunacy Act, 1911 (c. 40), s. 1, is that the jurisdiction of the Judge in Lunacy, conferred by Lunacy Act, 1890 (c. 5), s. 135 (1), to make a vesting order where a lunatic is seised of land by way of mtge., is transferred to the High Ct. in cases where the lunatic is a trustee for others; but, where the lunatic is himself entitled to the mtge. debt, the jurisdiction remains with the Judge in Lunacy. Where a lunatic mtgee. has become merely a trustee of the mtged. premises for the mtgor. by the mtge. money being paid off, the High Ct. has no jurisdiction to make an order.—*Re JAMES' MORTGAGE TRUSTS*, [1919] 1 Ch. 61; 88 L. J. Ch. 17; 120 L. T. 215; 63 Sol. Jo. 136.

**1317. —.]—***Re HAYTER'S MORTGAGE TRUSTS*, [1919] W. N. 32.  
*Annotation:—Expld. Re Hiron's Mortgage Trusts*, [1920] W. N. 55.

**1318. —.]—***Re HIRON'S MORTGAGE TRUSTS*, [1920] W. N. 55.

**1319. Jurisdiction of Judge in Lunacy—Lunatic entitled to mortgage money beneficially.]—***Re JAMES' MORTGAGE TRUSTS*, No. 1316, *ante*.

**1320. —.]—***Re HIRON'S MORTGAGE TRUSTS*, [1920] W. N. 55.

**1321. — Lunatic holding mortgaged premises—After payment of mortgage debt—As bare trustee for mortgagor.]—***Re JAMES' MORTGAGE TRUSTS*, No. 1316, *ante*.

*See, also, Sect. 10, sub-sect. 2, post.*

#### SUB-SECT. 4.—COSTS.

*See* Part XII., Sect. 11, *post*.

#### SECT. 10.—TRUSTS.

##### SUB-SECT. 1.—APPOINTMENT OF NEW TRUSTEE BY COURT.

###### A. In General.

*See, now, Trustee Act, 1925 (c. 19), ss. 41–43.*

**1322. Trustee of lunatic's will—All appointed having predeceased lunatic.]—**The Ct. sitting in Lunacy has power under Trustee Act, 1852 (c. 55), s. 9, to appoint new trustees of the will of a deceased lunatic, where the trustees appointed by the lunatic have died in his lifetime, for the purpose of getting rid of the funds standing in ct. to the credit of the lunacy.—*Re ORDE* (1883), 24 Ch. D. 271; 52 L. J. Ch. 832; 49 L. T. 430; 31 W. R. 801, L. JJ.

*Annotations:—Refd. Re Ambler's Trusts* (1888), 59 L. T. 210. *Mentd. Re Dodsworth, Spence v. Dodsworth*, [1891] 1 Ch. 657.

**Donee of power to appoint lunatic—Appointment by court.]—***See* Sub-sect. 3, A., *post*.

*B. In Place of Lunatic Trustee.**(a) In General.*

See, now, Trustee Act, 1925 (c. 19), ss. 41–43.

**1323. Trustee incapable from age & infirmity—Whether replaced by court—Trustee Act, 1850 (c. 60), ss. 32, 34.]**—The clause in s. 2 of above Act, which declares that the expression “person of unsound mind” shall mean “any person, not an infant, who not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs,” must be construed as referring to a person who although not found a lunatic, is nevertheless in such a state of mind, as to render him liable to be so found if an inquisition were held upon him. The case of a trustee who is from great age, & its infirmities practically incapable of transacting business, though not otherwise of unsound mind, is within s. 32 of above Act.—*Re PHELPS’ SETTLEMENT TRUSTS* (1885), 31 Ch. D. 351; 55 L. J. Ch. 465; 54 L. T. 480, L. JJ.

*Annotations:—N.F. Re Martin’s Trusts, Land, Building & Cottage Improvement Co. v. Martin, Re Martin* (1887), 34 Ch. D. 618. *Re M.* (1898), 68 L. J. Ch. 86.

**1324. ———.]**—*Re MARTIN’S TRUSTS, LAND, BUILDING, INVESTMENT & COTTAGE IMPROVEMENT CO. v. MARTIN, Re MARTIN*, No. 14, ante.

**1325. Alleged insanity denied by trustee—Direction of issue as to sanity.]**—Where the ground for a petition for the appointment of a new trustee is the alleged insanity of a trustee, & the insanity is denied by him, the ct. will not try the question whether the trustee is of sound mind, nor will it under Trustee Act, 1850 (c. 60), s. 52, direct a commission in the nature of a writ *de lunatico inquirendo* to issue concerning such person, the proper mode of establishing the lunacy in such a case being on a petition in lunacy or in an action in the High Ct. to remove the trustee.—*Re COMBS* (1884), 51 L. T. 45, C. A.

*(b) Necessity for Appointment.**i. Sole or Sole Surviving Trustee Insane.*

**1326. Refusal of court to administer property.]**—On petition under 11 Geo. 4 & 1 Will. 4, c. 60, the ct. never interferes in the administration of the trusts, but merely substitutes a trustee in the place of the lunatic.—*Re WARD* (1850), 2 Mac. & G. 73; 42 E. R. 29, L. C.

**1327. ———.]**—The sole surviving trustee of a sum of stock under a settlement having become of unsound mind, the persons beneficially entitled presented a Petition in Lunacy for an order vesting in them the right to transfer the stock & receive the dividends:—*Held*: such an order ought not to be made, as it would be administering the trust in Lunacy; but, on the petition being amended & entitled in the Ch. Div. as well as in Lunacy, an order was made appointing petitioners trustees of the settlement, & vesting in them, as such, the right to transfer the stock & receive the dividends.—*Re CURRIE* (1878), 10 Ch. D. 93; 40 L. T. 110; 27 W. R. 369, L. JJ.

**1328. ———.]**—A trustee of property held in trust for A. absolutely having become lunatic, A. presented a petition asking that the property might be vested in himself:—*Held*: such an order ought not to be made, but a new trustee ought to be appointed & the property vested in him.—*Re HOLLAND, Re HOWARTH’S TRUSTS* (1884), 33 Ch. D. 672; 50 L. J. Ch. 271; 44 L. T. 581; 29 W. R. 449, L. JJ.

**Vesting orders in beneficiaries.]**—See Sub-sect. 2, A. (c), post.

*ii. One of Several Trustees Insane.*

**1329. Whether surviving trustees reappointed—In place of themselves & lunatic—To exclude lunatic from trust.]**—The ct. will not, on petition, on the lunacy of one of several trustees, appoint the other trustees to be new trustees in the place of themselves & the lunatic’s trustee.—*Re COLYER* (1880), 50 L. J. Ch. 79; 43 L. T. 454, L. J.

*Annotations:—Folld. Re Aston* (1883), 31 W. R. 801. *Re M.* *Re Gardiner’s Trusts* (1886), 33 Ch. D. 590; *Re Chetwynd’s Settltmt., Scarisbrick v. Nevinson*, [1902] 1 Ch. 692.

**1330. ———.]**—When one of several trustees becomes a lunatic, it is the practice of the ct. to require a new trustee to be appointed in the place of the one who has become incapable before making a vesting order under Trustee Act, 1850 (c. 60), s. 5.—*Re NASH* (1881), 16 Ch. D. 503; 44 L. T. 40; 29 W. R. 294, L. JJ.

*Annotations:—N.F. Re Watson* (1881), 19 Ch. D. 384. *Folld. Re Ray* (1882), 47 L. T. 500. *Re M.* *Re Lamb’s Trust* (1884), 33 W. R. 163; *Re Gardiner’s Trusts* (1886), 33 Ch. D.

**1331. ———.]**—*Re WATSON*, No. 1262, ante.

**1332. ——— Discretion of court.]**—Where one of four trustees of stock became lunatic, & there was no difficulty in finding a new trustee to be appointed in his place, the ct., though having discretion under Trustee Act, 1850 (c. 60), s. 5 to do so, refused to make an order vesting the right to transfer the stock in the three remaining trustees, & ordered a new trustee to be appointed in the place of the lunatic trustee.—*Re RAY* (1882), 47 L. T. 500, L. JJ.

**1333. ———.]**—Where one of several trustees is of unsound mind, the ct. will not reappoint the other trustees as trustees in the place of themselves & the lunatic trustee, for the purpose of excluding the lunatic trustee from the trust; but a new trustee must be appointed in his place.—*Re ASTON* (1883), 23 Ch. D. 217; 48 L. T. 195; 31 W. R. 801, L. JJ.

*Annotations:—Re M.* *Re Lamb’s Trusts* (1884), 28 Ch. D. 77; *Re Gardiner’s Trusts* (1886), 33 Ch. D. 590; *Re Chetwynd’s Settltmt., Scarisbrick v. Nevinson*, [1902] 1 Ch. 692.

**1334. ——— Fund immediately divisible.]**—Although, where one of the trustees of a trust fund becomes lunatic, the ct. will not in general vest the right to deal with the trust funds in the trustees of sound mind, but will require a new trustee to be appointed in the place of the lunatic, an order vesting the right to the fund in the trustees of sound mind will be made where the fund is immediately divisible.—*Re MARTYN, Re TOUTT’S WILL* (1884), 26 Ch. D. 745; 54 L. J. Ch. 1016; 50 L. T. 552; 32 W. R. 734, L. JJ.

*Annotations:—Re M.* *Re Lamb’s Trusts* (1884), 28 Ch. D. 77; *Re Gardiner’s Trusts* (1886), 33 Ch. D. 590.

**1335. ———.]**—Where one of four trustees of a will had been found lunatic by inquisition, the ct. made an order vesting his estate in the other three trustees, being of opinion that, although the number of trustees would be thereby diminished, yet the terms of Lunacy Act, 1890 (c. 5), ss. 135, 136, were wide enough; & that, having regard to the state of the law previously to that Act being passed, there was jurisdiction to make the order.—*Re LEON*, [1892] 1 Ch. 348; 66 L. T. 390; *sub nom. Re L——*, 36 Sol. Jo. 198, L. JJ.

*(c) Jurisdiction.*

See, now, Trustee Act, 1925 (c. 19), ss. 41–43, 54, 55.

**1336. Jurisdiction in lunacy—Appointment on making of vesting order—Trustee Act, 1852 (c. 55),**



**Sect. 10.—Trusts: Sub-sect. 1, B. (c) & (d); sub-sect. 2, A. (a), (b), (c) & (d).]**

**s. 10.]**—Where a petition is presented under Trustee Act, 1850 (c. 60), & above Act, for the appointment of new trustees in the place of trustees some of whom are dead & the survivor a person of unsound mind, not so found by inquisition, the petition may be presented in Lunacy only, & not in Ch.

I am of opinion that above Act, sect. 10, was an express provision that the application may be made in Lunacy only (GIFFARD, L.J.).—*Re OWEN* (1869), 4 Ch. App. 782; 17 W. R. 1035, L. J.

*Annotation:—Reid. Re M., [1899] 1 Ch. 79.*

*See, now, Lunacy Act, 1890 (c. 5), s. 141.*

**1337. Where lunatic an infant.]—*Re ARROW-SMITH'S TRUSTS, Re THOMPSON*, No. 499, *ante*.**

**Trustee of mortgagee.]—*See Sect. 9, sub-sect. 3, B., ante*.**

*(d) Practice.*

**1338. Service of petition—On lunatic trustee.]—**

Where a petition is presented for the appointment of a new trustee under Trustee Act, 1850 (c. 60), in place of a trustee of unsound mind not so found, service on the trustee of unsound mind is not necessary.—*Re GREEN, Re MURTON'S TRUSTS* (1875), 10 Ch. App. 272; 32 L. T. 446; 23 W. R. 804, L. JJ.

*Annotation:—Mentd. Re Weston* (1898), 43 Sol. Jo. 29.

**1339. — On cestui que trust out of jurisdiction.]—**The persons entitled to the residuary estate of testator, presented a petition for appointment of new trustees of his will in the place of the original trustees, one of whom had died, & the other was a lunatic. The petition was served on three of the four persons who were entitled to the proceeds of sale of a real estate devised on trusts for persons who took no interest in the residue, but the fourth was resident in Australia, & was not served:—*Held*: (1) service on the *cestui que trust* in Australia might be dispensed with; (2) the signature of a new trustee to his consent to act must in Lunacy be verified by affidavit according to the old practice; R. S. C., Ord. 38, r. 19a, not applying to proceedings in Lunacy.—*Re WILSON* (1886), 31 Ch. D. 522; 55 L. J. Ch. 632; *sub nom. Re WILSON, Re NEEDHAM*, 54 L. T. 263, L. JJ.

*Annotation:—As to (2) Expld. Re Hume* (1887), 35 Ch. D. 457.

**1340. Consent of new trustee to act—Verification by affidavit—Appointed in lunacy.]—*Re WILSON*, No. 1339, *ante*.**

**1341. — — — Appointed in Chancery as well as in Lunacy—R. S. C., Ord. 38, r. 19a.]—*Re HUME, TRENCHARD'S WILL TRUSTS* (1886), 55 L. T. 414, L. JJ.**

**1342. — — — — —.]—**Where a new trustee is appointed in Ch. as well as in Lunacy his signature to his consent to act may be verified in manner provided by above rule, & need not be verified by affidavit according to the old practice; *secus*: where the order is made in Lunacy only.—*Re HUME* (1887), 35 Ch. D. 457; 56 L. J. Ch. 1026; 56 L. T. 351; 36 W. R. 84, L. JJ.

*See, now, Lunacy Rules, 1892, r. 92.*

**1343. Order—Trust funds in unauthorised investments.]—**One of the trustees of a settlement being a lunatic, a petition was presented for the appointment of new trustees. The trust funds were invested in securities not authorised by the settlement. It was therefore desired that the funds should not be transferred to the new trustees, but

sold & reinvested in authorised securities:—*Held*: it was proper in the order appointing new trustees to direct that the new trustees should have a right to call for a transfer of the funds to themselves, or to any purchaser or purchasers, the trustees undertaking to hold the proceeds on the trusts of the settlement.—*Re PEACOCK* (1880), 14 Ch. D. 212; 49 L. J. Ch. 228; 50 L. J. Ch. 380; 43 L. T. 99; 28 W. R. 801, L. JJ.

*Annotation:—Mentd. Re New Zealand Trust & Loan Co., [1893] 1 Ch. 403.*

**1344. Title of petition—Conveyance of property by committee.]—**A petition, praying that the committee of a lunatic may be ordered to transfer property vested in the lunatic as a trustee, ought to be entitled in the lunacy, & need not be entitled in the matter of the Act which authorises the Lord Chancellor to make the order.—*Re FOWLER* (1826), 2 Russ. 449; 38 E. R. 405, L. C.

**1345. — — — Vesting order.]—PRACTICE NOTE, [1923] W. N. 213.**

**SUB-SECT. 2.—VESTING ORDERS.**

**A. Jurisdiction to Make.**

**(a) In General.**

*See, now, Trustee Act, 1925 (c. 19), s. 54.*

**1346. Lunacy contested.]—**The summary jurisdiction given to the Lord Chancellor by the 11 Geo. 4 & 1 Will. 4, c. 60, s. 5, for the conveyance or transfer of property vested in persons as trustees or mtgees. who are lunatic, but not found such by inquisition, does not apply to cases in which the fact of lunacy is contested.—*Re WALKER* (1841), Cr. & Ph. 147; 10 L. J. Ch. 355; 5 Jur. 571; 41 E. R. 446, L. C.

*Annotation:—Consd. Re Combs* (1884), 51 L. T. 45.

**1347. Petition for appointment of new trustee—In place of one out of jurisdiction—Second trustee found to be insane.]—**Upon a reference, made on a petition for the appointment of a new trustee in the place of an original trustee, who had left this country, the master found that another of the original trustees had become lunatic. An order was afterwards made for the transfer of the trust funds by the committee, without a second reference in the matter of the lunatic.—*Re BUCKLE* (1846), 15 L. J. Ch. 289; 6 L. T. O. S. 449, L. C.

**1348. Not confined to sole trustee.]—**Trustee Act, 1850 (c. 60), s. 3, is not confined to a case where the lunatic or person of unsound mind is a sole trustee or mtgee., but extends to the case where he is one of several trustees or mtgees.

One of two trustees being of unsound mind, a new trustee was appointed in his place under a power:—*Held*: the ct. had jurisdiction to appoint a person to convey the interest of the trustee of unsound mind in a mtge., forming part of the trust estate, for the purpose of vesting the mtged. estate in the continuing trustee & the new trustee.—*Re JONES, ZINCRAFT'S WILL TRUSTS* (1886), 33 Ch. D. 414; 56 L. J. Ch. 272; 55 L. T. 498; 35 W. R. 172; 2 T. L. R. 477, L. J.

**1349. Criminal lunatic—Trustee Act, 1850 (c. 60), s. 5.]—**Where an Act conferring a certain jurisdiction is repealed by a subsequent Act containing a saving clause to the effect that the repeal shall not affect any jurisdiction established under the repealed Act, the jurisdiction under the repealed Act should, in the absence of any inconsistency between the two Acts, be regarded as preserved by virtue of the saving clause.

*As Lunacy Act, 1890 (c. 5), gives no jurisdiction*

to make a vesting order in the case of a trustee who is a criminal lunatic, the old jurisdiction in such a case under above sect. is preserved by the proviso or saving clause in Lunacy Act, 1890 (c. 5), s. 342, notwithstanding that by that sect. above Act, sect. 5, is in terms repealed, there being nothing in the later Act inconsistent with the preservation of that jurisdiction; & the Ct. in Lunacy will exercise that jurisdiction accordingly by making a vesting order under above Act.—*Re R.*, [1906] 1 Ch. 730; 75 L. J. Ch. 421; 94 L. T. 494; 54 W. R. 578, C. A.

**Whether given to Chancery Division—By re-appointment of duly appointed trustees.]—See Sub-sect. 2, A. (b), *post*.**

**In case of mortgages.]—See Sect. 9, sub-sect. 3, B., *ante*.**

*(b) Reappointment of duly appointed Trustee.*

*See, now, Trustee Act, 1925 (c. 19), ss. 41–43, 54.*

**1350. In Chancery Division—For purpose of giving jurisdiction.]—**(1) Where a trustee had become lunatic, & other trustees had been appointed under a power, there was no doubt as to the validity of their appointment, the Lords Justices sitting in Lunacy refused to reappoint the new trustees.

(2) Where one of two trustees became lunatic, & the continuing trustee, under a power for that purpose, duly appointed two new trustees, the ct. made an order, under Trustee Act, 1850 (c. 60), s. 20, appointing the continuing trustee & one of the new trustees, in whom, jointly with the lunatic, the legal estate in certain mtged. property was then vested, to convey, in the place of the lunatic, to themselves & the other new trustee.—*Re VICAT* (1886), 33 Ch. D. 103; 55 L. J. Ch. 843, n.; 54 L. T. 891; 34 W. R. 645, L. JJ.

*Annotations:—As to (1) Apld. Re Dewhurst's Trusts* (1886), 33 Ch. D. 416; *Re Gardiner's Trusts* (1886), 33 Ch. D. 590.

**1351. ———.]—**I., one of the three trustees of the will of D. became incapacitated, by paralysis, from transacting business. Under a power in the will to appoint a new trustee in case of the incapacity of any trustee, the other trustees X., & Y., by deed appointed S. to be a new trustee in the place of I. A petition was then presented to the Ch. Div. asking for the appointment of S., as a trustee of the will, together with X., & Y., in place of I. & X. & Y. & for an order vesting the trust property in X., Y., & S.:—*Held*: there was no jurisdiction to re-appoint the trustees for the purpose of making the order; (2) I., was a person of unsound mind within Trustee Act, 1850 (c. 60), & leave must be given to amend the petition by intituling it in lunacy & praying for the appointment of a person to convey the trust estate in the place of I.

The former trustee is paralytic & is unable through infirmity of mind to manage his own affairs. He is therefore of unsound mind though not strictly a lunatic, & that being so, a vesting order can be made under another sect. [of Trustee Act, 1850 (c. 60)] for transferring the estate to the new & the continuing trustees (COTTON, L.J.).—*Re DEWHIRST'S TRUSTS* (1886), 33 Ch. D. 416; 55 L. J. Ch. 842; 55 L. T. 427; 35 W. R. 147, C. A.

*Annotations:—As to (2) Folld. Re Martin's Trusts, Land, Building, Investment & Cottage Improvement Co. v. Martin, Re Martin* (1887), 34 Ch. D. 618. *Generally, Mentd. Re Gardiner's Trusts* (1886), 33 Ch. D. 590; *Re Hulme's Trusts* (1887), 57 L. T. 13; *Re Stocken's Settltmt. Trusts*, [1893] W. N. 203.

**1352. ———.]—**The property comprised in a settlement consisted of money lent upon a

mtge. of freeholds vested in the two surviving trustees, & of a sum of Consols standing in their names. One of these two surviving trustees was a lunatic, & the other was resident out of the jurisdiction; & under a power in the settlement two persons were appointed new trustees in their places. Upon a petition by these two new trustees & by all the beneficiaries praying for an order reappointing the new trustees as trustees of the settlement, & vesting in them the trust property. The ct. declined to reappoint the new trustees, but under Trustee Act, 1850 (c. 60), s. 3, vested the lands subject to the mtge. in the new trustees, & under Trustee Act, 1850 (c. 60), s. 5, vested the mtge. debt & the right to call for a transfer of the Consols in the trustee of sound mind resident out of the jurisdiction, & it appearing that he was out of the jurisdiction, vested the mtge. debt & the right to call for a transfer of the consols in the new trustees.—*Re BATHO* (1888), 39 Ch. D. 189; 58 L. J. Ch. 32; 59 L. T. 882, L. JJ.

*(c) Vesting Funds in Beneficiaries.*

**1353. Whether court has jurisdiction—Refusal of sane trustee.]—**There were three exors. of the surviving trustee of a settlement. One of them was a lunatic. The other two, when requested by the person who was absolutely entitled to some shares which were included in the settlement to transfer the shares to him refused to do so:—*Held*: (1) there was no jurisdiction under Trustee Act, 1850 (c. 60), s. 24, to make an order vesting the shares in the person absolutely entitled to them but it would be necessary to present a petition entitled in lunacy.

(2) Even if the lunatic exor. had been of sound mind, the refusal of two of the exors. to make the transfer would not have given the ct. jurisdiction under Trustee Act, 1850 (c. 60), s. 24, to make a vesting order.—*Re NICHOLL'S TRUSTS* (1870), 22 L. T. 323; 18 W. R. 443, L. J.; *subsequent proceedings, sub nom. Re WHITE*, 5 Ch. App. 698, L. JJ.

**1354. ———.]—**One of the three exors. of a surviving trustee of canal shares was of unsound mind, & the other two, when applied to by the persons absolutely entitled to the shares, declined to do anything:—*Held*: an order could be made vesting the right to transfer the shares in the persons beneficially entitled.—*Re WHITE* (1870), 5 Ch. App. 698; 23 L. T. 387, L. JJ.; *previous proceedings, sub nom. Re NICHOLL'S TRUSTS*, 22 L. T. 323, L. J.

*Annotation:—Folld. Re Wachter* (1882), 22 Ch. D. 535.

——.]—*See, also, Sub-sect. 1, B. (b) i., ante.*

*(d) Master in Lunacy.*

*See, now, Trustee Act, 1925 (c. 19), s. 54, Lunacy Act, 1890 (c. 5), ss. 116–130; Lunacy Act, 1891 (c. 65), s. 27 (1).*

**1355. Whether administration & management of estate—Lunacy Act, 1891 (c. 65), s. 27 (1)—On appointment under a power vested in lunatic.]—**By virtue of above sub-sect. a Master in Lunacy when, under Lunacy Act, 1890 (c. 5), s. 128, appointing a person to exercise a power of appointing new trustees which is vested in a person lawfully detained as a lunatic, has jurisdiction also, under Lunacy Act, 1890 (c. 5), s. 129, to make an order vesting the trust property in the new trustees when appointed.—*Re FULLER*, [1900] 2 Ch. 551; 69 L. J. Ch. 738; 83 L. T. 208; 49 W. R. 90, L. JJ.

*Annotation:—Distd. Re Langdale*, [1901] 1 Ch. 3.

**1356. ——— Appointment not made by court.]—**A Master in Lunacy has not jurisdiction



*Sect. 10.—Trusts: Sub-sect. 2, A. (d), B. & C.; sub-sect. 3, A., B., C. & D.; sub-sect. 4. Sects. 11, 12, 13 & 14: Sub-sects. 1 & 2, A.]*

to make a vesting order as to trust property which, new trustees having been already appointed, remains vested in the old trustees, one of whom is a lunatic. A vesting order in such a case is not part of the administration or management of the lunatic's estate within above sub-sect., which confers jurisdiction on a Master.—*Re LANGDALE*, [1901] 1 Ch. 3; 70 L. J. Ch. 38; 83 L. T. 451; 49 W. R. 177; 45 Sol. Jo. 78, L. JJ.

#### *B. Service of Petition.*

*See Rules in Lunacy, 1892, rr. 57–59.*

**1357. On committee of lunatic's estate.]—**A petition for an order vesting in new trustees property of which a trustee has become lunatic ought to be served on his committee.—*Re SAUMAREZ, Re CARTERET'S SETTLEMENT* (1856), 8 De G. M. & G. 390; 25 L. J. Ch. 575; 27 L. T. O. S. 212; 4 W. R. 658; 44 E. R. 440, L. JJ.

**1358. On lunatic trustee.]—**A power of appointing new trustees provided that if any trustees or trustee should die, or become unwilling or unable to act, the trustees or trustee for the time being, whether continuing or declining to act, might appoint a new trustee or trustees. One of the three trustees became of unsound mind, but was not so found by inquisition, & the other two appointed a new trustee in his room. A petition for an order vesting the trust estate in the continuing trustees, & the new trustee having been presented:—*Held*: service on the trustee of unsound mind was not necessary.—*Re EAST, Re BELLWOOD'S WILL TRUSTS* (1873), 8 Ch. App. 735; 42 L. J. Ch. 480, L. JJ.

#### *C. Form of Order.*

**1359. Lunatic trustee tenant in tail.]—**An order vesting in any person the estate of a trustee tenant in tail, who is of unsound mind, should only direct the land to be vested in such person for all the estate which the trustee, if sane, could convey.—*MASON v. MASON, Re MASON* (1878), 7 Ch. D. 707; 26 W. R. 565, L. JJ.

### **SUB-SECT. 3.—POWERS VESTED IN LUNATIC.**

#### *A. Power of Appointment of New Trustees.*

*See Trustee Act, 1925 (c. 19), ss. 41–43, 54, Lunacy Act, 1890 (c. 5), ss. 128, 129.*

**1360. Power exercised by committee—Under order of court—Form of order.]—***Re BOWMER* (1859), 3 De G. & J. 658; 28 L. J. Ch. 618; 33 L. T. O. S. 4; 5 Jur. N. S. 348; 7 W. R. 313; 44 E. R. 1423, L. JJ.

*Annotations:—Folld. Re Shortridge, [1895] 1 Ch. 278. Re A., [1904] 2 Ch. 328.*

**1361. ——— Necessity for order.]—**Two trustees had power to appoint new trustees of stock. One of them became lunatic:—*Held*: the Ct. of Ch. had no jurisdiction to order a transfer of the fund into ct. in a suit, but a Petition in Lunacy was also necessary.—*JEFFREYS v. DRYSDALE, Re DRYSDALE* (1861), 30 L. J. Ch. 612; 4 L. T. 454; 7 Jur. N. S. 667; 9 W. R. 428, L. JJ.

**1362. ——— Appointment not made under Conveyancing Act, 1881 (c. 41).]—***Re BLAKE*, [1887] W. N. 173, C. A.

*Annotation:—Re A., [1904] 2 Ch. 328.*

**1363. ——— Extent of order.]—**Where a lunatic is donee of a power of appointing new

trustees of a settlement, the judge has jurisdiction, under Lunacy Act, 1890 (c. 5), ss. 128, 129, to authorise the committee of the lunatic to exercise the power on his behalf by appointing persons named in the order to be new trustees of the settlement; & where the settlement comprises bank annuities, the order of the judge may properly go on to authorise the persons so named, upon their appointment as trustees, to call for a transfer of the bank annuities into their own names, to receive the dividends until transfer, & to hold the stock when transferred upon the trusts of the settlement.—*Re SHORTRIDGE*, [1895] 1 Ch. 278; 64 L. J. Ch. 191; 71 L. T. 799; 60 J. P. 38; 43 W. R. 257; 11 T. L. R. 135; 39 Sol. Jo. 134; 12 R. 81, L. JJ.

*Annotations:—Re A., [1904] 2 Ch. 328; Re Spurling [1909] 1 Ch. 199. Mentd. Re C. M. G., [1898] 2 Ch. 324.*

**1364. ——— Vesting order added—Jurisdiction of Master in Lunacy.]—***Re FULLER*, No. 1355, ante.

**1365. Jurisdiction of Chancery Division—To order transfer of fund into court.]—***JEFFREYS v. DRYSDALE, Re DRYSDALE*, No. 1361, ante.

**1366. ——— To appoint new trustee.]—**When the person having power to appoint a new trustee is a lunatic, found so by inquisition, an order appointing a new trustee may be made in Ch. under Trustee Act, 1850 (c. 60), s. 32.—*Re SPARROW* (1870), 5 Ch. App. 662; 18 W. R. 1185, L. C. & L. JJ.

*Annotations:—Re A., [1904] 2 Ch. 328.*

**1367. ———.]—**Property was left by will to trustees in trust for a person for her life, with remainder as therein mentioned. In the clause providing for the appointment of the trustees the power of appointment was vested solely in the tenant for life during her life. The tenant for life having become lunatic, & one of the trustees of the will having died, the Ct. [of Ch.] on the petition of the surviving trustee for the time being & the committee of the lunatic's estate, appointed a new trustee in the stead of the trustee who had died.—*Re HEAPHY'S TRUSTS* (1870), 18 W. R. 1070.

**1368. ——— Refusal of court to act—In absence of committee.]—**A tenant for life of trust property, with a power of appointing new trustees, was duly found lunatic; but no committee was appointed. On a petition being presented, under Trustee Act, 1850 (c. 60), for the appointment of new trustees of the property, the ct. declined to make an order in the absence of a committee.—*Re PARKER'S TRUSTS* (1863), 32 Beav. 580; 8 L. T. 378; 9 Jur. N. S. 998; 11 W. R. 655; 55 E. R. 228.

**1369. Jurisdiction in Lunacy—To appoint new trustee on making of vesting order.]—***Re DAVIES*, No. 933, ante.

**1370. ———.]—**A settlement contained a power to appoint a new trustee in case any trustee should become incapable of acting. A trustee became of unsound mind. Upon petition, under Trustee Act, 1850 (c. 60), the ct. made an order for appointing a new trustee, & empowering the continuing trustee to transfer the trust fund.—*Re COOPER'S SETTLEMENT* (1856), 25 L. J. Ch. 685; 27 L. T. O. S. 267; 4 W. R. 729, L. JJ.

#### *B. Power to Consent to Appointment of New Trustees.*

*See Trustee Act, 1925 (c. 19), ss. 41–43, 54, Lunacy Act, 1890 (c. 5), ss. 128, 129.*

**1371. Jurisdiction in lunacy—Confined to con-**

### **PART X. SECT. 10, SUB-SECT. 3.—B.**

*of court to dispense with consent of lunatic.]—**Re ADAMSON'S TRUSTEES*, [1917] S. C. 440; [1917] 1 S. L. T.

sent—Not extended to appointment.]—A will contained a power of appointment of new trustees exercisable with the consent of the tenant for life. The trustees having died, the tenant for life, who had been found lunatic, presented a petition in Lunacy & Ch. by the committee of her estate as next friend for the appointment of new trustees:—*Held*: there was no jurisdiction in Lunacy to appoint new trustees, except to replace a lunatic trustee, & the only proper application in Lunacy was to ask for an order authorising the committee to consent on behalf of the lunatic to an appointment of trustees under the power.—*Re GARROD* (1885), 31 Ch. D. 164; 55 L. J. Ch. 311; 54 L. T. 291; 34 W. R. 157, L. JJ.  
*Annotation*:—*Reid. Re A.* (1904), 73 L. J. Ch. 648.

#### C. Powers in Marriage Settlements.

See Lunacy Act, 1890 (c. 5), s. 128.

**1372. Power exercised by committee—Power of advancement—Lunacy of husband.**—A marriage settlement contained a power of advancement exercisable by the trustees after the death of the husband & wife, or at any time previously if they or the survivor of them should direct. The husband was found lunatic:—*Held*: under 16 & 17 Vict. c. 70, s. 137, the ct. had jurisdiction to authorise the committee to consent on behalf of the lunatic to the exercise of the power.—*Re NEVILL* (1885), 31 Ch. D. 161; 55 L. J. Ch. 435; 54 L. T. 290, L. JJ.

*Annotation*:—*Consd. Re A.*, [1904] 2 Ch. 328.

**1373. — Power of appointment among children—Lunacy of wife.**—Where a marriage settlement conferred on the husband & wife a joint power of appointment by deed among the children of the marriage, & the wife afterwards became a lunatic not so found:—*Held*: the Judge in Lunacy under Lunacy Act, 1890 (c. 5), s. 128, had jurisdiction to authorise the person appointed under sect. 116 to exercise the powers of a committee of the estate to concur on behalf of the alleged lunatic in exercising the joint power of appointment as being a power vested in the alleged lunatic “in the character of trustee.”—*Re A.*, [1904] 2 Ch. 328; 73 L. J. Ch. 648; 91 L. T. 238; 53 W. R. 2, L. JJ.

#### D. Other Powers.

See Lunacy Act, 1890 (c. 5), ss. 128, 129.

**Exercise of powers of tenant for life.**—See Sect. 5, sub-sect. 7, *ante*.

**Partition of land.**—See PARTITION.

**Barring entail.**—See Sect. 5, sub-sect. 7, *ante*.

**Sale of entailed land.**—See Sect. 5, sub-sect. 7, *ante*.

**Leasing.**—See Sect. 5, sub-sect. 3, *ante*.

#### SUB-SECT. 4.—COSTS.

See Part XII., Sect. 12, *post*.

### SECT. 11.—LUNACY OF LEGAL PERSONAL REPRESENTATIVE.

**Lunacy of executor.**—See EXECUTORS, Vol. XXIII., pp. 199, 200, 246, Nos. 2331–2350, 3004–3006.

**Lunacy of administrator.**—See EXECUTORS, Vol. XXIII., pp. 167, 168, 191, 200, 246, Nos. 1836–1840, 2203, 2341–2350, 3004–3006.

### SECT. 12.—LUNACY OF LIQUIDATOR.

See COMPANIES, Vol. X., p. 994, No. 6886.

### SECT. 13.—POWER TO CARRY ORDERS INTO EFFECT.

**1374. Strict observance of order necessary—Order for sale by auction—Sale by private treaty.**—The ct. will not carry into effect, after a lunatic's decease, a sale of his estate previously made by private contract, there having been only an order to sell by public auction.—*Re LOFT* (1844), 2 L. T. O. S. 397; 8 Jur. 206, L. C.

See Lunacy Act, 1890 (c. 5), ss. 119, 124, 333.

**1375. Covenants on behalf of lunatic—Inheritance subject to debts—Covenant for payment.**—*Re FOX*, No. 1098, *ante*.

**1376. — Covenants for title on conveyance.**—Lunacy Act, 1890 (c. 5), s. 124, enabling the committee of a lunatic on his behalf to execute & do all such assurances & things for giving effect to any order under the Act as the judge directs, must be construed as giving the ct. jurisdiction to authorise a committee who is selling the lunatic's property under an order in that behalf, not only to convey the same on his behalf, but also on his behalf to enter into with the purchaser the covenants usual & proper in such a conveyance, including the ordinary covenants for title.—*Re RAY*, [1896] 1 Ch. 468; 65 L. J. Ch. 316; 73 L. T. 723; 60 J. P. 340; 44 W. R. 353; 40 Sol. Jo. 238, C. A.

**1377. — Restrictive covenants in conveyance.**—*Re S. A.* (1906), Registrars' Library, Lunacy Office; cited in Halsbury's Laws of England, Vol. XIX., p. 456, n.

**Form of order on transfer of stock.**—See Sect. 8, sub-sect. 2, H., *ante*.

### SECT. 14.—EFFECT OF DEATH OF LUNATIC.

#### SUB-SECT. 1.—IN GENERAL.

**1378. General rule—Death determines jurisdiction.**—*Re BENNETT, GREENWOOD v. BENNETT*, No. 1404, *post*.

**1379. Court requires proof of death—By affidavit.**—The ct. will never act on the allegation of the decease of a lunatic without proof of that fact by affidavit.—*Ex p. FERMOR* (1852), 1 W. R. 43, C. A.

#### SUB-SECT. 2.—WHAT ORDERS MADE.

##### A. In General.

**1380. Report by master—Jurisdiction to make after death.**—*Ex p. ARMSTRONG*, No. 545, *ante*.

1551. — — — — — *Re WAY*, No. 1552, *post*.

#### PART X. SECT. 14, SUB-SECT. 1.

**1378 i. General rule—Death determines jurisdiction.**—The death of the lunatic determines the jurisdiction in lunacy except for certain purposes, as accounting, delivery of property etc.—*Re*

NEVINS (1888), 5 Man. L. R. 137.—CAN.

**1378 ii. — — — — —**—*Re KINGSTON (EARL)* (1839), 2 I. Eq. R. 169.—IR.

**n. Abatement of proceedings by committee.**—*FOOT v. LESLIE* (1885), 16 L. R. Ir. 411.—IR.

#### PART X. SECT. 14, SUB-SECT. 2.—A.

**1380 i. Report by master—Jurisdiction to make after death.**—*Re SINGLETON*, *Ex p. SINGLETON* (1858), 8 I. Ch. R. 263.—IR.



*Sect. 14.—Effect of death of lunatic: Sub-sect. 2, A., B. & C. (a) & (b); sub-sect. 3.]*

**1382. Confirmation of report—Made in lunatic's lifetime.]**—There is no jurisdiction in lunacy to confirm a report made after the lunatic's death approving of an arrangement entered into by the committee in his lifetime. *Qu.*: whether, if the report had been made in the lunatic's lifetime, it could have been confirmed after his death.

It appears to me, to say the least, very doubtful whether the master had any authority to make any report of this nature after the death (KNIGHT BRUCE, L.J.).—*Re WAY* (1861), 3 De G. F. & J. 175; 30 L. J. Ch. 815; 5 L. T. 510; 25 J. P. 629; 0 W. R. 563; 45 E. R. 845, L. JJ.

*Annotation*:—*Consd. Re Bennett, Greenwood v. Bennett*, [1913] 2 Ch. 318.

**1383. ———.]**—After presentation, but before hearing of a petition to confirm the master's report in the matter of a lunatic, the lunatic died. The ct. made no order on the petition, refused to allow the costs in the absence of the legal personal representative, & directed the petition to stand over, with liberty to apply as to costs when the funds in ct. came to be dealt with.—*Re POPHAM* (1881), 44 L. T. 323; 29 W. R. 403, L. JJ.

**1384. ——— Made after lunatic's death.]**—*Re WAY*, No. 1382, *ante*.

**1385. Variation of order.]**—*Re A. W.* (1910), Registrars' Library, Lunacy Office; cited in Halsbury's Laws of England, Vol. XIX., p. 457, n.

**1386. Proceedings commenced in lunatic's lifetime—Payment off of mortgage—Whether term assigned to attend inheritance or held in trust for next of kin.]**—*Ex p. GRIMSTONE*, No. 542, *ante*.

**1387. Payment of debt.]**—*Ex p. M'DOUGAL*, No. 1090, *ante*.

**1388. Delivery of deeds—Upon report as to heir.]**—*Re PEARSON* (1837), Coop. Pr. Cas. 314; 47 E. R. 523, L. C.

**Orders in nature of administration.]**—*See Sub-sect. 2, C., post*.

#### *B. Transfer of Property to Representatives.*

**1389. General rule.]**—M., a pauper lunatic in an asylum at Bethnal Green, but not found lunatic by inquisition, became entitled to a small fund in ct. An order was made in 1856, on petition under Trustee Relief Act, by M., by his next friend, directing that he should continue at the asylum until further order, & the guardians of the poor of his parish undertaking to maintain him there, that £31 a year should be raised out of the fund & paid to the guardians in repayment of the sums to be expended in his maintenance. In 1859 he was removed to the new asylum for his county by order of the justices, but without any order of the Ct. of Ch. From this time no payments were applied for by the guardians. He remained in the county asylum till his death in 1875. His legal personal representative petitioned for transfer of the funds in ct. to him. The guardians appeared & claimed maintenance for the past time:—*Held*: (1) the guardians could not claim maintenance under the order, which ceased to be operative on the lunatic's removal

to a fresh asylum; (2) any claim for maintenance independently of the order was merely a debt of the lunatic, payable by his personal representative in due course of administration, & the ct. had no jurisdiction in the matter to order payment of it, but the whole fund must go to the personal representative.—*Re MARMAN'S TRUSTS* (1878), 8 Ch. D. 256; 38 L. T. 797; 26 W. R. 621, C. A.

*Annotations*:—*As to (2) Apld. Re Bennett, Greenwood v. Bennett*, [1913] 2 Ch. 318. *Refd. Re Harris* (1880), 49 L. J. Ch. 327; *Re Webster, Derby Union Grdns. v. Sharratt* (1884), 54 L. J. Ch. 276.

**1390. Petition by executors—For payment of fund paid into court—Service on committee.]**—A petition presented after the death of a lunatic by his exors., for payment of the balance paid into ct., must be served on the committee, although he has passed his accounts & his security has been discharged.—*Re WYLDE* (1854), 5 De G. M. & G. 25; 23 L. J. Ch. 464; 22 L. T. O. S. 298; 18 Jur. 115; 43 E. R. 777, L. JJ.

**1391. Administration suit instituted—Transfer to the cause.]**—*Re MARCHANT* (1844), 2 L. T. O. S. 397, L. C.

#### *C. Order in Nature of Administration of Lunatic's Estate.*

##### *(a) In General.*

**1392. No jurisdiction in lunacy.]**—*Wigg v. TILER* (1779), 2 Dick. 552; 21 E. R. 385, L. C.

*Annotation*:—*Apld. Scammell v. Light* (1862), 4 Giff. 127.

**1393. ———.]**—No jurisdiction in lunacy, after the death of the lunatic, to try the question of heirship; but in a case of disputed heirship, the possession was, under the circumstances, given to the parties reported by the master to be the heirs-at-law. A party claiming to be heir to the lunatic permitted, after the possession of the estates had been given up to the parties reported to be the heirs, to inspect deeds & documents remaining in the master's office, which, it seems, may be retained till a proper investigation has taken place.—*Re NORFOLK (DOWAGER DUCHESS)*, *Ex p. CLARKE* (1822), Jac. 589; 37 E. R. 973, L. C.

*Annotations*:—*Apld. Re Butler* (1866), 1 Ch. App. 607. *Expld. Re Ferrior, Carrow v. Ferrior, Dunn v. Ferrior* (1867), 3 Ch. App. 175. *Refd. Carrow v. Ferrior, Dunn v. Ferrior* (1868), 3 Ch. App. 719. *Mentd. Re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51.

**1394. ———.]**—*SCAMMELL v. LIGHT*, No. 1409, *post*.

**1395. ———.]**—After the death of a lunatic there is no jurisdiction in Lunacy to interfere between adverse claimants to the real estate of the late lunatic, although there is jurisdiction to restrain the committee of the estate from taking advantage of his position to assert his own claims as heir-at-law, or to prejudice the rights of adverse claimants. Therefore, where two rival claimants had filed bills praying for a receiver of the real estates pending the decision of their rights, & then presented petitions in Lunacy for the appointment of a receiver, the ct. refused the application in Lunacy, & also declined to exercise its original jurisdiction in Ch. for that purpose, upon an interlocutory application in the suits. But the ct. made an order in Lunacy for the deeds

**1382 i. Confirmation of report—Made in lunatic's lifetime.]**—Before the confirmation of the master's report appointing a committee of the person & estate of a lunatic & propounding a scheme for her maintenance, the lunatic died:—*Held*: notwithstanding the death, an order should be made, the exors. of the deceased consenting, confirming the report & for the discharge of the committee & the sur-

render of his bond.—*Re GARNER* (1901), 1 O. L. R. 405; 21 C. L. T. 240.—CAN.

#### **PART X. SECT. 14, SUB-SECT. 2.—C. (a).**

**a. No jurisdiction in lunacy—Application for administration order proper proceeding.]**—The control of a ct. ceases with the death of the lunatic, & an order for the distribution of a lunatic's estate will not be made under

proceedings in lunacy. Under such circumstances the committee took, under authority of the ct., proceedings for the administration of the estate by applying for an administration order, which was granted.—*Re BRILLINGER* (1871), 3 Ch. Ch. 290.—CAN.

**p. ——— Ascertainment of rights of next of kin.]**—*Ex p. GILBERT* (1810), 1 Ball & B. 297.—IR.

to be retained in the master's office for inspection by the claimants.—*Re FERRIOR, CARROW v. FERRIOR, DUNN v. FERRIOR* (1867), 3 Ch. App. 175; 37 L. J. Ch. 571, n.; 18 L. T. 65; 16 W. R. 298, L. J.; *subsequent proceedings* (1868), 3 Ch. App. 719, L. JJ.

*Annotations*:—*Reid. Re Hinchliffe* (1894), 64 L. J. Ch. 76; *Re Strachan*, [1895] 1 Ch. 439.

1396. —.—.]—*Re MARMAN'S TRUSTS*, No. 1389, *ante*.

(b) *Particular Orders.*

1397. **Funeral expenses—No committee of person or estate—No ready money available.**—Lunatic died without leaving ready money to pay the expenses of his funeral, & of whose person or of whose estate there was no committee. The heir-at-law, who was one of the next of kin, petitioned that a sufficient sum belonging to the lunatic should be paid out of ct. for such purpose; but the ct. directed the persons with whom the lunatic had resided to proceed with the funeral & ordered the petition to stand over.

A petition for this purpose is necessary; a warrant from the Lunatic office is not sufficient.—*Re TOWNSEND* (1852), 21 L. J. Ch. 747; 18 L. T. O. S. 231, L. JJ.

1398. **Whether mortgage term assigned to attend inheritance—Or held in trust for next of kin.**—*Ex p. GRIMSTONE*, No. 542, *ante*.

1399. **Payment of debt established at law—Petition for payment in lunatic's lifetime.**—*Ex p. M'DOUGAL*, No. 1090, *ante*.

1400. **Possession of lands—Given to those reported by Master to be heirs—Special circumstances.**—*Re NORFOLK (DOWAGER DUCHESS)*, *Ex p. CLARKE*, No. 1393, *ante*.

1401. **Transfer of real estate to heirs—Estates in possession of committee—Possession given by court.**—A lunatic was found by the ct. to be seised in fee of certain real estate, & certain persons were found to be his heirs. On his death intestate:—*Held*: (1) the committee of the person who had been put by the ct. into possession of certain part of the real estate must deliver possession thereof to the heirs so found, but without prejudice to any question of title, & could not retain possession as an adverse claimant; (2) the ct. could not order the committees of the person & estate to deliver possession of other part of the estate, which the committee of the person had taken possession of claiming adversely to the heirs, & the committees were not accountable in Lunacy for rents accrued since the death of the lunatic; (3) the ct. could not, under its general jurisdiction, order a solr. to account for rents so accrued & received by him as solr. for the committee of the estate.—*Re BUTLER* (1866), 1 Ch. App. 607, L. JJ.

*Annotations*:—*As to* (1) *Consd. Re Ferrior, Carrow v. Ferrior, Dunn v. Ferrior* (1867), 3 Ch. App. 175. *As to* (2) *Consd. Carrow v. Ferrior, Dunn v. Ferrior* (1868), 3 Ch. App. 719.

1402. —.—.]—**Possession taken by committee adversely to heirs.**—*Re BUTLER*, No. 1401, *ante*.

1403. **Payment out of fund in court—Fund representing land in settlement—Disentailing deed.**—A fund in ct. in a lunacy, the lunatic being dead, represented land in settlement. A deceased tenant in tail had created a base fee:—*Held*: the fund could not be paid out to the persons claiming through him, except upon the production of a deed enlarging the base fee.—*Re REYNOLDS* (1876), 3 Ch. D. 61; 35 L. T. 293; 24 W. R. 991, L. JJ.

1404. **Surplus income accrued since last payment to persons entitled—In hands of committee—Not**

**subject to orders in lunacy.**—Under orders in lunacy the net surplus income of a lunatic's estate, after providing for the maintenance of the lunatic & other allowances, was ordered to be paid to her daughters in certain shares. At the death of the lunatic the committee of her estate had in his hands certain moneys representing net surplus income received by him since the last payments made by him to the daughters, which he subsequently paid over to the administrator with the will annexed of the lunatic. These moneys were claimed by the daughters as due to them under the orders in lunacy:—*Held*: (1) the death of the lunatic determined the jurisdiction in lunacy & (2) the moneys in the hands of the administrator were not therefore payable to the daughters under the orders in lunacy, but formed part of the corpus of the lunatic's estate & were applicable according to the provisions of her will.—*Re BENNETT, GREENWOOD v. BENNETT*, [1913] 2 Ch. 318; 82 L. J. Ch. 506; 109 L. T. 302.

1405. **Stop order—Against funds payable to next of kin.**—*Re AUBEREY* (1836), 1 H. & Tw. 215; 47 E. R. 1390.

1406. **Restraint of committee—From prejudicing rights of adverse claimants.**—*Re FERRIOR, CARROW v. FERRIOR, DUNN v. FERRIOR*, No. 1395, *ante*.

1407. **Account of rents—By solicitor of committee—Under general jurisdiction over solicitors.**—*Re BUTLER*, No. 1401, *ante*.

**Payment of creditors—For maintenance.**—*See* Sect. 2, sub-sect. 3, E. (b), *ante*.

*See, also*, Sub-sect. 3, *post*.

SUB-SECT. 3.—POSITION OF COMMITTEE.

1408. **Whether accounts ordered—In lunacy—Expenditure during lifetime of lunatic.**—After the death of the lunatic, his personal representatives cannot, by petition to the Lord Chancellor sitting in Lunacy, obtain from the committee of the person an account of his expenditure of the allowance for maintenance. *Semble*: such an account may, under some circumstances, be obtained by a bill in the Ct. of Ch.—*GROSVENOR v. DRAX* (1833), 2 Knapp, 82; 12 E. R. 410, P. C.

*Annotations*:—*Appld. Scammell v. Light* (1862), 4 Giff. 127. *Consd. Re French* (1868), 3 Ch. App. 317. *Reid. Strangeways v. Read*, [1898] 2 Ch. 419.

1409. —.—.]—The jurisdiction of the Lord Chancellor in Lunacy does not extend to the administration of assets, & in a suit to administer the estate of deceased lunatic an account will be taken against the committee as to his dealings with the estate during the lunacy.—*SCAMMELL v. LIGHT* (1862), 4 Giff. 127; 1 New Rep. 83; 32 L. J. Ch. 53; 7 L. T. 414; 8 Jur. N. S. 1122; 11 W. R. 83; 66 E. R. 648.

1410. —.—.]—**Rents accrued since death of lunatic.**—*Re BUTLER*, No. 1401, *ante*.

1411. —.—.]—**& profits.**—The committee or receiver of the estate of a lunatic is not accountable in the lunacy, in his character of committee or receiver, for rents & profits received by him after the lunatic's death; & consequently, where the committee or receiver has made default, his surety is not liable in respect of any such receipts.—*Re WALKER*, [1907] 2 Ch. 120; 76 L. J. Ch. 580; 96 L. T. 864; 51 Sol. Jo. 482, L. JJ.

1412. —.—.]—**In Chancery—Expenditure during lifetime of lunatic.**—*GROSVENOR v. DRAX*, No. 1408, *ante*.



**Sect. 14.—Effect of death of lunatic: Sub-sect. 4, A. & B. Sects. 15 & 16. Part XI. Sect. 1: Sub-sect. 1, A. & B.; sub-sect. 2, A.]**

**SUB-SECT. 4.—RETENTION AND INSPECTION OF DOCUMENTS.**

**A. Retention.**

**1413. For inspection by claimants to lunatic's estate.]—***Re NORFOLK (DOWAGER DUCHESS), Ex p. CLARKE*, No. 1393, *ante*.

**1414. —.]—***Re FERRIOR, CARROW v. FERRIOR, DUNN v. FERRIOR*, No. 1395, *ante*.

**1415. By committee — Till discharge.]—**The committee of a lunatic obtained an order giving her liberty to make the lunatic co-pltf. with herself in an action. The order was based on an affidavit by the committee, which exhibited a case for the opinion of counsel & his opinion thereon. The affidavit was filed, but the exhibits were retained by the committee. The lunatic died before the action was decided, & her exor. desired to have all documents affecting her handed over to him, & also to have inspection of the exhibits:—*Held*: any person entitled to see an affidavit was entitled to see exhibits referred to therein; the rights of the lunatic had been affected by the affidavit, & the committee must produce the exhibits for inspection; but the committee was entitled to retain documents in the nature of vouchers until she was discharged.—*Re HINCHLIFFE*, [1895] 1 Ch. 117; 64 L. J. Ch. 76; 71 L. T. 532; 43 W. R. 82; 39 Sol. Jo. 25; 12 R. 33, L. C. & L. JJ.

*Annotations*:—*Mentd. Sloane v. Britain S.S. Co.*, [1897] 1 Q. B. 185; *Carter v. Roberts*, [1903] 2 Ch. 312.

**B. Inspection.**

*See, generally*, *DISCOVERY*, Vol. XVIII., pp. 38 *et seq.*

**1416. Of will—Arrangements for funeral.]—**The will of a deceased lunatic, which had been deposited in ct., ordered to be opened with a view to arrangements for the funeral.—*Re MONTAGUE, Ex p. FARRAR* (1838), 2 Jur. 462, L. C.

**1417. — Expenses of funeral.]—***Re TOWNSEND*, No. 1397, *ante*.

**Documents in custody of court.]—***See DISCOVERY*, Vol. XVIII., pp. 62, 63, Nos. 191–198.

**SECT. 15.—COURT PERCENTAGE.**

*See Lunacy Act, 1890 (c. 5), s. 148; Lunacy Act, 1891 (c. 65), s. 27 (3), Lunacy Rules, 1892, r. 126.*

**1418. Lunatic so found—Property in Ireland—Percentage paid in Ireland—No further percentage payable on transmission of income to England.]—**Where the property of a lunatic, so found in England, is situate in Ireland, a percentage for administration is payable in Ireland on the whole income; & no further percentage is payable in England on income remitted to the English committee of the estate for maintenance of the lunatic.—*Re GREHAN*, [1895] 2 Ch. 12; 64 L. J. Ch. 505; 72 L. T. 383; 59 J. P. 325; 43 W. R. 433; 39 Sol. Jo. 362; 12 R. 210, L. C. & L. JJ.

**1419. — “Clear annual income” — No deduction for legal costs of management.]—***Re WELD*, No. 826, *ante*.

**SECT. 16.—CHAMPERTOUS AGREEMENT.**

**1420. Agreement to convey lunatic's estates—When inherited.]—***PERSSE v. PERSSE*, No. 1583, *post*.

## Part XI.—Actions.

**SECT. 1.—PARTIES.**

**SUB-SECT. 1.—BY AND AGAINST LUNATICS SO FOUND.**

**A. The Committee.**

*See R. S. C., Ord. 16, r. 17.*

**1421. Committee joint party with lunatic.]—***FULLER v. LANCE* (1863), 1 Cas. in Ch. 18; 22 E. R. 672.

*Annotations*:—*Consd. Farnham v. Milward*, [1895] 2 Ch. 730. *Refd. Re Townshend's Settltmt., Townshend v. Robins*, [1908] 1 Ch. 201.

**1422. —.]—***Re WHITAKER*, No. 1035, *ante*.

**1423. —.]—**Where an action has been brought by the committee of a lunatic, & the lunatic is subsequently adjudicated bkpt., the right of action vests in his trustee in bkpcy.; & if the trustee declines to prosecute the action he cannot be added as a deft. against his will. Where he has been so added, he is entitled to have the action stayed as against him.

Where a lunatic sues by a committee the proper practice is that the committee should be added as a co-pltf. (*STIRLING, J.*).—*FARNHAM v. MILWARD & Co.*, [1895] 2 Ch. 730; 64 L. J. Ch. 816; 73 L. T. 434; 44 W. R. 135; 13 R. 810.

*Annotations*:—*Follid. Re Townshend's Settltmt., Townshend v. Robins*, [1908] 1 Ch. 201. *Refd. Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

**PART XI. SECT. 1, SUB-SECT. 1.—A.**

**q. Lunatic defendant in county court action.]—**A lunatic so found may

be sued in the county ct. without appointing a guardian *ad litem* or joining his committee.—*KELLY v. WATTERSON & HANNA* (1913), 47

L. L. T. 223.—*IR.*

**r. Action against committee — Respecting discharge of official duties—Consent of court necessary.]—**

**1424. —.]—***Re TOWNSHEND'S (LORD) SETTLEMENT, TOWNSHEND (LORD) v. ROBINS*, No. 694, *ante*.

**1425. —.]—**In the case of a lunatic the committee & lunatic are both made parties, but this is not so where a person of unsound mind sues by a next friend, & the next friend is not a party to the action (*EVE, J.*).—*PINK v. SHARWOOD (J. A.) & Co., LTD.*, [1913] 2 Ch. 286; 82 L. J. Ch. 542; 108 L. T. 1017.

*Annotation*:—*Mentd. Paspati v. Paspati*, [1914] P. 110.

**1426. Sanction of court — Before proceedings undertaken.]—***Re NOTLEY*, No. 869, *ante*.

**1427. —.]—***WILKINSON v. WILKINSON*, No. 145, *ante*.

**1428. — Jurisdiction of Master in Lunacy.]—**Under Lunacy Act, 1891 (c. 65), s. 27 (1) a Master in Lunacy has jurisdiction to authorise the committee of a lunatic to bring an action in the name of the lunatic, in respect of an alleged breach of trust by the trustees of a will under which the lunatic is a beneficiary, without any confirmation of his order by the judge in Lunacy.—*Re HINCHLIFFE* (1895), 73 L. T. 522; 40 Sol. Jo. 82, L. JJ.

**1429. Lunatic defendant to probate action—Appointment of committee unconfirmed—Stay of proceedings pending confirmation—Committee party**

to suit in other capacity.]—The ct. will not, when a competent party is opposing a will, stay the admission of the exors. allegation propounding such will, till the appointment of a committee of a lunatic next of kin be confirmed, more especially such committee being already a party to the suit as curator of the other next of kin.—*TYRELL v. JENNER* (1828), 2 Hag. Ecc. 72.

**1430. Lunatic & committee residing abroad—Cause of action in England—Registration of commission in England.]**—It is not the practice of the ct. to appoint a person resident abroad to be guardian *ad litem*.

A. was found lunatic in Ireland, & B. was appointed his committee there. A. being a deft. to a suit in England, an application was made that B. might be appointed guardian *ad litem*:—*Held*: the proper course was to get the Irish commission recorded in England, under Infants Property Act, 1830 (c. 65), s. 41, & then for the lunatic & committee to answer together.—*HARTLAND (LADY) v. ATCHERLEY* (1844), 7 Beav. 53; 13 L. J. Ch. 122; 49 E. R. 982.

**1431. Death of lunatic—Cessation of interest of committee—Power of administrator of lunatic to continue action.]**—*HARLAND v. GARBUTT*, [1881] W. N. 8.

**1432. Bankruptcy of lunatic—After action brought by committee—Right of action vests in trustee.]**—*FARNHAM v. MILWARD & Co.*, No. 1423, *ante*.

**Costs—Application for prospective order—Court will not entertain—***See* No. 1608, *post*.

—*See, generally*, Part XII., *post*.

**Substitution of other committee or party.]**—*See* Sub-sect. 1, B, *post*.

#### B. Substitution of Other Committee or Party.

**1433. Appointment of guardian—Lunatic defendant—Committee a plaintiff.]**—*SNELL v. HYAT* (1756), 1 Dick. 287; 21 E. R. 279.

**1434. Substitution of new committee—Lunatic defendant—Committee also defendant—Refusal to act.]**—*LLOYD v. —* (1772), 2 Dick. 460; 21 E. R. 348.

**1435. ———.]**—In a suit to which a lunatic & his committee were defts., the ct. declined, before decree, to make an order, on motion, substituting a new committee as a deft.—*RUDD v. SPEARE* (1849), 3 De G. & Sm. 374; 64 E. R. 522.

**1436. ——— In future proceedings—Death of original committee after decree.]**—After a decree in a suit, in which a lunatic & his committee were defts., the committee died, & a new one was appointed. Ordered, upon motion, that the new committee should be named as such in all future proceedings in the cause.—*LYON v. MERCER* (1823), 1 Sim. & St. 356; 57 E. R. 143.

*Annotation*:—*Folld. Bryan v. Twigg* (1854), 3 Eq. Rep. 62.

**1437. ———.]**—After a decree in a suit in which a lunatic & his committee were defts., the committee died & a new one was appointed. Ordered upon motion that the name of the new committee should be substituted for deceased in all future proceedings in this case.—

*BRYAN v. TWIGG* (1854), 3 Eq. Rep. 62; 24 L. T. O. S. 87; 3 W. R. 42.

**1438. ——— After change of committee.]**—Two of defts. in a suit were lunatics, & the same three persons had been appointed the committee of each of the lunatics. Three other gentlemen were afterwards appointed the committee of one of the lunatics, & two other gentlemen were appointed the committee of the other. It was ordered, upon motion, that the names of the new committee respectively might be substituted in future proceedings for the names of the former committees.—*SAUMAREZ v. SAUMAREZ* (1840), 9 L. J. Ch. 317.

#### SUB-SECT. 2.—BY AND AGAINST LUNATICS NOT SO FOUND.

##### A. Next Friend.

*See* R. S. C., Ord. 16, r. 17.

**1439. Right of next friend to act—General rule.]**—*BEALL v. SMITH*, No. 485, *ante*.

**1440. ———.]**—*DIDISHEIM v. LONDON & WESTMINSTER BANK*, No. 1066, *ante*.

**1441. ——— For protection of lunatics' property.]**—Jurisdiction of the ct. to entertain a suit instituted in the name of a person of weak mind by a next friend.

Decree made in such a suit for the protection of pltf.'s property, & liberty given to apply in Lunacy as to its application.—*LIGHT v. LIGHT* (1858), 25 Beav. 248; 53 E. R. 631.

*Annotations*:—*Folld. Jones v. Lloyd* (1874), L. R. 18 Eq. 265. *Refd. Vane v. Vane* (1876), 34 L. T. 613; *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666.

**1442. ——— Dissolution of partnership.]**—*JONES v. LLOYD*, No. 1119, *ante*.

**1443. ——— Without sanction of Court in Lunacy.]**—*DIDISHEIM v. LONDON & WESTMINSTER BANK*, No. 1066, *ante*.

**1444. ——— Matters affecting real property.]**—*HALFHIDE v. ROBINSON*, No. 1152, *ante*.

**1445. ———.]**—Under Partition Act, 1876, (c. 17), s. 6 a person of unsound mind not so found by inquisition may, by his next friend, be pltf. in an action instituted for the purpose of obtaining a sale.—*WATT v. LEACH* (1878), 26 W. R. 475.

*Annotation*:—*Consd. Porter v. Porter* (1888), 58 L. T. 688.

**1446. ——— Partition.]**—A partition action may be brought by a person of unsound mind, not so found, by a next friend. Where, therefore, an action for sale under Partition Acts was brought by two tenants in common, one of whom, being stated to be of weak mind, sued by the other as his next friend, the ct. being of opinion that an action in this form being *prima facie* for his benefit could be maintained, refused to strike out his name as co-pltf.; but intimated an opinion that, at the trial, his request for sale by his next friend, assuming that the next friend could effectually make a request, could not be acted upon in the same way as a request by a person not under disability, without the ct. being satisfied that the sale would be for his benefit.—*PORTER v. PORTER*

*v. OULTON* (1878), 18 N. B. R. (2 P. & B.) 343.—CAN.

#### PART XI. SECT. 1, SUB-SECT. 2.—A.

**1439 i. Right of next friend to act—General rule.]**—A lunatic may sue through his next friend even though not adjudged a lunatic under any law.

—*RASIK LAL DUTT v. BIDHU MUKHI DAS* (1906), I. L. R. 33 Calc. 1094; 10 C. W. N. 719.—IND.

**1441 i. ——— For protection of lunatic's property.]**—An action was brought in the name of pltf., a lunatic not so found, confined in a public asylum, by

his wife as next friend, to set aside a conveyance of land made by him as improvident, etc.:—*Held*: the action being for the protection of the lunatic's property, not for the disposal of it, was properly brought by a next friend.—*MASTIN v. MASTIN* (1893), 15 P. R. 177.—CAN.



**Sect. 1.—Parties: Sub-sect. 2, A. & B. (a), & (c).]**

(1888), 37 Ch. D. 420; 58 L. T. 688; 36 W. R. 580, C. A.

**Annotations:—***Refd.* *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666.

**1447. ———.]—(1)** An action for the recovery of land may be brought, under R. S. C. 1883, Ord. 16, r. 17, by the next friend of a person of unsound mind not so found by inquisition & a writ issued in such an action by the next friend, in the name of the person of unsound mind, is regular.

(2) Where the ct. is of opinion on the facts of the case that such action is not a beneficial one to the lunatic pltf., it will be stayed by the ct. on that ground.—*WATERHOUSE v. WORSNOP* (1888), 59 L. T. 140.

**Annotation:—***As to (2)* *Refd.* *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

**1448. ——— Only if beneficial to lunatic.]—***PORTER v. PORTER*, No. 1446, *ante*.

**1449. ———.]—***NEW YORK SECURITY & TRUST CO. v. KEYSER*, No. 1032, *ante*.

**Stay of proceedings if not beneficial.]**

*See Sect. 4, post.*

**1450. Liability of next friend—For improper interference—Costs of proceedings.]—***M.* filed a bill as next friend of *P.*, whom he alleged to be of unsound mind. An application in lunacy was directed, & *P.*'s sanity was established. *P.* thereupon applied to have the bill taken off the file, which was ordered, but without any directions as to costs. *P.* moved the Ct. of Appeal to vary this order by directing the next friend to pay his costs as between solr. & client, & deft. moved to vary it by inserting a direction for the next friend to pay her costs:—*Held*: *P.* was entitled to indemnity against all consequences of the suit having been instituted in his name, & *M.* must pay *P.*'s costs as between solr. & client of the application to the ct. below, & of *P.*'s appeal motion, & must pay deft.'s costs of the suit as between party & party, including the costs of motions in the ct. below & on appeal.—*PALMER v. WALESBY* (1868), 3 Ch. App. 732; 37 L. J. Ch. 612; 19 L. T. 1; 16 W. R. 924, L. JJ.

**Annotations:—***Refd.* *Nurse v. Durnford* (1879), 13 Ch. D. 764; *Andrews v. Barnes* (1888), 39 Ch. D. 133.

**—— To justify interference.]—***BEALL v. SMITH*, No. 485, *ante*.

**—— To make discovery of documents.]—***See DISCOVERY*, Vol. XVIII., pp. 61, 62, Nos. 182, 183.

**1452. Next friend not a party.]—***PINK v. SHARWOOD (J. A.) & Co., LTD.*, No. 1425, *ante*.

**1453. Who may be next friend—Wife—Action for debts due to lunatic—Payment out of money in court.]—**The wife of a lunatic who has no committee has a sufficient implied authority to sue in the name of the lunatic for debts due to him.—*ROCK v. SLADE* (1838), 7 Dowl. 22; 2 Jur. 993.

**1448 i. ——— Only if beneficial to lunatic.]—***PRANSUKHRAM DINANATH v. BAI LADKOR* (1898), 1 L. R. 23 Bom. 53.—*IND.*

**t. Jurisdiction of court to appoint—When exercised.]—***PALMER v. M'NAMEE* (1910), 44 L. L. T. 112.—*IR.*

**a. Action by next friend—Lunatic replaced.]—**Where a person of unsound mind sues by a next friend, the usual *præcipe* order that pltf. do produce is proper & is sufficiently obeyed by the affidavit of the next

friend.—*TRAVISS v. BELL* (1881), 8 P. R. 550.—*CAN.*

**b. Whether security required—Particulars.]—**The next friend of an idiot is not required to establish his solvency or give security. Where, however, in the bill, the description & residence of the next friend were not given, the secretary ordered an amendment to be made within a week giving the residence & description, or deft. to be entitled to security.—*SHARP v. SHARP* (circa 1865), 2 Ch. Ch. 244.—*CAN.*

**1454. ———.]—**An action having been brought by the wife of a lunatic, not so declared by commission, in his name, for the recovery of a debt, deft. paid the money into ct. The ct. made absolute a rule for payment of the money out to the wife.—*GLEDDON v.* (1860), 9 C. B. N. S. 367; 142 E. R. nom. *GLIDDON v. TREBLE*, 30 L. J. C. P. 160.

**Annotation:—***Refd.* *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

**Foreign curator or administrateur provisoire—Domiciled & resident to give security for costs.]—***DIDISHEIM v. LONDON & WESTMINSTER BANK*, No. 1066, *ante*.

**Power to sign liquidation petition.]—***See BANKRUPTCY*, Vol. IV., p. 30, No. 248.

### *B. Guardians ad litem.*

#### *(a) Who May be Appointed.*

*See* R. S. C., 1883, Ord. 16, r. 17; Ord. 55, r. 27.

**1456. Who may be appointed—Person abroad.]—***HARTLAND (LADY) v. ATCHERLEY*, No. 1430, *ante*.

**1457. ——— Solicitor—Official solicitor.]—**The solr. of the suitor's fund appointed, under Ord. 28, of Oct. 26, 1842, guardian *ad litem* of a lunatic deft. not so found by inquisition.—*M'KEVERAKIN v. CORT* (1844), 7 Beav. 347; 49 E. R. 1099.

**1458. ———.]—(1)** It is not absolutely necessary in the case of a deft., a lunatic, but not found so by inquisition, that the solr. to the suitors' fund should be appointed his guardian for the purpose of his appearing to & answering pltf's. bill, but any other solr. may be appointed his guardian who will undertake the duty of appearing to & answering the bill for the party.

(2) In the present case the solr. of the wife was appointed the guardian of the husband on the production of an affidavit showing that the husband had no interest adverse to the wife.—*BID-DULPH v. CAMOYS (LORD)* (1846), 9 Beav. 548; 7 L. T. O. S. 337; 50 E. R. 455; *sub nom.* *BID-DULPH v. DAYRELL*, 15 L. J. Ch. 320.

**Annotation:—***As to (1)* *Refd.* *Russell v. Walker* (1851), 1 L. T. O. S. 241.

**1459. ——— Relatives declining to act.]—**Deft. in a suit was a person of unsound mind, & his relations declined to act as guardians. An application that the solr. to the suitors' fund might be made guardian *ad litem*, granted.—*PALMER v. LONGLAND* (1853), 21 L. T. O. S. 180.

**1460. ———.]—***EADY v. ELSDON*, [1901] 2 K. B. 460; 70 L. J. K. B. 701; 84 L. T. 615; 49 W. R. 595; 45 Sol. Jo. 520, C. A.

**1461. ———.]—***GILL v. GILL*, No. 374, *ante*.

**1462. ——— Relatives refusing to act.]—**On an application to appoint a solr. guardian *ad litem*, to a deft. of unsound mind, not so found by inquisition, the ct. required to be first satisfied that no relative would undertake the defence.—*MOORE v. PLATEL* (1845), 7 Beav. 583; 49 E. R. 1192.

### **PART XI. SECT. 1, SUB-SECT. 2.—B. (a).**

**c. Who may be appointed—Relative of lunatic—Having no adverse interest.]—**It must also be shown that the proposed guardian has no interest conflicting with that of the lunatic.—*MCINTYRE v. KINGSLEY* (circa 1861), 1 Ch. Ch. 281.—*CAN.*

**d. ———.]—***Re BALL* (1828), 2 Mol. 145.—*IR.*

**e. ———.]—**Deft. being of unsound mind, though not so found

1463. — — — — —.]—BIDDULPH v. CAMOYS (ORD), No. 1458, ante.

1464. — — — — —.]—Where the sole surviving trustee of a fund had become imbecile, & a bill was filed by the parties interested in the fund, the ct. refused to appoint his nephew, who acted as the family solr., guardian *ad litem* for the purpose of putting in the answer of the trustee & removing an incumbrance by one of the cestuis *à trust* of which the trustee had had notice, though his only sister & nearest relative was also imbecile & paralytic.—PATRICK v. ANDREWS (1852), 22 L. J. Ch. 240; 20 L. T. O. S. 197; 1 R. 96.

1465. — — — — — Relative of lunatic—Co-defendant—Having no adverse interest.]—Where a deft. was a lunatic, not so found by inquisition, the ct. on the application of pltf. appointed his brother, who was a co-deft., but had no adverse interest, his guardian *ad litem*.—BONFIELD v. GRANT (1863), 11 W. R. 275.

1466. — — — — —.]—Where an aged deft. in a suit was imbecile, & incapable of attending to business, his son, a co-deft., but whose interest in the subject-matter of the suit was not adverse to that of his father, was appointed his guardian *ad litem*.—NEWMAN v. SELFE (1863), 8 L. T. 487; 11 W. R. 764.

(b) Appointment in Default of Appearance.

See R. S. C., Ord. 13, r. 1.

1467. Plaintiff obliged to apply for appointment—Former practice.]—When a writ of summons in an action has been served upon a deft. to the action, being a person of unsound mind not so found by inquisition, in manner provided in that behalf by Ord. 13, r. 1, & deft. does not appear, the action can proceed, at all events if deft. is only a formal party, under Ord. 13, r. 9, as if such party had appeared, & it is not imperative on pltf. to apply for the appointment of a guardian to such deft.—TAYLOR v. PEDE (1881), 44 L. T. 514; 29 W. R. 627.

Annotation:—Reid. Furnival v. Brooke (1883), 49 L. T. 134.

1468. — — — — — Judgment signed without application—Judgment set aside.]—Deft., who carried on business in the name of a firm apparently consisting of more than one person, was sued in her firm name; the writ was served at her place of business upon the manager according to Ord. 9, r. 6a; & judgment signed in default of appearance. At the time of the service of the writ she was of unsound mind & confined in an asylum but this was unknown to pltf.:—Held: the judgment must be set aside, as the writ ought to have & had not been served under Ord. 13, r. 1.

Where deft. is in a lunatic asylum the proper service would be on the keeper of the asylum (GROVE, J.).—FORE STREET WAREHOUSE CO. v. DURRANT & CO. (1883), 10 Q. B. D. 471; 52 J. Q. B. 287; 48 L. T. 531; 31 W. R. 765, C.

—LEAVER v. TORRES (1899), 43 Sol. Jo. 778.

1470. To what proceedings rule applicable—

by inquisition, the ct. appointed his son guardian *ad litem*, upon an affidavit that there was no conflict of interest between the father & son.—N v. BILLING (1872), 6 I. R. Eq. IR.

PART XI. SECT. 1, SUB-SECT. 2.—  
B. (c).

Proof that person not found lunatic by inquisition—Necessity for.]—In

moving to have a guardian *ad litem* appointed to a person of unsound mind, it must be shown that he has not been so found by inquisition.—CRAWFORD v. BIRDSALL (circa 1855), 1 Ch. Ch. 70.—CAN.

g. Clear proof of lunacy required—Person not found by inquisition.]—WATSON v. KNILANS (1874), 22 W. R. 639.—IR.

h. — — — Affidavit of party to suit.]

Originating summons.]—The procedure for the appointment of a guardian *ad litem* of a lunatic deft. not so found by inquisition, provided by Ord. 13, r. 1, is applicable to proceedings commenced by an originating summons.—Re PEPPER, PEPPER v. PEPPER (1884), 53 L. J. Ch. 1055; 50 L. T. 580; 32 W. R. 765.

1471. — — — Lunatic respondent in divorce petition—Petitioner suing in form *pauperis*.]—Where a resp., in a suit for dissolution of marriage is a person of unsound mind not so found by inquisition, it is incumbent upon petitioner, even though suing in form *pauperis* to apply for an order that some proper person be assigned guardian of resp.—GILES v. GILES, [1900] P. 17; 69 L. J. P. 26; 81 L. T. 823; 48 W. R. 288.

Annotations:—Reid. Paspatti v. Paspatti, [1914] P. 110. Mentd. Bullus v. Bullus (1910), 102 L. T. 399; De Gasquet James v. Borwin (Duke of Mecklenburg-Schwerin) (1914), 30 T. L. R. 329; Myers v. Myers, Carpendale, Radford & Thom, [1918] P. 260; B. v. B., [1924] P. 176.

(c) Other Cases.

See R. S. C., Ord. 16, r. 17; Ord. 55, r. 27.

1472. Infant of unsound mind—Appointment by Court of Chancery.]—A guardian to an infant deft. of unsound mind, not so found by inquisition, should be appointed by the Ct. of Ch., & not under the jurisdiction in Lunacy.—PIDCOCK v. BOULTBEE (1852), 2 De G. M. & G. 898; 22 L. J. Ch. 611; 20 L. T. O. S. 267; 42 E. R. 1123; sub nom. PIDDOCKE v. BOULTBEE, 1 W. R. 101, L. JJ.

1473. How appointment obtained—Motion ex parte—Supported by affidavit of fitness.]—In a suit commenced by summons, for the administration of the estate of an intestate, against the administratrix & her husband, the husband became lunatic, though not so found by inquisition, & the ct., on motion *ex p.*, supported by affidavit of fitness, appointed a guardian *ad litem*.—Re OSBALDISTON'S ESTATE, OSBALDISTON v. CROWTHER (1853), 1 Sm. & G. App. xii; 20 L. T. O. S. 322; 1 W. R. 255; 67 E. R. 1323.

1474. — — — Reference in chambers—Evidence of service—Nature of claim explained to lunatic.]—Where a deft. is of unsound mind & confined in an asylum, evidence that she was made aware, on the service of the claim upon her, of the general nature of the claim, is sufficient to authorise the ct. to make a reference into chambers to appoint a guardian.—ELLISTON v. SHIELDRAKE, CATT v. ELLISTON (1860), 2 L. T. 48.

1475. Power of guardian—To answer on behalf of lunatic.]—Pltf. cannot except for insufficiency to the answer of a deft. of unsound mind, against, whom a commission of lunacy has not issued, answering by his guardian.—MICKLETHWAITE v. ATKINSON (1844), 1 Coll. 173; 3 L. T. O. S. 72; 63 E. R. 371.

Annotation:—Expld. Stanton v. Percival (1855), 5 H. L. Cas. 257.

1476. — — — Consent under Leases & Sale of Settled Estates Acts.]—Consent to an application under 19 & 20 Vict. c. 120, s. 36 may be given on behalf of a person of unsound mind not so found by inquisition, by a guardian appointed by the

—MAULEVERER v. WARREN (1836), 3 Jo. Ex. Ir. 47.—IR.

k. Plaintiff becoming lunatic between action & appeal—Guardian for purposes of appeal—Appeal adjourned for appointment.]—MOLONEY v. LOOBY, [1915] 2 I. R. 116.—IR.

l. Necessity for appointment of guardian—Money in court for lunatic—Request for payment out by asylum



**Sect. 1.—Parties: Sub-sect. 2, B. (c); sub-sect. 3. Sect. 2: Sub-sects. 1 & 2.]**

ct. for the purpose.—*Re* VENNER'S SETTLED ESTATES (1868), L. R. 6 Eq. 249; 16 W. R. 1033.

**Annotation:—N.F.** *Re* Clough's Estate (1873), L. R. 15 Eq. 284.

**1477. ——— Sale—Objection by purchaser.]**

—On a petition presented under 19 & 20 Vict. c. 120, s. 36 an order was made for the sale of an estate to which A., a person of unsound mind, but not so found by inquisition, was entitled for life in remainder. A's brother had been previously appointed, under sect. 35 of the Act, the guardian of A. & of certain infants, for the purpose of consenting on their behalves to the application, & he was to be at liberty on behalf of the infants to consent. The order for the sale was made upon hearing counsel for A. by his guardian, & the guardian by his counsel consenting. The purchaser objected to the title on the ground that only a committee properly appointed could consent on behalf of A.:—*Held*: the objection was well founded; & a summons taken out by the vendors to compel the payment of the balance of the purchase-money, interest, & the costs, dismissed.—*Re* CLOUGH'S ESTATE (1873), L. R. 15 Eq. 284; 42 L. J. Ch. 393; 28 L. T. 261; 21 W. R. 452, L. J.J.; *subsequent proceedings* (1875), 32 L. T. 194.

**Annotation:—Reid.** *Re* Crabtree's S. E. (1875), 23 W. R. 761.

See, now, Settled Land Act, 1925 (c. 18).

**1478. ——— Consent to evidence by affidavit—Without sanction of court.]—**PIGGOTT v. TOOGOOD (1904), 48 Sol. Jo. 573.

**1479. Lunatic respondent to petition.]—**A guardian *ad litem* appointed to a person of unsound mind but not found lunatic by inquisition, who was resp. to a petition presented under statutory

*Re* GREAVES, *Re* GREAT NORTHERN RY. CO., 23 L. T. O. S. 53; 2 W. R. 355, L. C. & L. J.

**1480. Unsoundness of mind in dispute—Appointment irregular—Appointment made discharged.]—**Pltf. & his sister had given a mtge. to M., a solr., & the bill was filed against M. & the sister to have accounts taken of what was

of unsound mind, though not found so by inquisition. Pltf.'s solr. did not serve the bill on the sister, but by pltf.'s instructions, assumed to act for her entered

the appointment of a guardian *ad litem*. The appearance & the appointment of a guardian were discharged by the Vice-Chancellor, on evidence that the sister had sufficient capacity to authorise a solr. to act for her, & that she had authorised M. so to act:—*Held*: whether the capacity of the sister was proved or not the order of the Vice-Chancellor was right, for the appearance & the appointment of a guardian founded on it were irregular.—CAMPBELL v. MARSHALL (1873), 8 Ch. App. 462, L. C. & L. J.

**1481. ——— Divorce & Matrimonial Rules, r. 196.]—**An order ought not to be made under

*superintendent.*—KERR v. STEWART (1909), 43 I. L. T. 119.—IR.

The ct. will at the instance of pltf. appoint a guardian *ad litem* to a lunatic deft. out of the jurisdiction; but if necessary will direct a reference to ascertain the

*notice of appointment of guardian & ratification by guardian.*—DAVIS v. REYNOLDS (1909), 11 W. L. R. 288.—CAN.

*o. Notice of appointment of guardian—Necessity for.*—WARNOCK v. PRIEUR

above rule, assigning a guardian *ad litem* to a person alleged to be of unsound mind, where there is a substantial & *bona fide* dispute as to the unsoundness of mind of the person to whom it is proposed to assign the guardian. *Qu.*: whether above rule applies where the person has not been found lunatic by inquisition.—FRY v. FRY (1890)

FRY, 59 L. J. P. 43; 38 W. R. 615, C. A.

**Annotation:—Consd.** Howell v. Lewis (1891), 61 L. J. Ch. 89.

**1482. Appointment at instance of co-defendant—Analogy to R. S. C., Ord. 13, r. 1.]—**A guardian *ad litem* to deft. may, under circumstances rendering it necessary, be appointed at the instance of a co-deft. by analogy to above rule.—*Re* DAWSON, JOHNSTON v. HILL (1880), 41 Ch. D. 115, 58 L. J. Ch. 734; 37 W. R. 733.

**1483. Appointment after service of judgment—Fact of lunacy concealed during proceedings.]—**CUTBUSH v. CUTBUSH (1893), 37 Sol. Jo. 685.

**1484. Death of guardian—Appointment of new guardian—Special application.]—**Where a guardian *ad litem* of a person of unsound mind, though not so found by inquisition dies, a special application is necessary to obtain the appointment of a new guardian, & an appointment by an order of course is irregular.—*Re* SMITH (1843), 4 Beav.

**1485. Discharge of guardian—Recovery of lunatic.]—**BLYTH v. GREEN, [1876] W. N. 214.

**Annotation:—Reid.** Dunn v. R. (1900), 44 Sol. Jo. 731.

**1486. ——— Application by motion.]—**DUNN v. R. (1900), 44 Sol. Jo. 731.

#### SUB-SECT. 3.—FOREIGN CURATOR OR TUTEUR.

receive property -- appointed in Scotland to a person found lunatic there, can recover & give a good discharge for personal property of the lunatic in this country.—SCOTT v. BENTLEY (1855), 1 K. & J. 281; 3 Eq. Rep. 428; 24 L. J. Ch. 244; 25 L. T. O. S. 114; 1 Jur. N. S. 394; 3 W. R. 280; 69 E. R. 464.

**Annotations:—Consd.** *Re* Garnier (1872), L. R. 13 Eq. 532. *Expld.* *Re* Barlow's Will (1887), 36 Ch. D. 227. *Re* Brown, *London & Westminster Bank*, [1900] 2 Ch. 15. *Consd.* *Thiery v. Chalmers, Guthrie*, [1900] 1 Ch. 80. *Reid.* *Mackie v. Darling* (1871), 19 W. R. 796; *New York Security & Trust Co. v. Keyser*, [1901] 1 Ch. 666.

**1488. ——— lunatic & No. 1276,**

*ante.*

**1489. ——— No locus standi against English committee—Bankruptcy proceedings—Rescission of receiving order.]—***Re* AYTOUN, *Ex p.* ROBERTSON DUNHAM (1901), 36 L. Jo. 407.

**1490. ———.]—***Re* R. S. A., No. 870, *ante.*

**1491. Administrateur provisoire or tuteur—Recovery of property of lunatic—Application in own name—Without joining lunatic.]—**THIERY v. CHALMERS, GUTHRIE & CO., No. 1278, *ante.*

**1492. ———.]—**DIDISHEIM v. LONDON & WESTMINSTER BANK, No. 1066, *ante.*

(1887), 12 P. R. 264.—CAN.

#### PART XI. SECT. 1, SUB-SECT. 3.

*p. Curator bonis — Right to compromise claim.*—SCOTT v. CRAIG'S REPRESENTATIVES (1897), 24 R. (Ct. of Sess.) 402; 34 So. L. R. 304; 4 S. L. T. 264.—SCOT.

*q. ———.]—*The ct. recognised the

1493. ———.]—*PÉLÉGRIN v. COUTTS & Co., v. MESSEL (L.) & Co., No. 1851, post.*  
 Right to act as next friend.]—*See No. 1066, ante.*

## SECT. 2.—SERVICE ON LUNATIC DEFENDANT.

### SUB-SECT. 1.—IN GENERAL.

*See R. S. C., Ord. 9, r. 5.*

1494. Lunatic personally—Ejectment.]—Service of a declaration in ejectment upon a lunatic in an asylum was held to be sufficient.

After several unsuccessful attempts to effect personal service, a declaration in ejectment was left with the tenant's daughter on May 21, the day before the term. A letter from the tenant's attorney, dated May 24, was received on May 25, by the attorneys of the lessor of pltf., stating that the tenant had put the declaration into his hands:—*Held*: sufficient to raise a presumption that the declaration reached the tenant on May 21 & the service was sufficient.—*DOE d. GIBBARD v. ROE* (1841), 9 Dowl. 844; 3 Man. & G. 87; 3 Scott, N. R. 363; 133 E. R. 1068.

1495. ——— Subpœna.]—Deft., who is of unsound mind, but not found so by inquisition, may, together with his wife, a co-deft., both of whom are residing out of the jurisdiction, be served, by order of the ct., with subpœna to appear & answer the bill.—*BIDDULPH v. CAMOYS (LORD)* (1846), 7 Beav. 580; 15 L. J. Ch. 141; 6 L. T. O. S. 429; 10 Jur. 485; 49 E. R. 1191.

*Annotations*:—*Reid. Elliston v. Sheldrake, Catt v. Elliston* (1860), 2 L. T. 48. *Mentd. Chaffers v. Baker* (1855), 3 Eq. Rep. 639.

1496. Notice under Leases & Sale of Settled Estates Acts—Interest in property remote.]—The service of notice of an intended application under 19 & 20 Vict. c. 120, on a person of unsound mind, not so found by inquisition, who had only a remote contingent interest in the property, was dispensed with, there being others in the same interest who concurred.—*Re FRANKLIN'S SETTLED ESTATE* (1858), 7 W. R. 45.

1497. ———.]—*Re CRABTREE'S SETTLED ESTATES*, No. 1507, *post*.

*See, now, Settled Land Act, 1925 (c. 18).*

1498. ——— Service in presence of medical attendant.]—*MORGAN v. JONES*, No. 1515, *post*.

1499. ———.]—*In the Goods of SURTEES*, No. 1501, *post*.

1500. Committee—Ejectment.]—*ANON.* (1774), Lofft, 401; 98 E. R. 715.

1501. ——— Citation.]—Where a person whom it is necessary to cite as interested in the estate of deceased is a lunatic, & a committee of his estate has been appointed, service of the citation upon such committee is sufficient. It is not necessary that the lunatic should be personally served in the presence of some medical man.—*In the Goods of SURTEES* (1859), 28 L. J. P. & M. 89.

1502. ———.]—When a party upon whom a citation is to be served is a lunatic, the citation should be issued in the usual form, & served upon the committee, or if there is no committee, upon the next of kin of the lunatic, or some other person on his behalf, & the affidavit of service should state the fact of the lunacy, & the manner in which the service has been effected.—*MOSELEY v. BURNS* (1860), 25 J. P. 24.

1503. Servant of lunatic—Ejectment.]—*ANON.* (1774), Lofft, 401; 98 E. R. 715.

1504. Relation of lunatic—Ejectment.]—Judgment cannot be signed against the casual ejector in respect of a service on the daughter carrying on the business of the tenant in possession who is a lunatic & confined away from the premises.—*DOE d. BROWN v. ROE* (1838), 6 Dowl. 270; 1 Will. Woll. & H. 86; 2 Jur. 468.

1505. ——— Citation.]—*MOSELEY v. BURNS*, No. 1502, *ante*.

1506. Wife of lunatic.]—*DOE d. — v. ROE*, No. 1512, *post*.

1507. Person having care of lunatic—Notice under Leases & Sale of Settled Estates Acts.]—A person of unsound mind, not so found by inquisition, whose consent is required to a petition under 19 & 20 Vict. c. 120, may be served with a notice under 37 & 38 Vict. c. 33, s. 2. Such notice should be served on the person of unsound mind personally, & also on the person in whose care he is.—*Re CRABTREE'S SETTLED ESTATES* (1875), 10 Ch. App. 201; 44 L. J. Ch. 261; 32 L. T. 349; 23 W. R. 761, L. JJ.

1508. ——— In default of committee—Lunatic so found.]—In an action for specific performance of a contract, where one of the parties to the contract had become a lunatic so found by inquisition, but no committee had been appointed of her person or estate, the ct. directed service of the writ upon the keeper of the asylum at which she was residing, or upon the person with whom she was residing.—*THAN v. SMITH* (1879), 27 W. R. 617.

——— Keeper of asylum.]—*See Sub-sect. 2, post*.

1509. Lunatic's business manager.]—*FORE STREET WAREHOUSE CO. v. DURRANT & Co.*, No. 1468, *ante*.

1510. Guardian—Personal service on lunatic required.]—The sole extrix. & universal legatee of deceased testator was his widow. She was a lunatic, & a guardian had been appointed in the Ch. Div. to receive certain rents, etc., to which she was entitled. A creditor of deceased testator applied for a grant of administration with the will annexed, & served a citation on the guardian who refused to allow personal service on the lunatic:—*Held*: a grant might be made to the creditor under Court of Probate Act, 1857 (c. 77), s. 73, without requiring the lunatic to be personally served.—*In the Goods of ATHERTON*, [1892] P. 104; 61 L. J. P. 134; 66 L. T. 267.

## SUB-SECT. 2.—SERVICE ON KEEPER OR MEDICAL OFFICER OF ASYLUM.

*See R. S. C., Ord. 9, r. 5.*

1511. Validity of service.]—After service of a *distringas* on the keeper of a lunatic asylum, in which deft., a lunatic, was confined, such keeper refusing the person serving the writ permission to see deft., the ct. allowed an appearance to be entered for the lunatic on an affidavit of notice to the keeper of pltf.'s intention to enter such appearance.—*DODSON v. WARNE* (1842), 6 Jur. 1113.

1512. ———.]—(1) Service on the wife of a lunatic on the premises, the doctor having refused the party serving permission to see the lunatic himself, is sufficient for a rule absolute for judgment against the casual ejector.

appointment of appct. in England as curator to a lunatic.—*Ex p. TOMPKINS ESTATE* (1909), 19 C. T. R. 1068.—**S. AF.**

PART XI. SECT. 2, SUB-SECT. 1.  
 r. Lunatic personally — Necessity for.]—*SANDALL v. GODBOE* (1849), 6

N. B. R. (1 All.) 441.—**CAN.**  
 t. ——— Service in presence of asylum superintendent.]—*B. v. B.* (1875), 9 I. R. Eq. 551.—**IR.**



**SECT. 2.—Service on lunatic defendant: Sub-sect. 2.**  
**Sects. 3, 4, 5 & 6: Sub-sects. 1, 2, 3, 4 & 5.]**

(2) Where the tenant was a lunatic, & was not permitted by the keeper of the lunatic asylum to be seen, & the service of the declaration had been effected on his sister-in-law on the premises, & also on the keeper of the lunatic asylum, this ct. granted a rule *nisi* for judgment against the casual ejector.—*DOE d. — v. ROE* (1843), 1 L. T. O. S. 260; 7 Jur. 725.

**1513. —**—A judge at chambers having made an order directing an appearance to be entered for a lunatic deft., upon an affidavit of service of the writ of summons by leaving a copy with the keeper of an asylum in which the lunatic was confined, without a previous writ of *distringas*, the ct. set aside the order.—*BLAKE v. COOPER* (1851), 11 C. B. 680; 138 E. R. 642.

**1514. —**—**Personal service not detrimental to lunatic.]**—*— v. —* (1856), 2 Jur. N. S. 324.

**1515. —**—The ct. will not allow substituted service to be made upon the medical officer of the asylum where a lunatic deft. is confined. *Semble*: Such service is to be effected upon the lunatic himself in presence of the medical officer.—*MORGAN v. JONES* (1856), 26 L. T. O. S. 308; 4 W. R. 381.

**1516. —**—Deft. in an action being a lunatic, & in a lunatic asylum, the writ of summons was shown, & a copy delivered to the proprietor of the asylum, who informed the lunatic of the fact, & accepted service on his behalf. On an application to the ct. for leave to proceed, as if personal service had been effected, the ct. granted leave to proceed.—*KIMBERLEY v. ALLEYNE* (1863), 2 H. & C. 223; 2 New Rep. 247; 8 L. T. 398; 9 Jur. N. S. 650; 11 W. R. 757.

**1517. —**—Substituted service of copy of bill allowed on the medical officer of the asylum in which deft. of unsound mind, but not so found by inquisition, had been placed, on an affidavit that the medical officer refused to allow any person to see deft. or to serve him with legal papers.—*RAINE v. WILSON* (1873), L. R. 16 Eq. 576; 43 L. J. Ch. 469; 29 L. T. 51.

**1518. —**—*THAN v. SMITH*, No. 1508, *ante*.

**1519. —**—*FORE STREET WAREHOUSE CO. v. DURRANT & CO.*, No. 1468, *ante*.

**1520. —**—*ROBINSON v. GALLAND* (1889), 5 T. L. R. 504.

**1521. Refusal of keeper to allow service on lunatic—Or bring service to his notice—Attachment.]**—Where the keeper of an asylum refused to allow service of a writ of summons on a lunatic under his charge, or to bring it to his notice, the ct. granted a rule *nisi* for an attachment against him for obstructing the proceedings of the ct.—*DENISON v. HARDING* (1867), 15 W. R. 346.

**SECT. 3.—DISPUTE AS TO CAPACITY.**

**1522. Jurisdiction of Court to direct inquiry—Capacity of defendant.]**—When it is disputed whether deft. is, from infirmity of mind, incompetent to answer, it will be referred to the master to inquire as to the fact.—*LEE v. RYDER* (1822), 6 Madd. 294; 56 E. R. 1103.

*Annotation*:—*Consd. Howell v. Lewis* (1891), 61 L. J. Ch. 89.

**1523. —**—**Capacity of plaintiff.]**—*PALMER v. WALESBY*, No. 1450, *ante*.

**1524. —**—*—*—In an action by a person alleged to be of unsound mind, not so found, by his next friend, pltf. asserting his soundness of mind, & that the action was brought without his authority, & the evidence on the subject being conflicting, the ct. directed an inquiry whether pltf. was competent to instruct the solrs. to commence the proceedings.—*HOWELL v. LEWIS* (1891), 61 L. J. Ch. 89; 65 L. T. 672; 40 W. R. 88; 36 Sol. Jo. 61.

*Annotation*:—*Reid. Didlsheim v. London & Westminster Bank* (1900), 82 L. T. 738.

**1525. —**—The ct. has jurisdiction, on a proper case being made out, to direct an inquiry as to whether pltf. was, at the date of the writ, competent to retain a solr.—*POMERY v. POMERY* (1909), 53 Sol. Jo. 631.

**1526. Capacity cannot be raised by defence—Defence raising capacity struck out.]**—In an action brought by pltf. described as "of unsound mind not so found" by her next friend against a firm of solrs. for delivery up of certain deeds & documents of title which had been deposited with them by pltf. as her solrs., the statement of claim alleged that pltf. was & had for many years past been a person of unsound mind not so found. Defts. by their defence stated that they did not admit that, either at the time when the deeds & documents came into their possession or at any time since, pltf. was, or that she now was, a person of unsound mind; that they held the deeds & documents for her; & that she alleged that she was during the period in question, & still was of full mental capacity & soundness of mind. On an application by pltf. to strike out so much of the defence as did not admit the unsoundness of mind of pltf. & for judgment on the admissions in the defence:—*Held*: defts. by raising the issue as to the unsoundness of mind of pltf. were in effect denying the authority of pltf.'s solrs. to bring the action, & that was not an issue which it was competent to them to raise at the trial; so much of the defence as did not admit the unsoundness of mind of pltf. must be treated as irrelevant, & pltf. was entitled to an order for delivery up of the deeds & documents on the admissions in the defence.—*RICHMOND v. BRANSON & SON*, [1914] 1 Ch. 968; 83 L. J. Ch. 749; 110 L. T. 763; 58 Sol. Jo. 455.

*Annotations*:—*Mentd. Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co.*, [1915] 1 K. B. 893; *The Jupiter* (No. 2) (1925), 94 L. J. P. 59; *Russian Commercial & Industrial Bank v. Comptoir D'Escompte de Mulhouse*, [1925] A. C. 112.

**Appointment of guardian ad litem—Irregularity.]**—*See Nos. 1480, 1481, ante.*

**SECT. 4.—ACTION NOT BENEFICIAL TO LUNATIC.**

**1527. Action struck out.]**—The ct., upon the motion of deft. supported by affidavits suggesting that the bill had been filed without any authority from the person named as pltf., such person being so imbecile as to be unable to give any authority for the purpose, & that the suit was instituted for litigious purposes in the name of pltf., but by another deft. in the suit, referred it to the master to inquire whether any authority was given by pltf. for the filing of the bill, & whether the institution of suit was for his benefit, & whether it was for his advantage that the same should be prosecuted. On the master's reporting in the negative,

**XI. SECT. 3.**

**1523 i. Jurisdiction of court to direct inquiry—Capacity of plaintiff.]**—*HAMBLIN v. HAMBLIN* (1923), 53 O. L. R. 610.—*CAN*

& that the bill was filed under the authority of one of defts. the ct. ordered the bill to be taken off the file, & the costs of other defts. to be paid by deft. who had instituted the suit.—**BLAKE v. SMITH** (1832), You. 594; 159 E. R. 1128.

*Annotation*:—**Refd.** *Pomery v. Pomery* (1909), 53 Sol. Jo. 631.

**1528. Action stayed.**—**WATERHOUSE v. WORSNOP**, No. 1447, *ante*.

**1529. — Application by lunatic.**—**DIDISHEIM v. LONDON & WESTMINSTER BANK**, No. 1066, *ante*.

#### SECT. 5.—APPEARANCE AND DEFAULT OF APPEARANCE.

*See* R. S. C., Ord. 16, r. 17.

**The committee.**—*See* Sect. 1, sub-sect. 1, *ante*.

**The guardian ad litem.**—*See* Sect. 1, sub-sect. 2, B. (a), *ante*.

**— Appointment in default of appearance.**—*See* Sect. 1, sub-sect. 2, B. (b), *ante*.

#### SECT. 6.—PROCEEDINGS SUBSEQUENT TO APPEARANCE.

##### SUB-SECT. 1.—CHANGE IN CAPACITY SUBSEQUENT TO COMMENCEMENT OF PROCEEDINGS.

**1530. Incapacity supervening—Bail not discharged.**—The ct. will not discharge the bail on the ground of deft.'s having become a lunatic since the commencement of the action.—**IBBOTSON v. GALWAY (LORD)** (1795), 6 Term Rep. 133; 101 E. R. 474.

**1531. — Entry of judgment on warrant of attorney.**—It is no objection to entering up judgment on a warrant of attorney that deft., since the execution of it, had become insane.—**PIGGOT v. KILLICK** (1835), 1 Har. & W. 518.

**1532. — Whether proceedings stayed—If properly instituted.**—A bill may be taken off the file, if filed in the name of pltf. who is in a state of mental incapacity. *Semble*: a suit being properly instituted, the proceeding not to be stayed on the ground of pltf.'s subsequently becoming imbecile.—**WARTNABY v. WARTNABY** (1821), Jac. 377; 37 E. R. 893, L. C.

*Annotation*:—**Refd.** *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

**1533. — Pending report of Lunacy Commission.**—After decree, a Commission of lunacy issued against pltf., who, being a married woman, was suing by her next friend. The ct., on the application of her husband, deft., stayed the proceedings in the suit until the result of the proceedings under the Commission was known.—**HARTLEY v. GILBERT** (1843), 13 Sim. 596; 60 E. R. 232.

*Annotations*:—**Expld.** *Re Armstrong*, [1896] 1 Ch. 536. **Refd.** *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

**1534. — — — — —.**—*Re* **ARMSTRONG (GEORGE) & SONS**, No. 1663, *post*.

**1535. — Person of unsound mind subsequently found lunatic by inquisition—Continuance of action with sanction of Court in Lunacy—Proceedings without sanction irregular & void.**—**BEALL v. SMITH**, No. 485, *ante*.

**1536. — — — — — By committee.**—Where pltf., a person of unsound mind, not so found, suing by a next friend, becomes a lunatic during the progress of the action, & a committee is appointed, the committee may obtain an order, under R. S. C., Ord. 50, r. 4, for leave to continue the action.—*Re* **GREEN'S ESTATE**, **GREEN v. PRATT** (1879), 48 L. J. Ch. 681; 41 L. T. 30.

**1537. — Summons for leave to amend—Addition of next friend.**—Pltf. subsequently to the commencement of the action, became incapable from infirmity of transacting business. Defts. obtained orders that pltf. should make an affidavit of documents, & that defts. should be at liberty to administer interrogatories. Pltf.'s brother, who for many years had managed pltf.'s business affairs, made an affidavit of documents & answered the interrogatories. Defts. took out a summons under R. S. C., Ord. 31, r. 21, that the action might be dismissed with costs on the ground of non-compliance with the orders. Pltf.'s brother also took out a summons for leave to amend by adding himself as next friend, & that the two affidavits which he had made might be accepted as compliance with the said orders of the ct.:—*Held*: in the absence of evidence that the action was commenced without pltf.'s sanction, no order could be made on defts.' summons, & pltf.'s summons must be allowed; but as this was by way of indulgence to pltf., costs of both summonses to be paid by pltf.—**CARDWELL (LORD) v. TOMLINSON** (1885), 54 L. J. Ch. 957; 52 L. T. 746; 33 W. R. 814.

**1538. — Affidavit filed by party acting as next friend—Before permission of court obtained.**—**CARDWELL (LORD) v. TOMLINSON**, No. 1537, *ante*.

**1539. Recovery of sanity—Proceedings stayed—Till recovery verified.**—**HANCOCK v. PEATY**, No. 149, *ante*.

**1540. — Authority of next friend exhausted.**—**BEALL v. SMITH**, No. 485, *ante*.

**— Discharge of guardian.**—*See* Nos. 1485, 1486, *ante*.

##### SUB-SECT. 2.—ALLEGATION OF FACT IN PLEADING NOT TAKEN TO BE ADMITTED.

*See* R. S. C., Ord. 19, r. 13.

##### SUB-SECT. 3.—CONSENT AS TO MODE OF TAKING EVIDENCE.

*See* R. S. C., Ord. 17, r. 21, & No. 1478, *ante*.

##### SUB-SECT. 4.—COMPROMISE OF ACTION.

**1541. Power of court to sanction compromise—Stay of proceedings—Payment of money to next friend.**—*Re* **RYAN, RYAN v. RYAN**, [1911] W. N. 56.

##### SUB-SECT. 5.—DISCHARGE OF ORDER TO CARRY ON PROCEEDINGS.

*See* R. S. C., Ord. 17, rr. 6, 7.

#### PART XI. SECT. 6, SUB-SECT. 1.

**a. Insanity discerned during trial.**—Deft. whose sanity was unsuspected, his eccentric conduct at the trial,

caused a verdict for large damages to be returned against him:—*Held*: a ground from granting a new trial.—**TEAS v. KENNEDY** (1881), 2 N. S. W. L. R. (L.) 55.—**AUS.**

**b. Incapacity supervening — Intervention of official guardian.**—**WOLFF v. OGILVY, Re HAGAR** (1888), 12 P. R. 645.—**CAN.**



**Sect. 6.—Proceedings subsequent to appearance: Sub-sects. 6, 7, 8, 9 & 10. Sects. 7 & 8. Part XII. Sects. 1 & 2: Sub-sects. 1 & 2, A., B. & C.; sub-sects. 3 & 4, A. & B.]**

**SUB-SECT. 6.—DISCOVERY, INSPECTION AND INTERROGATORIES.**

See *DISCOVERY*, Vol. XVIII., pp. 61–63, 119, 188, Nos. 182–198, 686, 1378.

**SUB-SECT. 7.—EXECUTION.**

**1542. Stay of execution—Judgment against lunatic—Application by committee to Master—Leave to pay judgment debt.]—BURT v. BLACKBURN (1887), 3 T. L. R. 356, C. A.**

——.]—See, generally, *EXECUTION*, Vol. XXI., pp. 424 *et seq.*

**Charging orders.]—See EXECUTION, Vol. XXI., pp. 649, 650, Nos. 2279–2282.**

**SUB-SECT. 8.—INJUNCTION.**

See, generally, *INJUNCTION*, Vol. XXVIII., pp. 361 *et seq.*

**1543. Lunatic partner—Restraint of injury to business.]—J. v. S., No. 1138, ante.**

**SUB-SECT. 9.—MONEY OR DAMAGES RECOVERED BY LUNATIC.**

See *R. S. C.*, Ord. 22, r. 15.

**SUB-SECT. 10.—SETTING DOWN SPECIAL CASE.**

See *R. S. C.*, Ord. 34, rr. 4, 5.

**SECT. 7.—ACTIONS FOR ILLEGAL DETENTION OR ILLEGAL RESTRAINT.**

See Part XV., Sect. 3, *post*.

**SECT. 8.—COSTS.**

See Part XII., Sect. 12, *post*.

## Part XII.—Costs.

**SECT. 1.—DISCRETION OF COURT.**

See *Lunacy Act*, 1890 (c. 5), s. 109.

**1544. Discretion will not be fettered by rules.]—**A petition presented by a husband for an inquiry into the mental condition of his wife resulted in a finding that she was of sound mind & capable of managing herself & her affairs. Petitioner applied that the ct. should, in the discretion given to it by *Lunacy Act*, 1890 (c. 5), s. 109, direct his costs to be paid by resp. The costs were very large, & petitioner would have been almost ruined if obliged to pay his own costs. Resp. had considerable property. The ct. was of opinion that there were ample grounds for instituting an inquiry, & that petitioner had acted *bonâ fide* in the interests of his wife, but his conduct had been such as to excite great hostility in her, thereby probably causing extra expense:—*Held*: petitioner's costs must be taxed as between party & party, & two-thirds of the taxed amount must be paid out of a sum of £10,000, part of his wife's estate, in which he claimed an interest, but which claim he waived so far as was necessary for the payment of the costs.

The matter [of costs] being thus left to the discretion of the ct., I do not think it right to attempt to lay down any principles or rules by which the free exercise of its discretion may be fettered. I will content myself with enumerating & making a few observations on those matters which occur to me as essential for consideration. The points to be considered are: (a) the reasons for believing in the insanity of the alleged lunatic; (b) the

reasons for believing him to be not only insane, but also incapable of managing himself or his affairs; (c) the reasons for instituting any proceedings, assuming him to be insane & incapable of managing himself or his affairs; (d) the relation in which petitioner stands to the alleged lunatic, & the objects & conduct of petitioner. These matters must always be important; but, in addition to them, there may be others, & if there are, they also must be taken into account by the ct. before coming to a conclusion as to what ought to be done (*LINDLEY, L.J.*).—*Re CATHCART*, [1892] 1 Ch. 549; 61 L. J. Ch. 99; 66 L. T. 9; 40 W. R. 257; 8 T. L. R. 170; *on appeal*, [1893] 1 Ch. 466, C. A.

**1545. Reasons for belief in insanity.]—Re CATHCART, No. 1544, ante.**

**1546. — & also incapable of managing affairs.]—Re CATHCART, No. 1544, ante.**

**1547. Reasons for instituting proceedings.]—Re CATHCART, No. 1544, ante.**

**1548. Relation of petitioner to lunatic—Objects & conduct of proceedings.]—Re CATHCART, No. 1544, ante.**

**1549. Means of parties—Amount of costs.]—Re CATHCART, No. 1280, ante.**

**1550. Multiplicity of counsel engaged.]—Re CUMMING (1852), 1 De G. M. & G. 537; 21 L. J. Ch. 753; 19 L. T. O. S. 38; 16 Jur. 483; 42 E. R. 660, L. C. & L. JJ.**

*Annotations*:—*Mentd.* Blann v. Bell (1852), 2 De G. M. & G. 775; *Re* — (1854), 23 L. T. O. S. 123; *Re Cumming* (1854), 23 L. J. Ch. 261; *Re Gilchrist*, [1907] 1 Ch. 1.

**PART XI. SECT. 6, SUB-SECT. 7.**

**c. Setting aside execution — Judgment against lunatic.]—**In this case a judge refused to set aside the execution issued upon a *cognovit*, either upon the ground of insanity of debt., or of fraud on the part of pltf.—*PATERSON v. SQUIRES* (1850), 1 C. L. Ch. 234.—*CAN.*

**d. Judgment before lunatic declared — Priority not interfered with.]—**The common law right as to the priority

of an execution creditor of a lunatic who has an execution in the hands of a sheriff before the lunatic has been declared such, will not be interfered with by injunction restraining him from realising under his writ.—*Re GRANT* (1881), 28 Gr. 457.—*CAN.*

**e. Arrest in execution of decree — Discretionary power of court.]—BHA-NABHAI v. CHOTABHAI** (1897), 1 L. R. 22 Bom. 961.—*IND.*

**PART XI. SECT. 6, SUB-SECT. 9.**

**1. Bursar of asylum — Recovery of lunatic's money in court.]—**On an application by the bursar of the provincial lunatic asylum for moneys in ct. belonging to a lunatic party in a suit, in which his property had been sold:—*Held*: such application was not authorised by C. S. U. C., c. 71.—*MEIN v. MEIN* (1870), 3 Ch. Ch. 62.—*CAN.*

1. Death of lunatic during inquisition—Costs of inquisition—Proceedings taken bond *vide*.—*Re KAYE* (1897), 6 B. C. R. 61.—CA



**Sect. 2.—Out of lunatic's estate: Sub-sect. 4, B.; sub-sects. 5, 6 & 7. Sects. 3 & 4: Sub-sects. 1, 2, 3, 4 & 5. Sect. 5.]**

2 Eq. Rep. 19; 23 L. J. Ch. 233; 22 L. T. O. S. 298; 18 Jur. 114; 43 E. R. 720, L. JJ.

*Annotations:—Folld. Re Cumming* (1854), 18 Jur. 181. *Expld. Re E. G.*, [1914] 1 Ch. 927. *Refd. Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94.

**1570. —Death pending traverse of inquisition.]**—The costs of issuing a commission of lunacy, if for the lunatic's benefit & after the lunatic's death, may be proved against the lunatic's estate, notwithstanding the pendency of a traverse of the inquisition.—*Re CUMMING* (1854), 5 De G. M. & G. 30; 23 L. J. Ch. 261; 22 L. T. O. S. 312; 18 Jur. 181; 2 W. R. 248; 43 E. R. 780, L. JJ.

#### SUB-SECT. 5.—ORDER.

**1571. Order directing transfer of consols—Not a charging order.]—***Re CATHCART*, No. 1280, *ante*.

#### SUB-SECT. 6.—APPEAL.

**1572. Lies without leave—From Lord Justices to Court of Appeal.]—***Re CATHCART*, No. 1280, *ante*.

#### SUB-SECT. 7.—RECOVERY BY ACTION.

**1573. Effect of Lunacy Regulation Act, 1862 (c. 86), s. 11.]—***BROCKWELL v. BULLOCK*, No. 535,

now, Lunacy Act, 1890 (c. 5), s. 109.

### SECT. 3.—OF PETITION.

**1574. Opposition by nearest relatives.]—**The nearest relations of a supposed lunatic ordered to pay the costs occasioned by their opposition to a petition for a commission of lunacy, presented by strangers to the family.—*Re SMITH* (1826), 1 Russ. 348; 38 E. R. 135, L. C.

### SECT. 4.—OF INQUISITION.

#### SUB-SECT. 1.—COSTS OF ALLEGED LUNATIC.

**1575. Application made bonâ fide—No order as to costs.]—***Re WINDHAM*, No. 684, *ante*.  
**Costs of traverse.]—***See Sect. 5, post*.

#### SUB-SECT. 2.—COSTS OF PERSON WITH CONDUCT OF INQUIRY.

**1576. General rule—Costs allowed—In absence of special circumstances.]—**The wife of a gentleman alleged to be a lunatic, & who was separated from her, presented a petition praying an inquiry into the state of his mind. The petition being ordered to stand over, the husband in the meantime recovered:—*Held*: unless there were grave reasons against such a course, the costs of the petition must be paid by the alleged lunatic.—*Re F*—(1863), 2 De G. J. & Sm. 89; 33 L. J. Ch. 333; 9 L. T. 698; 46 E. R. 308; *sub nom.* ANON., 3 New Rep. 272, L. JJ.

*Annotation:—Refd. Re*—(1889), 5 T. L. R. 227.

**1577. All costs out of estate—Inquiry based upon report of Commissioners in Lunacy.]—**Where an inquiry as to the lunacy of a supposed lunatic had

been based upon the report of the Comrs. in Lunacy, & had resulted in his being declared of sound mind, the ct. ordered the costs of the proceedings in lunacy & of the inquiry to be paid out of the supposed lunatic's estate.—*Re C*—(1874), 10 Ch. App. 75; 23 W. R. 577, L. JJ.  
*Annotations:—Refd. Re Mearns* (1879), 48 L. J. Ch. 190; *Re Cathcart*, [1892] 1 Ch. 549.

**1578. Two-thirds of costs out of estate—Sufficient grounds for instituting inquiry—Conduct of petitioner causing extra cost.]—***Re CATHCART*, No. 1280, *ante*.

**1579. Inquiry instigated by petitioner's solicitor—No order made.]—**A petition was presented for an inquiry as to the state of mind of S. The medical visitor, by direction of the ct., saw her, & he made a report showing that the case was one for inquiry. She was, however, when the inquiry took place, found by a jury to be of sound mind. The ct. was satisfied, on the evidence before it, that petitioner had not presented the petition of his own accord, but that the proceedings originated with petitioner's solr., who induced petitioner to lend his name, & after the inquiry gave him an undertaking to indemnify him against costs:—*Held*: no costs ought to be given to petitioner, but, as the case was one calling for inquiry, he ought not to be ordered to pay costs.—*Re E. S*—(1876), 4 Ch. D. 301; 35 L. T. 828; *sub nom.* *Re S.*, 46 L. J. Ch. 233; 25 W. R. 133, L. JJ.

*Annotation:—Refd. Re Cathcart*, [1892] 1 Ch. 549.

**1580. No fair reason for inquiry.]—***Re*—(1889), 5 T. L. R. 227, L. JJ.

**1581. Petitioner ordered to pay costs—Inquiry kept back for years.]—**LUNATICK PETITIONS, No. 649, *ante*.

**1582. —Inquiry for petitioner's benefit.]—**If a commission is to issue, [petitioners] must pay the expenses of such commission, being for their benefit.—*Ex p.* TUTIN (1814), 3 Ves. & B. 149; 35 E. R. 435, L. C.

**1583. Agreement to pay all costs—On consideration of conveyance of estates that would descend from lunatic—Whether void.]—**By indenture made in 1827 between R. & his eldest son P., reciting that A. of C. was seised of large real estates, was never married, & was then in a state of mental & bodily imbecility; that in the event of his dying so seised, intestate & without issue, R. as his heir at law would be entitled to the reversion of his estates in fee; that R. was desirous of having a commission of lunacy sued out for the protection of A. & his property & of his own reversion, & that P., at R.'s request, agreed to sue out & prosecute such commission & take other necessary law proceedings at his own expense, in R.'s name; R., in consideration of the agreement & of love & affection for P., covenanted to convey all the estates that would descend to him on the decease of A. to the use of himself for life, remainder to the uses expressed respecting the estate of B. in P.'s marriage settlement, being for the benefit of P. & the heirs male of the marriage. The commission was accordingly issued; A. was declared a lunatic, & P. was reimbursed for his expenses out of his estate. R. was then sixty-three years of age; the lunatic was forty; P. was younger. The lunatic died in 1829, & R. entered into possession of his real estates, & conveyed them to his second son, H., for valuable consideration. On a bill filed by P. to set aside that conveyance & for specific performance of the covenant, R., by his answer, said he entered into it without legal advice, & by fraud, imposition & misrepresentation

on the part of P. It was proved in evidence that both parties employed the solr. who prepared the indenture under advice of counsel for each; that R. read it & heard it read before executing it, & afterwards as well as before expressed his desire that the estate of C. should be united to the estate of B. & go to his eldest son:—*Held*: R. tendered a false defence, & all the matters put in issue by his answer were disproved by the evidence.

The thing to be looked to in matters of lunacy is the protection of the person & property of the lunatic, & for that purpose the encouragement to parties to interfere & to bring the facts before the ct. It is obvious that this object would in many cases be impeded, rather than promoted, by holding that all agreements relative to the costs of the proceedings, or the ultimate division of the property, were void (LORD COTTENHAM, C.).—*PERSSE v. PERSSE* (1840), 7 Cl. & Fin. 279; West. 110; 4 Jur. 358; 7 E. R. 1073, H. L.

*Annotations*:—*Mentd.* Callaghan v. Callaghan (1841), 8 Cl. & Fin. 374; *Persse v. Persse* (1856), 2 Jur. N. S. 551; *Williams v. Williams* (1865), 2 Drow. & Sm. 378.

#### SUB-SECT. 3.—COSTS OF SOLICITOR FOR LUNATIC.

1584. Right of lunatic to employ—Volition of lunatic—Costs paid from lunatic's estate.]—*WENTWORTH v. TUBB*, No. 1600, *post*.

1585. Necessity for proof of retainer—Whether acting *bonâ fide*.]—A solr., coming to the ct. to be allowed, out of a lunatic's estate, the costs of opposing a commission on behalf of the lunatic, must give satisfactory evidence of a retainer on the part of the lunatic, & that he acted fairly & *bonâ fide* under such retainer. Where, therefore, a solr., having notice that his claim would be opposed, failed to satisfy the ct. of his retainer, & the ct. entertained some doubt of the *bona fides* with which he had acted, his petition was dismissed with costs, leave to amend being refused. A subsequent application, curing the defects of the former application, was granted by the ct.—*Re TAYLER, Ex p. BUTT* (1841), 5 Jur. 1172.

1586. —.]—*Re GALLON* (1844), 3 L. T. O. S. 278, L. C.

1587. Opposition vexatious.]—Where costs are incurred in opposing a commission of inquiry as to the state of mind of a party & the opposition fails, although circumstances are stated showing a previous knowledge & that the opposition was vexatious, a solr. will be allowed the costs of opposition as between solr. & client.—*FIELD v. TARNER* (1855), 3 Eq. Rep. 1012; 3 W. R. 469.

1588. Defence not conducted in interest of lunatic—Frivolous or needlessly litigious.]—*WENTWORTH v. TUBB*, No. 1600, *post*.

1589. —.]—*Re JONES* (1890), 6 T. L. R. 442, L. JJ.

1590. Lien on lunatic's estate for costs.]—*Re RUTTER, CHESTER v. ROLFE*, No. 1569, *ante*.

1591. Failure to tax costs—In reasonable time.]—*Re OTTE* (1845), 5 L. T. O. S. 122, L. C.

1592. —.]—Solrs., who claimed costs for taking out the commission, & for other business in the lunacy, obtained an order for taxation, but did not tax. Five years after the order the lunatic died, leaving real estate, but no personal property. The solrs. sued the committees at law, but they

set up Stat. Limitations, & the action failed. The solrs. now presented a petition praying an order for taxation with a view to proceedings to make the real estate liable, & the ct. made the order, but without prejudice to any question whether petitioners had any claim on the lunatic's estate.—*Re HART* (1852), 21 L. J. Ch. 810, L. JJ.

Costs of supersedeas.]—*See Sect. 6, post*.

Limitation of action.]—*See LIMITATION OF ACTIONS*, Vol. XXXII., p. 324, Nos. 98, 99.

#### SUB-SECT. 4.—COSTS OF NEXT OF KIN AND PARTIES INTERESTED IN ESTATE.

1593. Opposition by heir-at-law.]—Whether the heir-at-law is entitled to the costs . . . must be determined on a petition presented by the heir-at-law. The question would be whether the opposition made by the heir-at-law to the commission was reasonable; if made without reason, his costs will be disallowed (LORD LYNTHURST, C.).—*Re BAKER* (1845), 5 L. T. O. S. 122, L. C.

Costs of attendance.]—*See Sect. 2, sub-sect. 2, C., ante*.

#### SUB-SECT. 5.—WHAT COSTS ALLOWED.

1594. Costs, charges & expenses.]—*Re MOFFATT* (1845), 5 L. T. O. S. 262, L. C.

*See, now, Lunacy Act, 1890 (c. 5), s. 109.*

1595. Expenses of medical witness—Without order under Lunacy Regulation Act, 1862 (c. 86), s. 11.]—*BROCKWELL v. BULLOCK*, No. 535, *ante*.

1596. Shorthand note of judgment for purpose of appeal—Case already reported in law reports.]—*Re CATHCART* (No. 2) (1893), 37 Sol. Jo. 559, C. A.

#### SECT. 5.—TRAVERSE OF INQUISITION.

*See Lunacy Act, 1890 (c. 5), s. 109.*

1597. Costs of petition—Whether discretion to allow.]—*SHERWOOD v. SANDERSON*, No. 584, *ante*.

1598. Costs of hearing—Discretion to allow sum to defray expenses.]—*Re BRIDGE*, No. 731, *ante*.

1599. — Traverse allowed after personal examination—Not matter of right.]—*SHERWOOD v. SANDERSON*, No. 584, *ante*.

1600. Unsuccessful traverse.]—The costs of an unsuccessful traverse of an inquisition of lunacy allowed out of the lunatic's estate.

I apprehend the law to be, that if a man is alleged to be a lunatic, whether truly or not, he may employ, so far as he can be said to exercise volition on the subject, a solr., not only to resist the commission, but afterwards, for the purpose of traversing it, & that, although the proceedings fail, the lunatic's estate is liable for costs, subject to this—that if anything fraudulent or unfair—or perhaps I may go as far as to say frivolous or litigious—appears to have taken place on the part of the solr., the ct. may say that no debt arises (KNIGHT BRUCE, V.-C.).—*WENTWORTH v. TUBB* (1843), 2 Y. & C. Ch. Cas. 537; 1 L. T. O. S. 455; 7 Jur. 738; 63 E. R. 241.

*Annotation*:—*Consd. Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94.

#### PART XII. SECT. 5.

m. Petition by husband—To declare wife lunatic—Costs of wife's opposition.]—*Re DUMBRILL* (1884), 10 P. R. 216.—CAN.

n. Lunatic's solicitor's costs.]—*McLAUGHLIN v. FREEHILL* (1908), 5 C. L. R. 858.—AUS.

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## SECT. 6.—SUPERSEDEAS.

*See, generally, Lunacy Act, 1890 (c. 5), s. 109.*

**No jurisdiction in lunacy to grant.]—***See* Sect. 2, sub-sect. 1, *ante*.

**1601. Unsuccessful petition—By solicitor of lunatic—Acting for benefit of lunatic—& on advice of counsel.]—***Re* SMITH (1844), 3 L. T. O. S. 197, L. C.

**1602. Refusal to make any order—Security against repetition of application—Except on proper grounds.]—***Re* DYCE SOMBRE, No. 758, *ante*.

**1603. ——— Petition originating with third parties.]—***Re* DYCE SOMBRE, No. 758, *ante*.

## SECT. 7.—RECEIVER FOR LUNATIC NOT SO FOUND.

**1604. Abortive petition—Consent of lunatic.]—**  
[1890] W. N. 207, L. JJ.

**1605. Duplicate evidence.]—**Two sisters alleged to be persons of unsound mind not so found by inquisition were detained in an asylum. Each was entitled to a one-third share in a small property; one of them had also a mtge. of £392, & the other a mtge. of £58. Their sister applied for an order that she should be appointed receiver of their estates & that she might be at liberty to apply their income to their maintenance. For this purpose she took out two summonses in similar terms founded on evidence which had been previously filed. This evidence consisted of affidavits practically in duplicate by appct. stating the family history & property of the lunatics; duplicate copies of an affidavit of the fitness of appct. to be receiver; & affidavits by the medical attendant, which differed considerably. Separate undertakings by appct. to account were also filed. The master objected to the duplicate evidence & made one order appointing appct. receiver on both summonses; allowing the whole income to be applied for maintenance; & directing that only such costs should be allowed as would have been incurred, if one set of affidavits & one undertaking had been filed in the two matters.

The receiver appealed & asked that separate orders might be made:—*Held*: the master's order was right. It was necessary to have two summonses in the first instance, but not to have duplicate evidence.—*Re* MORRIS, [1912] 1 Ch. 730; 81 L. J. Ch. 451; 106 L. T. 553, L. JJ.

**1606. Employment of solicitor—In connection with lunatic's real estate—All income necessary for maintenance—Liability of receiver.]—**Solrs. appointed by the quasi-committee of a lunatic not so found by inquisition did work in respect of the lunatic's real estate, the costs of which were not paid to them inasmuch as all the lunatic's income was applied for her benefit & there were no funds available. Some of these costs were, as against the quasi-committee, barred by lapse of time:—*Held*: the quasi-committee was the statutory agent of the lunatic & was not personally liable to the solrs. appointed by him to act for the lunatic; the cost of the solrs. were payable out of the estate of the lunatic; the relation of the solr. & client did not exist between the solrs. & the quasi-committee, therefore the question of Stat. Limitations could not be raised by him; & if it might be raised by the judge, that in the present case it ought not to be pleaded.—*Re* E. G., [1914] 1 Ch. 927; 83 L. J. Ch. 586; 111 L. T. 95; 58 Sol. Jo. 497, L. JJ.

## SECT. 8.—COMMITTEES AND THEIR SURETIES.

## SUB-SECT. 1.—IN GENERAL.

**1607. Committee of person of estate—Appearance by separate solicitors.]—***Re* CHAMBERS (1844), 3 L. T. O. S. 278, L. C.

**1608. Prospective order.]—**A lunatic was made deft. as one of the next of kin of an intestate. He & his committee presented a petition entitled in the suit, & also in the lunacy, praying that the lunatic might defend by his guardian, & that the committee might be appointed such guardian. The committee prayed that, as such, he might be at liberty to prosecute the claim of the lunatic as next of kin, & that all such costs as should be properly incurred, & as should not be paid out of the estate to be administered in the suit might be raised & paid out of the lunatic's estate. The ct. gave liberty to the committee to defend the suit, but refused to appoint a guardian as being unnecessary, or to make any prospective order as to costs, & directed the title in the cause to be struck out.

The ct. will not make any order for the payment of extra costs out of the estate of a lunatic, until such costs have been incurred.—*Re* MANSON (1852), 21 L. J. Ch. 249; 18 L. T. O. S. 266, L. JJ.

*See, also, Sect. 13, sub-sect. 3, post.*

## SUB-SECT. 2.—APPOINTMENT OF COMMITTEE.

**1609. Proposals for appointment—Opposition to master's report.]—***Re* FUST (1808), 1 Collinson on Idiots, Lunatics, etc., p. 461, L. C.

**1610. Original appointment—Opposition to master's report.]—**Where a petition against the master's report, approving of the appointment of a particular person to be committee of the person failed, costs were not given against petitioner, as the relations of lunatic persons should not be discouraged from making application to the ct.—*Re* COLLINS (1848), 12 L. T. O. S. 61, L. C.

**1611. Appointment of new committee—Objection—At risk of party objecting.]—***Re* CLARKE, No. 786, *ante*.

**1612. ———.]—***Re* LIVESEY (1845), 5 L. T. O. S. 69, L. C.

**Contest between trustees of will of lunatic's father—& next of kin.]—**Where testator had directed the trustees of his will to have the custody of his lunatic son, & such trustees had been allowed to go in before the Master to contest the appointment of committees of the person with the lunatic's brothers, his next of kin, & the Master decided in favour of the brothers:—*Held*: the trustees must pay the costs incurred by the next of kin out of testator's estate.—*Re* BOOTH (1850), 15 L. T. O. S. 429, L. C.

## SUB-SECT. 3.—ACCOUNTS.

**1614. Passing accounts—Irregularity.]—***Ex p.* CLARKE, No. 916, *ante*.

**1615. ——— Attendance of next of kin.]—***Re* AMOY (1807), 2 Coop. temp. Cott. 105; 47 E. R. 1074, L. C.

**1616. ——— Surcharge successfully carried in.]—***Re* RADCLIFFE (1844), 4 L. T. O. S. 109, L. C.

**1617. ——— Petition by executors of deceased committee.]—***Re* BRIGNALL (1844), 3 L. T. O. S. 237, L. C.

**1618. Expenditure without previous sanction of court.]—***Re* CHURCHILL (1839), 3 Jur. 719, L. C.

**1619. ———.]—***Re* JENNINGS (1845), 4 L. T. O. S. 389, L. C.

## SUB-SECT. 4.—THE SURETY.

**1620. Death of surety—Costs of executing fresh security—Liability of trustees & executors of deceased surety.]—**Committee having entered into fresh security, order made that the former bond should be cancelled, & the trustees & exors. of deceased surety should pay the costs of the petition.—*Re BULL* (1843), 2 Coop. temp. Cott. 86; 47 E. R. 1053, L. C.

**1621. Defaulting committee—Liability of surety for costs of recovery of balance—Construction of surety bond.]—***Re LOCKEY*, No. 908, ante.

**1622. — Petition raising construction of bond.]—***Re LOCKEY*, No. 908, ante.

## SECT. 9.—COMPULSORY PURCHASE OF LUNATIC'S ESTATE.

See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 256, 258, Nos. 1629, 1641, 1642, 1675.

## SECT. 10.—LEASES.

Leases generally, see LANDLORD & TENANT, Vol. XXX., p. 429.

**1623. Apportionment of costs—Between estate & lessee.]—**Apportionment of the costs of granting a lease of a lunatic's estate, between the estate & the lessee.—*Re NORFOLK (DUCHESS)*, *Ex p. PRICKETT* (1818), 3 Swan. 130; 36 E. R. 801, L. C.

**1624. Renewal of lease—Application to court for direction to committee.]—**Where a lunatic was bound by covenant to grant a renewal of a lease, the expenses incurred by the lessee in applying to the Court, under Infants Property Act, 1830 (c. 65), for a direction to the committee to execute a lease instead of the lunatic, must be borne by the lunatic's estate.—*Ex p. BARNES* (1848), 17 L. J. Ch. 436, L. C.

*Annotation:—Reid. Wortham v. Dacre* (1856), 2 K. & J. 437.

**1625. Lease of lunatic's life estate—Approval by court—Attendance of heir-at-law.]—**On a petition being presented for the confirmation of the Master's report, approving of a lease for twenty-one years of a house belonging to a lunatic, determinable on his decease, the heir-at-law, who was also one of the next of kin, appeared by counsel:—*Held*: he was only entitled to the costs of his appearance as one of the next of kin.—*Re DYNELEY* (1853), 21 L. T. O. S. 82; 1 W. R. 294, L. J.

## SECT. 11.—MORTGAGES.

## SUB-SECT. 1.—RECONVEYANCE ON LUNACY OF MORTGAGEE.

**1626. Whether costs borne by lunatic's estate.]—**The costs of the committee of a lunatic mortgagee, requisite to enable him to reconvey to the mortgagee, under 4 Geo. 2, c. 10, including the costs of the reference, are to be paid out of the lunatic's estate, whether the application be made by the mortgagee, or by the committee, which is the usual course. If the mortgagee be ready to pay, the committee of a lunatic mortgagee should apply for a reference under the statute, & it seems he would not be allowed to bring an action.—*Re LEWIS*, *Ex p. RICHARDS* (1820), 1 Jac. & W. 264; 37 E. R. 376, L. C.

*Annotations:—Dtd. Re Marrow* (1841), Cr. & Ph. 142. *Fold. Re Townsend* (1847), 2 Ph. 348; *Re Wheeler* (1852), 1 De G. M. & G. 434. *Consd. Webb v. Crosse* [1912] 1 Ch. 323. *Reid. Re Biddle* (1853), 23 L. J. Ch. 23. *Mentd. King v. Smith* (1848), 6 Hare, 473.

**1627. —.]—***Ex p. BREARLEY* (1832), cited in 1 De G. M. & G. 434, n.; 42 E. R. 620.

**1628. —.]—***Semble*: the expenses of the proceedings under 11 Geo. 4 & 1 Will. 4, c. 60, s. 5, for the purpose of obtaining a reconveyance of a mortgaged estate from a mortgagee of unsound mind, but not found such by inquisition, are to be borne by the mortgagee.—*Re MARROW* (1841), Cr. & Ph. 142; 10 L. J. Ch. 340; 41 E. R. 444.

*Annotations:—Reid. King v. Smith* (1848), 6 Hare, 473. *Mentd. Ex p. Ommaney* (1841), 5 Jur. 647.

**1629. —.]—**The costs of proceedings under 11 Geo. 4, & 1 Will. 4, c. 60, s. 3, for the purpose of obtaining a reconveyance of a mortgaged estate from a lunatic mortgagee, are to be borne by the lunatic's estate.—*Re TOWNSEND* (1847), 2 Ph. 348; 16 L. J. Ch. 456; 9 L. T. O. S. 429; 41 E. R. 977, L. C.

*Annotations:—Reid. King v. Smith* (1848), 6 Hare, 473. *Mentd. Webb v. Crosse*, [1912] 1 Ch. 323.

**1630. —.]—**The costs of the proceedings for obtaining from the committee of a lunatic a reconveyance of premises mortgaged to the lunatic will be ordered to be paid out of the lunatic's estate, where the lunatic is beneficially interested in the mortgage money, & the petition is presented by the committee. This rule will not, however, be acted on if the mortgagee presents the petition, unless in cases where the committee has declined to take that step.—*Re WHEELER* (1852), 1 De G. M. & G. 434; 21 L. J. Ch. 759; 20 L. T. O. S. 57; 42 E. R. 620, L. C.

*Annotations:—Distd. Re Stuart, Ex p. Marshall* (1859), 4 De G. & J. 317. *Mentd. Webb v. Crosse*, [1912] 1 Ch. 323.

**1631. — Exception of cost of stamp.]—**Upon the petition of the committee of a lunatic mortgagee, an order was made vesting the estate in the mortgagee, the costs of the order to be paid out of the lunatic's estate, with the exception of the stamp, which was to be paid by the mortgagee.—*Re THOMAS* (1853), 22 L. J. Ch. 858; 20 L. T. O. S. 299; 1 W. R. 155, L. C.

*Annotation:—Fold. Re Biddle* (1853), 23 L. J. Ch. 23.

**1632. — Lunatic not so found.]—**Where, through the lunacy of a mortgagee, not found lunatic by inquisition, a petition under Trustee Act, 1850 (c. 60) is rendered necessary in order to enable the mortgagee to pay off the mortgage debt, the costs must be paid out of the mortgage debt. There being no committee, but only a receiver of the mortgagee's estate under 8 & 9 Vict. c. 100, the costs of the appearance of the heir-at-law & next of kin were allowed.—*Re BIDDLE* (1853), 2 Eq. Rep. 71; 23 L. J. Ch. 23; 22 L. T. O. S. 217; 2 W. R. 50, L. JJ.

**1633. — —.]—**The rule that a lunatic mortgagee bears the costs of proceedings, under Trustee Act, 1850 (c. 60), occasioned by his lunacy, to obtain a reconveyance of the estate, applies equally to a person of unsound mind not so found by inquisition, & whether the proceedings are taken in a redemption suit, or in the course of the administration of the mortgagee's estate.—*Re VIALI, HAWKINS v. PERRY, Ex p. SARGEANT* (1856), 8 De G. M. & G. 439; 25 L. J. Ch. 656; 4 W. R. 686; 44 E. R. 460, L. JJ.

*Annotation:—Reid. Re Sparks* (1877), 37 L. T. 301.

**1634. — Costs of appearance of heir-at-law & next of kin.]—***Re BIDDLE*, No. 1632, ante.

**1635. —.]—***Re ROWLEY*, No. 1312, ante.

**1636. — Mortgagor served with petition.]—**Where the committee of a lunatic mortgagee presents a petition under Trustee Act, 1850 (c. 60), for a reconveyance of the mortgaged estate to the mortgagee, the mortgagee is not entitled to his costs out of the lunatic's estate, even though served with the



**Sect. 11.—Mortgages: Sub-sects. 1 & 2. Sects. 12 & 13: Sub-sects. 1, 2, 3, 4 & 5.]**

petition.—*Re PHILLIPS* (1869), 4 Ch. App. 629; 17 W. R. 904, L. J.

**1637. — Application by mortgagor—Committee's refusal to proceed.]—*Re WHEELER*, No. 1630, *ante*.**

**1638. — —.]—Where a mtgee. becomes of unsound mind, & the mtgor. desires to pay off the mtge. debt & presents a petition, to obtain a vesting order, he must pay the whole of the mtge. debt & interest into ct., & will not be allowed the costs of his petition, nor will he have to pay the mtgee.'s costs.—*Re SPARKS* (1877), 6 Ch. D. 361; 37 L. T. 301; 25 W. R. 869, L. JJ.**

**1639. — Lunatic a trustee—To the knowledge of mortgagor.]—*Re TOWERS, Ex p. CLAY* (1830), cited in Shelford on Lunatics, 2nd ed. p. 510, L. C. Annotations:—*Folld. Re Lewes* (1849), 1 H. & Tw. 123; *Re Stuart, Ex p. Marshall* (1859), 4 De G. & J. 317.**

**1640. — —.]—Where a mtge. in fee had been executed with knowledge that the mtgee. was a trustee only of the money advanced, & the mtgee. became lunatic, all such extra costs of procuring a reconveyance as were occasioned by the lunacy were thrown upon the mtgor., & were not payable either by the lunatic, or by the parties beneficially interested in the mtge. money.—*Re LEWES* (1849), 1 Mac. & G. 23; 1 H. & Tw. 123; 18 L. J. Ch. 153; 13 Jur. 548; 47 E. R. 1352, L. C.**

Annotations:—*Consd. Webb v. Crosse*, [1912] 1 Ch. 323. *Refd. Re Townsend* (1850), 1 Mac. & G. 686.

**Trust unknown to mortgagor.]—**In the case of a petition by a mtgor., seeking to confirm the Master's report as to a lunatic mtgee., & a reconveyance of the mtged. premises, & appointment of new trustees, there being no proof that the mtgor. was aware of the lunatic being a trustee, the costs of & incidental to the application were ordered to be paid out of the trust estate.—*Re TOWNSEND* (1850), 1 Mac. & G. 686; 2 H. & Tw. 185; 47 E. R. 1649, L. C.

#### SUB-SECT. 2.—RECONVEYANCE ON LUNACY OF MORTGAGEE'S HEIR.

**1642. Costs borne by mortgagor.]—Where a mtge. in fee had been paid off to the mtgee.'s exor., & a petition was presented under Trustee Act, 1850 (c. 60), by the mtgor. for a reconveyance from the mtgee.'s heir, who was a lunatic, or for a vesting order:—*Held*: mtgor. must pay the costs of the proceeding.—*Re STUART, Ex p. MARSHALL* (1859), 4 De G. & J. 317; 45 E. R. 123, L. C.**

Annotation:—*Refd. Webb v. Crosse*, [1912] 1 Ch. 323.

**1643. —.]—On a mtge. being paid off, the costs of obtaining a vesting order, rendered necessary by the lunacy of the heir-at-law of the mtgee., were ordered to be paid by the mtgor.—*Re JONES* (1860), 2 De G. F. & J. 554; 30 L. J. Ch. 112; 3 L. T. 495; 7 Jur. N. S. 115; 9 W. R. 175; 45 E. R. 736, L. JJ.**

#### SECT. 12.—TRUSTS.

**1644. Committee's costs—Paid by cestui que trust.]—The costs of the committee of a lunatic**

trustee conveying under the statute [4 Geo. 2, c. 10], must be paid by the *cestuis que trust*. The estate being vested in the lunatic upon trusts for securing an annuity, & subject thereto upon trust for the grantor of the annuity, the grantee & the assignee of the grantor of the annuity were ordered to defray equally the committee's costs of an application by them for a reconveyance of the estate.—*Re PEARSE, Ex p. PEARSE* (1823), Turn. & R. 325; 37 E. R. 1125.

**1645. No order made.]—Where a trustee becomes a lunatic, & consequently an application to the ct. in Lunacy becomes necessary for the purpose of obtaining a transfer of the trust funds, no order as to costs will be made.—*Re GARDEN* (1865), 6 New Rep. 347; 34 L. J. Ch. 466.**

#### SECT. 13.—ACTIONS.

##### SUB-SECT. 1.—IN GENERAL.

**1646. Whether solicitor can recover his costs by action.]—(1) A solr. employed on part of a lunatic can have no action against him for his bill of costs.**

**(2) Committee of lunatic has a lien on the lunatic's estate.—*BARNESLEY v. POWELL* (1750), Amb. 102; 27 E. R. 63, L. C.**

Annotations:—*Generally, Refd. Re Rutter, Chester v. Rolfe* (1853), 4 De G. M. & G. 798; *Re E. G.*, [1914] 1 Ch. 927. *Mentd. Shaw v. Neale* (1858), 6 H. L. Cas. 581.

**1647. Suit for dissolution of partnership.]—On dissolution by reason of lunacy, the costs of the suit are to be borne by the joint partnership assets.—*JONES v. WELCH* (1855), 1 K. & J. 765; 1 Jur. N. S. 994; 69 E. R. 668.**

**1648. Suit for partition.]—To a suit for partition of property, one undivided share of which was vested in a lunatic's tenant in tail in possession, with remainder to an infant tenant in tail, with remainder to a married woman in tail, with remainders over, the persons interested in remainder after the lunatic & infant tenants in tail, were made defts., & they, by their answers, claimed such interests in the undivided share of the property as they were alleged to have by the bill:—*Held*: the persons so named as defts. were not unnecessary parties to the suit; &, having regard to the remoteness, & uncertainty of their interest in the property, their costs up to the decree on the hearing should be a charge on the property, which should be allotted in severalty in respect of the undivided share in which they were so interested.—*SINGLETON v. HOPKINS* (1855), 25 L. J. Ch. 50; 26 L. T. O. S. 146; 1 Jur. N. S. 1199; 4 W. R. 107; *subsequent proceedings, sub nom. Re BLOOMAR* (1857), 2 De G. & J. 88, L. JJ. ]—*Re BLOOMAR*, No. 1097, *ante*.**

**1650. Costs of unsuccessful appeal.]—*Re BARLOW'S WILL*, No. 1034, *ante*.**

**1651. Proceedings for order for payment out of lunatic's funds.]—Defts. held securities & moneys on behalf of a domiciled Frenchman who had had business relations with them as bankers & stock brokers respectively. He became of unsound mind, & P. was appointed provisional administrator of his property by the French ct. P. requested defts. to transfer the property to him offering to prove the orders of the French ct appointing him administrator in any manne satisfactory to defts.; but they declined to transfer the property without an order of an English ct.**

#### PART XII. SECT. 13, SUB-SECT. 1.

**o. Suit for partition—Appointment of guardian ad litem.]—Applica-**

tion refused in a partition suit, that costs of appointing guardian *ad litem* of deft., a person of unsound mind, not so found, & of proving her unsoundness

of mind by affidavits, be borne by deft.'s share in estate.—*MASTERS v. MASTERS* (1903), 2 N. B. Eq. R. 486; 23 C. L. T. 266.—**CAN.**

—*Held*: the case was governed by *Didisheim v. London & Westminster Bank*, No. 1066, *ante*, & in view of that decision defts. had shown an undue & unreasonable excess of caution in the attitude which they had assumed, & were not entitled to costs in proceedings by P. & the lunatic for an order for the delivery of the property to P.—*PÉLÉGRIN v. COUTTS & Co., PÉLÉGRIN v. MESSEL (L.) & Co.*, [1915] 1 Ch. 696; 84 L. J. Ch. 576; 113 L. T. 140.

#### SUB-SECT. 2.—LIABILITY OF NEXT FRIEND.

1652. Plaintiff supposed to be insane—Subsequently found sane—Liability to plaintiff.]—*PALMER v. WALESBY*, No. 1450, *ante*.

1653. ——— Liability to defendant.]—*PALMER v. WALESBY*, No. 1450, *ante*.

1654. ——— Subsequently found insane—Reimbursement out of lunatic's estate—Benefit of lunatic.]—*BEALL v. SMITH*, No. 485, *ante*.

1655. Security for costs—Insolvency of next friend.]—*CRUICKSHANK v. KNOWLES* (1897), cited in Halsbury's Laws of England, Vol. XIX., p. 463.

#### SUB-SECT. 3.—POSITION OF COMMITTEE.

1656. Joined as co-plaintiff—Death of lunatic—Dismissal of committee from action.]—*HARLAND v. GARBUTT*, [1881] W. N. 8

1657. Extent of liability—Estate of lunatic in his hands.]—Where a lunatic & his committee were unsuccessful applts., it was held, in the absence of any principle to the contrary, & in the special circumstances of the case, that resps. were entitled to costs as against the committee only to the extent of the lunatic's estate coming to his hands & not personally.—*BRADFORD OLD BANK v. SUTCLIFFE*, [1918] 2 K. B. 852, n.; 88 L. J. K. B. 85, C. A.

1658. Lien for costs.]—*BARNESLEY v. POWELL*, No. 1646, *ante*.

#### SUB-SECT. 4.—COSTS OF GUARDIAN AD LITEM.

1659. Costs must be incurred—Before any order made.]—*Re MANSON*, No. 1608, *ante*.

1660. Defendant becoming insane after action brought—Recovery before hearing.]—Where a deft. originally appeared by his own solr. & afterwards became insane, & pltf. obtained an order appointing the solr. to the Suitors' Fee Fund his solr. in the cause, but deft. having recovered some time before the hearing took no steps to discharge such order until the suit was brought to a hearing:—*Held*: deft. must pay the costs of the solr. to the Suitors' Fee Fund before obtaining an order to substitute his original solr., but might add such costs to his own costs of the suit.—*FRAMPTON v. WEBB* (1863), 2 New Rep. 547; 9 L. T. 114; 11 W. R. 1018.

*Annotation*:—*Reid. Blyth v. Green*, [1876] W. N. 214.

1661. Defence of insanity pleaded—Withdrawal on failure to procure witness.]—*EMANUEL v. KIRK* (1885), 29 Sol. Jo. 258.

*Annotation*:—*Reid. Eady v. Elsdon*, [1901] 2 K. B. 460.

1662. Nullity suit—Costs of official solicitor.]—*JACKSON v. JACKSON*, No. 151, *ante*.

#### SUB-SECT. 5.—LIABILITY OF SOLICITORS ACTING FOR PERSON OF UNSOUND MIND.

1663. Ex parte order obtained—Knowledge of pending petition in lunacy—Whether professional misconduct.]—(1) A solr. is not prevented from taking legal proceedings on behalf of his client by the mere fact that to his knowledge a petition in lunacy for an inquiry into the state of mind of the client is pending, provided that he believes the client to be sane. The ct. will, however, in a proper case, when informed of the petition, stay the proceedings until the inquiry is completed.

(2) A solr. who was aware that a petition in lunacy against his client was pending obtained on her behalf an order *ex p.* without disclosing the fact. He believed her to be sane, but she was subsequently found to be of unsound mind. Upon the order being discharged:—*Held*: he had not been guilty of such professional misconduct as to make him liable for the costs.—*Re ARMSTRONG (GEORGE) & SONS*, [1896] 1 Ch. 536; 65 L. J. Ch. 258; 74 L. T. 134; 44 W. R. 281; 40 Sol. Jo. 228.

*Annotation*:—*Generally, Reid. Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

1664. Conduct of defence—Ignorance of insanity.]—Where an authority given to an agent has without his knowledge been determined by the death or lunacy of the principal, & subsequently, the agent has, in the belief that he was acting in pursuance thereof, made a contract or transacted some business with another person, representing that, in so doing, he was acting on behalf of the principal, the agent is liable as having impliedly warranted the existence of the authority which he assumed to exercise, to that other person in respect of damage occasioned to him by reason of the non-existence of that authority.

Solrs. were instructed by a client to conduct his defence to an action which was then threatened & was afterwards commenced against him. Before the commencement of the action the client became, & was certified as being, of unsound mind. In ignorance of his unsoundness of mind, & of his having been so certified, the solrs. entered an appearance for him in the action, & delivered a defence, to which pltf. replied, & other interlocutory proceedings took place in the action. Subsequently, the action not having come to trial, pltf.'s solr. was informed that deft. had been certified as being of unsound mind; & an application was made on behalf of pltf. at chambers for an order that the appearance & all subsequent proceedings in the action should be struck out, & that the solrs. who had assumed to act for deft. should be ordered personally to pay pltf.'s costs of the action up to date, on the ground that they had so acted without authority. The master made an order that the appearance & subsequent proceedings in the action should be struck out, but refused to make an order for payment of the pltf.'s costs by the solrs. personally, which refusal was on appeal affirmed by the judge at chambers:

—*YOUNG v. HERON* (1868), 14 Gr. 580.—CAN.

#### PART XII. SECT. 13, SUB-SECT. 5.

1664. Conduct of defence—Ignorance of insanity.]—*GROSE v. BANK OF NEW SOUTH WALES* (1910), 11 S. R. N. S. W. 24; 27 N. S. W. W. N. 145.—AUS.

#### PART XII. SECT. 13, SUB-SECT. 2.

p. Security for costs—Intention to remain in province—During lunatic's life.]—*Held*: where the next friend of pltf., a person of unsound mind not so found, was a son who had returned after an absence of 21 years

& who expressed his intention to remain here during his mother's life, security for costs could not be ordered against him.—*STAUFFER v. LONDON & WESTERN* (1913), 24 O. W. R. 627; 4 O. W. N. 1336; 10 D. L. R. 853.—CAN.

q. Where suit appears unneces-



**Sect. 13.—Actions: Sub-sect. 5. Sects. 14 & 15.**  
**Part XIII. Sects. 1, 2, 3, 4 & 5.]**

the solrs. who had taken on themselves to act for deft. in the action had thereby impliedly warranted that they had authority to do so, & therefore were liable personally to pay pltf.'s costs of the action.—*YONGE v. TOYNBEE*, [1910] 1 K. B. 215; 79 L. J. K. B. 208; 102 L. T. 57; 26 T. L. R. 211, C. A.

*Annotations:—*Reid. *Re Dunn*, *Simmons v. Liberal Opinion*, [1911] 1 K. B. 966; *Fernée v. Gorlitz*, [1915] 1 Ch. 177. *Mentd. Haxby v. Wood Advertising Agency* (1913), 109 L. T. 946; *McNeall v. Hawes* (1923), 92 L. J. K. B. 729; *Re Wingfields*, [1923] 2 K. B. 112; *Edwards v. Porter*, [1925] A. C. 1.

**Liability as next friend.]—**See Sect. 13, sub-sect. 2, *ante*.

**SECT. 14.—ISSUE AS TO CONTRACTUAL CAPACITY.**

**1665. Purchase of real estate—Purchaser found lunatic after payment of deposit—As from time prior to contract.]—***FROST v. BEAVAN*, No. 134, *ante*.

**1666. Impeachment of settlement.]—**A gentleman made a settlement of nearly the whole of his property in trust for himself for life, & then for four of his five children & their issue. About two years afterwards he was found lunatic. A son who took no benefit under the settlement desired to have it impeached, & adduced evidence showing that there was reasonable ground for contending that the settlor was of unsound mind when he executed it. The income of the lunatic was amply sufficient for his wants:—*Held*: no proceedings ought to be directed at the expense of the lunatic's estate, but the excluded son ought

to be allowed to file a bill, as next friend of the lunatic, without giving security for costs, to impeach the settlement.—*Re GORDON* (1875), 10 Ch. App. 192; 44 L. J. Ch. 208; 32 L. T. 348; 23 W. R. 760, L. JJ.

**SECT. 15.—ISSUE AS TO TESTAMENTARY CAPACITY.**

**1667. Whether costs of appeal allowed—Out of estate.]—***DITCHBURN v. FEARN*, No. 217, *ante*.

**1668. ———.]—***DIMES v. DIMES*, No. 368, *ante*.

**1669. Costs of all parties allowed out of estate.]—**In a testamentary suit the will was opposed by the next of kin on the ground of testator's insanity. The ct. held that at the time of making the will testator was of sound mind, memory & understanding, & granted probate. But in deciding the question of costs, it held that when testator's general conduct, though it fell short of insanity is such as to raise doubts as to his sanity, & after due inquiry, to afford reasonable grounds for litigating the questions, the costs of all parties ought to be borne out of the estate. Accordingly, it allowed the unsuccessful opponents of the will costs out of the estate.—*DAVIES v. GREGORY* (1873), L. R. 3 P. & D. 28; 42 L. J. P. & M. 33; 28 L. T. 239; 37 J. P. 279; 21 W. R. 462.

*Annotations:—*Folld. *Roe v. Nix*, [1893] P. 55; *Brown v. Penn* (1895), 12 T. L. R. 46. *Consd. Browning v. Mostyn* (1897), 66 L. J. P. 37. *Reid. Richardson v. Wood* (1901), 45 Sol. Jo. 380.

**Costs of heir-at-law.]—**See *EXECUTORS*, Vol. XXIII., p. 272, Nos. 3346–3350.

*See, also, EXECUTORS*, Vol. XXIII., pp. 261, 262, 264, 269, 395, Nos. 3187–3192, 3224, 3305, 4668; *EVIDENCE*, Vol. XXII., p. 617, No. 6836.

## Part XIII.—Administration in Regard to Reception and Care of Lunatics.

**SECT. 1.—THE COMMISSIONERS IN LUNACY.**

*See Lunacy Act, 1890 (c. 5), ss. 162, 187, 191, 194, 208, 226; Lunacy Act, 1911 (c. 40), s. 3; Mental Deficiency Act, 1913 (c. 28), ss. 22, 26, 65.*

**1670. Liability for wrongful detention.]—***HARNETT v. BOND*, No. 1869, *post*.

**SECT. 2.—THE VISITORS IN LUNACY.**

*See Lunacy Act, 1890 (c. 5), ss. 163–173, 176–179, 181, 183–186; Mental Deficiency Act, 1913 (c. 28), ss. 28, 40, 66; Rules in Lunacy, 1892, rr. 100, 107; Rules in Lunacy, 1893, r. 5.*

**1671. Power to make agreements—For plans for asylums—Plans not ultimately approved.]—**A declaration against the clerk to a committee of visitors of a county lunatic asylum, under 8 & 9 Vict. c. 126, ss. 16, 17, stated, that the committee under the statute agreed with pltf., in consideration that he would render his services as an architect in examining the site of a proposed lunatic asylum, & preparing the requisite probationary drawings for the committee, & all other drawings required to be submitted to the Comrs. in Lunacy & the Secretary of State, that a certain sum should

be paid to him, & averred that he did prepare requisite probationary drawings for the approval of the committee, & was ready to prepare all other drawings to be submitted to the Comrs. & Secretary of State, but that the committee wrongfully discharged him & prevented him from completing the agreement. Second plea, that pltf. did not prepare the requisite probationary drawings. Fifth plea, that a reasonable time had elapsed for pltf. to prepare the requisite probationary drawings for the approval of the committee, & that pltf. prepared divers drawings which were not approved of by the committee, but rejected by them, & that, save as aforesaid, pltf. did not prepare any probationary drawings for the approval of the committee, wherefore, etc.:—*Held*: 'probationary' drawings meant drawings to be approved of by the committee, the Comrs., & the Secretary of State; even if the visitors could contract for the payment for plans not approved of, yet there was a contract here which would make them liable for dismissing pltf.; & pltf. could not recover on the *indebitatus* counts.

*Qu.*: whether the visitors had power to contract for the payment for plans not ultimately approved of; whether *mandamus* to the treasurer of the county would be the proper remedy in such a

case; whether the clerk could be sued; & whether the county would be liable on such a contract.—**MOFFATT v. DICKSON** (1853), 13 C. B. 543; 1 C. L. R. 294; 22 L. J. C. P. 265; 17 Jur. 1009; 138 E. R. 1311.

*Annotations*:—**Reid**. **Kendall v. King** (1856), 17 C. B. 483. **Mentd.** **Moffatt v. Laurie** (1855), 15 C. B. 583.

**1672.** — Breach of contract by committee—Remedy by action—Or mandamus.]—**MOFFATT v. DICKSON**, No. 1671, *ante*.

**1673.** — Clerk sued in name of committee.]—**MOFFATT v. DICKSON**, No. 1671, *ante*.

**1674.** — By 8 & 9 Vict. c. 126, s. 17, a select number of the justices for a county or borough, called the "committee of visitors," were empowered to contract for plans, etc., for the erection of a lunatic asylum for the county, etc.; & by sect. 16, they were enabled to sue & be sued in the name of their clerk:—**Held**: an action might be maintained against the committee of visitors in the name of their clerk, in respect of a contract so entered into by them, although pltf. might have no means of enforcing his judgment when obtained.—**KENDALL v. KING** (1856), 17 C. B. 483; 25 L. J. C. P. 132; 20 J. P. 246; 4 W. R. 389; 139 E. R. 1163.

*Annotations*:—**Mentd.** **Hall v. Taylor** (1858), E. B. & E. 107; **Itchin Bridge Co. v. Southampton L. B. of Health** (1858), 6 W. R. 223; **Ward v. Lowndes** (1859), 5 Jur. N. S. 1124; **Bush v. Beavan** (1862), 1 H. & C. 500; **Coe v. Wise** (1864), 5 B. & S. 440.

**1675.** Presumption that visits duly paid—After long lapse of time.]—**MARTIN v. JOHNSTON**, No. 475, *ante*.

**1676.** Theft of goods purchased for asylum—Property in county council—Not in visiting committee.]—In an indictment for larceny of meat bought by the county authority for the inmates of the county asylum, the property in the meat should be laid in the county council & not in the asylum visiting committee.—**R. v. HUNTING & WARD** (1908), 73 J. P. 12; 1 Cr. App. Rep. 177, C. C. A.

### SECT. 3.—VISITATION.

See Lunacy Act, 1890 (c. 5), ss. 183–185, 187–195, 197–199, 201–206; Rules in Lunacy, 1893, r. 5.

### 4.—LICENCED HOUSES AND HOSPITALS.

See Lunacy Act, 1890 (c. 5), ss. 21, 207–209, 211–219, 221–225, 227–232, 234–237; Mental Deficiency Act, 1913 (c. 28), ss. 20, 46; Rules as to Institutions for Lunatics, 1925, No. 75.

**1677.** Licenced house—Restriction against user of premises for trade—Use of house as private asylum not trade.]—In a lease of a house, made in 1802, there was a covenant, with a clause of forfeiture, not to use or exercise the trades or businesses of a butcher, baker, slaughterman, melter of tallow, tallow chandler, tobacco pipe maker, tobacco pipe burner, soap maker, sugar baker, fellmonger, dyer, distiller, victualler, vintner, tavern keeper or coffee house keeper, tanner, common brewer, or any offensive trade, without licence:—**Held**: the lease was not forfeited by carrying on any occupation besides a trade, & it was not a trade to use the house as a private lunatic asylum; the word trade in this covenant being applicable only to a business conducted by *buying & selling*.—**DOE d. WETHERELL v. BIRD** (1834), 2 Ad. & El. 161; 4 Nev. & M. K. B. 285; 4 L. J. K. B. 52; 111 E. R. 63.

### SECT. 5.—COUNTY AND BOROUGH ASYLUMS.

See Lunacy Act, 1890 (c. 5), ss. 238–278; Lunacy Act, 1891 (c. 65), ss. 14–16, 29; Mental Deficiency Act, 1913 (c. 28), ss. 27, 29, 30, 32–34, 38; Local Government (Adjustments) Act, 1913 (c. 19), s. 1; Asylum Officers' Superannuation Act, 1909 (c. 48); Asylum & Certified Institutions (Officers' Pension) Act, 1918 (c. 33); Lancashire County (Lunatic Asylums & other Powers) Act, 1891 (c. xx).

**1678.** Plans for asylum—Probationary plans.]—**MOFFATT v. DICKSON**, No. 1671, *ante*.

**1679.** Sale of land for asylum—Approval before signature.]—(1) A contract for the sale of land to the committee of visitors of a lunatic asylum may be approved of by the ct. of quarter sessions before being actually signed by the parties, if it can be identified as the contract which was afterwards entered into.

(2) 16 & 17 Vict. c. 97, s. 36, incorporating the clauses of Lands Clauses Consolidation Act, 1845 (c. 18), with respect to the purchase of lands by agreement, & with respect to the purchase-money or compensation coming to parties having limited interests, enables the parties having limited interests to contract with the committee of visitors for the sale of land, although the committee of visitors have no compulsory powers of purchasing.—**DEVENISH v. BROWN** (1856), 26 L. J. Ch. 23; 27 L. T. O. S. 287; 20 J. P. 820; 2 Jur. N. S. 1043; 4 W. R. 783.

**1680.** — By limited owner.]—**DEVENISH v. BROWN**, No. 1679, *ante*.

**1681.** Agreement to unite—Boroughs paying annual rent—Transference of liability to county council—Subject to existing contracts.]—By an agreement made in 1844 between the county of S. & the borough of W. it was agreed that the county & borough should unite for the purpose of providing a county lunatic asylum for paupers, to be erected at their joint expense in certain specified proportions, & an asylum was erected accordingly. By an agreement in 1846, the county of M. joined this union, & agreed to pay a specified sum in respect of the expenses already incurred & to be incurred in the erection of the asylum, & it was also agreed that these three bodies should contribute to the future maintenance of the asylum in certain shares. These three bodies thus became the joint owners of the asylum. By subsequent agreements, made in 1851, 1866, & 1869 respectively, the boroughs of O., B., & L. in the county of Salop were admitted to & joined this union, & became united with the counties of S. & M. & the borough of W., for the purpose of using the joint asylum for their lunatics, each having a representative on the board of visitors. These agreements provided that these three boroughs should pay an annual rent to the treasurer of the asylum for the privilege of using the asylum, & they also provided that in case of a dissolution of the union these boroughs should not be entitled to any right, claim, or interest in the asylum, & in consideration thereof should not be liable, during the continuance of the union, to contribute towards the expenses of the asylum. Each of the three boroughs was, at the date when Local Government Act 1888 (c. 41), came into operation, a quarter sessions borough with a population of less than ten thousand:—**Held**: the liability of the boroughs of O., B., & L., under the above agreements, to provide for the maintenance, management of, & other dealings with the joint asylum, was not extinguished, but was transferred under Local Government Act, 1888 (c. 41),



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adjudge the legal place of settlement of such pauper, have no power to make a retrospective order upon the parish for the payment of maintenance during the time of his confinement in the asylum, antecedent to their adjudication:—the charges so incurred must be borne by the county.

An order of justices made under the 5 Geo. 4, c. 71, stated, "that the justices, after due examination had on oath, having adjudged the legal place of settlement of a pauper lunatic, confined in a lunatic asylum, to be in M., did thereby require the churchwardens & overseers of M. to pay to the treasurer of the lunatic asylum £10 16s. due for twenty-four weeks' maintenance, etc., being at the rate of 9s. per week, & to pay the same weekly sum during so long a time as the pauper should remain therein." The parish of M. appealed against this order, & in their notice of appeal described it as an order of settlement & maintenance:—*Held*: as the parish of M. had treated this as an order of settlement, it must be presumed that there was no other order, & therefore, the words, "having adjudged," must be understood as words of present adjudication, & the order was good in this respect; so much of the order as was retrospective was bad, but it was good for the residue.—*R. v. MAULDEN (INHABITANTS)* (1828), 8 B. & C. 78; 2 Man. & Ry. K. B. 146; 1 Man. & Ry. M. C. 380; 6 L. J. O. S. M. C. 76; 108 E. R. 972.

*Annotations*:—*Mentd.* *R. v. St. Nicholas, Leicester* (1835), 3 Ad. & El. 79; *R. v. Green* (1851), 20 L. J. M. C. 168; *Bradford Union v. Wilts (Clerk of the Peace)* (1868), L. R. 3 Q. B. 604.

**1697. — Lunatic from borough—When borough contributes to county rate.**—Under 18 & 19 Vict. c. 105, s. 14, if lunatics whose settlement cannot be ascertained are sent to an asylum from a borough having a separate ct. of quarter sessions, the borough is liable to the expenses if it does not contribute to the county rate under 5 & 6 Will. 4, c. 76, s. 117, & is not liable if it does so contribute.—*R. v. BACCHUS* (1859), 2 E. & E. 181; 29 L. J. M. C. 56; 33 L. T. O. S. 318; 6 Jur. N. S. 218; 7 W. R. 738; 121 E. R. 69; *sub nom.* *BIRMINGHAM GUARDIANS v. BACCHUS*, 24 J. P. 85, Ex. Ch.; *affg.* *S. C. sub nom. BIRMINGHAM GUARDIANS v. BEAUMONT* (1858), 8 E. & B. 870.

**1698. —**—*J.*—A Scotsman, who had no settlement in England, married an Englishwoman. While they resided together in an English parish, she was sent as a lunatic pauper to a lunatic asylum by order of a justice of the peace, under 16 & 17 Vict. c. 97:—*Held*: notwithstanding Poor Removal Act, 1856 (c. 117), relative to the removal of Scottish paupers & their families to their own country, the expenses of her removal to the asylum & her maintenance there should be charged to the county, & not to the parish where the husband & wife resided.—*SOMERSET (CLERK OF THE PEACE) v. SHIPHAM OVERSEERS* (1863), 3 B. & S. 507; 1 New Rep. 267; 32 L. J. M. C. 83; 7 L. T. 673; 27 J. P. 437; 9 Jur. N. S. 869; 11 W. R. 283; 122 E. R. 191.

**1699. —**—*J.*—The attestation paper of a pauper lunatic soldier at the time of his enlistment stated he was born in the parish of C. in the county of Surrey.

The Secretary of State for War made an order for the reception of the pauper lunatic into the county asylum. No information could be obtained from the pauper lunatic as to his birth-place, & no inquiries could ascertain that the pauper lunatic had had at any time a settlement

acting upon the  
refused to make

an order upon the county. The C. union appealed. *Held*: the order was wrong, & the case must be remitted to the magistrate to make the order upon the county.—*CHERTSEY UNION GUARDIANS v. SURREY (CLERK OF PEACE)* (1893), 69 L. T. 384; 57 J. P. 807; 5 R. 532, D. C.

**1700. — Liability of borough—When not contributing to county rate.**—*R. v. BACCHUS*, No. 1697, *ante*.

**1701. — Liability of parish of birth—Parents with no settlement in England.**—A lunatic pauper born in England, whose father, an Irishman, had not gained a settlement in England, & whose mother was not known to have ever gained a settlement, being above the age of sixteen, but living with his parents, & unemancipated, was removed to a lunatic asylum under 16 & 17 Vict. c. 97:—*Held*: an order for his maintenance upon the parish of his birth was rightly made under sect. 97.—*R. v. NEWCHURCH (INHABITANTS)* (1862), 3 B. & S. 107; 1 New Rep. 23; 32 L. J. M. C. 19; 7 L. T. 271; 9 Jur. N. S. 536; 11 W. R. 24; 122 E. R. 41.

**1702. — Union in which lunatic chargeable.**—Lunacy Act, 1890 (c. 5), ss. 286–298, which provide that, where the settlement of a pauper lunatic can be ascertained, the expense of maintaining the lunatic shall be paid by the union in which the lunatic's settlement is, & where that cannot be ascertained, by the union in which the lunatic has become chargeable, must be read subject to the exception in sect. 294 that where a lunatic has become irremovable from a union the expenses shall be paid by that union, & not by the union where the lunatic's settlement is, & therefore, sect. 303, which gives a right of appeal to quarter sessions against an order of justices adjudging the settlement of a lunatic must be read as giving a similar right of appeal against an order adjudging that a lunatic has become irremovable.—*EASTBOURNE GUARDIANS v. CROYDON GUARDIANS*, [1910] 2 K. B. 16; 79 L. J. K. B. 646; 102 L. T. 595; 74 J. P. 286; 26 T. L. R. 447; 8 L. G. R. 503, D. C.

**1703. Where lunatic removable—Liability of parish of settlement—Wife living apart by consent.**—A pauper lunatic, living by consent apart & in a different parish from her husband, who was irremovable by virtue of Poor Removal Act, 1846 (c. 66), was sent to a lunatic asylum, & an order for her maintenance was made upon the parish of her husband's settlement, under 16 & 17 Vict. c. 97, s. 97:—*Held*: the pauper lunatic was not irremovable by 11 & 12 Vict. c. 111, s. 1, & therefore the order was rightly made under sect. 97, & not under sect. 102 of 16 & 17 Vict. c. 97.—*EAST RETFORD UNION GUARDIANS v. STRAND UNION GUARDIANS* (1862), 3 B. & S. 122; 122 E. R. 47; *sub nom.* *STRAND UNION GUARDIANS v. EAST RETFORD GUARDIANS*, 1 New Rep. 21; *sub nom.* *R. v. EAST RETFORD UNION GUARDIANS*, 32 L. J. M. C. 17; 27 J. P. 229; 11 W. R. 25.

*Annotation*:—*Expld. & Distd.* *Lewisham Union Grdns. v. Wandsworth Union Grdns.*, [1919] 2 K. B. 462.

**1704. — Child living with parent.**—A pauper lunatic had resided for more than five years in resp. parish with her father & mother, when he died, & she continued to reside with her mother in that parish till Oct. 1858, when she was sent to the workhouse, where she remained till Jan. 24, 1860. In Dec. 1859, her mother went to reside in another parish, but did not acquire any settlement in her own right. On Jan. 24, 1860, the pauper lunatic was sent from the workhouse



to the county lunatic asylum & was confined there until Apr. 25 following, when she was discharged & went to reside with her mother. Upon an appeal, against an order of adjudication & maintenance, under 16 & 17 Vict. c. 97, upon the parish in which her father was settled:—*Held*: the pauper lunatic being unemancipated, continued part of her mother's family, & therefore, her mother having ceased to be irremovable, she also ceased to be irremovable, & the order was rightly made. *Qu.*: whether an unemancipated child can acquire a status of irremovability in its own right.—*R. v. ST. MARY ARCHES, EXETER OVERSEERS* (1862), 1 B. & S. 890; 31 L. J. M. C. 77; 5 L. T. 637; 8 Jur. N. S. 457; 121 E. R. 944; *sub nom. ST. MARY ARCHES, EXETER (CHURCHWARDENS) v. MANCHESTER GUARDIANS*, 26 J. P. 356.

*Annotations*:—*Distd. Salford Grdns. v. Manchester Overseers* (1882), 10 Q. B. D. 172. *Appl. Mitford & Launditch Union Grdns. v. Wayland Union Grdns.* (1890), 25 Q. B. D. 164. *Reid. R. v. St. Mary, Islington* (1862), 3 B. & S. 46; *West Ham Union Grdns. v. St. Matthew, Bethnal Green*, [1892] 2 Q. B. 676.

**1705. Admission of chargeability—Adjudication of settlement not necessary.**—Where, under Lunacy Act, 1890 (c. 5), s. 287, an order for payment to the managers of a county lunatic asylum of certain sums, in respect of the past expenses of maintenance of a pauper lunatic sent from a union to the asylum, was made by justices upon the guardians of another union, who had admitted that the lunatic was chargeable to their union without an adjudication as to the settlement of the lunatic under Lunacy Act, 1890 (c. 5), s. 289:—*Held*: the order was rightly made upon the guardians of the last mentioned union.—*R. v. HATHERTON (LORD), Ex p. ORMSKIRK UNION*, [1912] 1 K. B. 616; 106 L. T. 579; 76 J. P. 177; 56 Sol. Jo. 324; 10 L. G. R. 274; *sub nom. R. v. STAFFORDSHIRE JJ., Ex p. ORMSKIRK UNION*, 81 L. J. K. B. 894, C. A.

(b) *When Settlement adjudicated.*

See Part XIII., Sect. 7, sub-sect. 7, A., *post*.

(c) *When Status of Irremovability acquired.*

See Lunacy Act, 1890 (c. 5), s. 294.

**1706. Union of parish of irremovability.**—Under Poor Law Amendment Act, 1849 (c. 103), s. 5, if a pauper lunatic, born in Ireland & having no English settlement, is removed to an asylum after five years' residence in a parish in England from which, if sane, he would have been irremovable by Poor Removal Act, 1836 (c. 66), the union, not the county, is liable to the expenses of his removal & maintenance.—*R. v. ARNOLD, R. v. MIDDLESEX (CLERK OF THE PEACE)* (1852), 18 Q. B. 553; 21 L. J. M. C. 180; 16 J. P. 536; 17 Jur. 300; 118 E. R. 210; *sub nom. R. v. MIDDLESEX JJ.*, 19 L. T. O. S. 255.

**1707.**—*Before Oct. 1844*, the pauper had resided in A. more than five years, & was then taken therefrom without an order of removal to the workhouse of the union in which A. was situate, he being in a state which ended in lunacy, & a small sum was charged to A. by the union & paid on account of the pauper. M. was a parish of the union, & the guardian for M. at the board of guardians appears to have consented that M. should be charged with the maintenance of the pauper by reason of the settlement being supposed by him to be in that parish. After being twelve months in the workhouse, the pauper was removed by the relieving officer of the union under an order of a justice who was chairman of the board

of guardians of the union, & taken to an asylum, & he was afterwards removed to D. asylum, & on both occasions he was described to be of A. For several years M. was charged with & paid the maintenance of the asylum as if he had been settled therein:—*Held*: the pauper lunatic had acquired a status of irremovability in A., & the expense of his maintenance was chargeable out of the funds of the union, & M. was not liable thereto, nor estopped from showing its nonliability by reason of the payment of the expenses for several years.—*R. v. WEST WARD UNION GUARDIANS* (1856), 7 E. & B. 21; 26 L. J. M. C. 29; 28 L. T. O. S. 157; 21 J. P. 212; 3 Jur. N. S. 185; 5 W. R. 87; 119 E. R. 1155.

*Annotation*:—*Reid. Ipswich Union Grdns. v. West Ham Union Grdns.* (1887), 58 L. T. 419.

**1708.**—*Eastbourne Guardians v. Croydon Guardians*, No. 1702, *ante*.

**1709. Married woman.**—A married woman, who had acquired a status of irremovability in parish A., while on a visit in parish W. became a lunatic, & was sent by parish W. to the county asylum; while there, her husband died. Parish B. was the parish of her settlement:—*Held*: parish W. might obtain, & two justices, by 16 & 17 Vict. c. 97, s. 102, had power to make an order on the parish of irremovability for the lunatic's expenses while in the asylum.—*LEEDS GUARDIANS & OVERSEERS v. WAKEFIELD UNION GUARDIANS & WAKEFIELD OVERSEERS* (1857), 7 E. & B. 258; 26 L. J. M. C. 37; 3 Jur. N. S. 292; 119 E. R. 1243; *sub nom. R. v. LEEDS*, 28 L. T. O. S. 265; 21 J. P. 582; 5 W. R. 259.

*Annotations*:—*Consd. East Retford Union Grdns. v. Strand Grdns.* (1862), 3 B. & S. 122; *R. v. Bruce*, [1892] 2 Q. B. 136; *Lewisham Union Grdns. v. Wandsworth Union Grdns.*, [1919] 2 K. B. 462.

**1710.**—*Though husband removed to another parish.*—H. & his wife were irremovable in the W. union when the wife was sent as a pauper lunatic under an order of justices to an asylum as a lunatic. Nine months afterwards, while she remained in the asylum, the husband left the W. union, & had never since returned to it:—*Held*: the wife was still chargeable to the W. union, as that was the irremovability union when she was sent to the asylum.—*THAME UNION GUARDIANS v. WANDSWORTH UNION GUARDIANS* (1871), 36 J. P. 167.

**1711.**—*Husband serving in His Majesty's Forces.*—A man who had a settlement in W., but had acquired a status of irremovability in L., enlisted in the army & married a woman, who, during her husband's absence on active service, resided in W., where both she & her husband had a settlement. During her husband's absence she was sent to an asylum as a pauper lunatic. The husband was afterwards killed in action:—*Held*: although at the time when the pauper lunatic was put in the asylum she was not actually residing in L., yet, as by Poor Removal Act, 1846 (c. 66), s. 1, amended by 11 & 12 Vict. c. 111, s. 1, she had a status of irremovability in the same parish as her husband, & as both the husband & wife must be deemed to have been residing in L. during the husband's service in the army, Lunacy Act, 1890 (c. 5), s. 294, applied, & the guardians of L. were liable for the expenses of her maintenance.—*LEWISHAM UNION GUARDIANS v. WANDSWORTH UNION GUARDIANS*, [1919] 2 K. B. 462; 89 L. J. K. B. 33; 121 L. T. 333; 83 J. P. 178; 17 L. G. R. 465, D. C.

**1712.**—*Unemancipated child—Though father removed to another parish.*—A boy, eighteen years of age, having resided, unemancipated with



**Sect. 7.—Expenses of pauper lunatics: Sub-sect. 3**  
**B. (c), & C.; sub-sects. 4 & 5, A., B., C. & D.]**

his father, for more than five years in A., a parish in the S. union, became insane, & was removed as a lunatic pauper to an asylum, the expense of his maintenance, etc., being paid by the S. union. After three years, the lunatic still being in the asylum, the father removed altogether from A., upon which an order of justices was made, under 16 & 17 Vict. c. 97, s. 97, adjudging the lunatic to be settled in the parish of G., the place of his father's settlement, & directing that parish to pay the costs of his maintenance, etc.:—*Held*: the order was invalid, & the costs of maintenance ought still to be borne by the S. union, under sect. 102; for at the time of his being conveyed to the asylum, the lunatic was exempt from removal by reason of some provision in Poor Removal Act, 1846 (c. 66), coupled with 11 & 12 Vict. c. 111, which must be taken to be incorporated with it.—*R. v. ST. GILES IN THE FIELDS OVERSEERS* (1860), 3 E. & E. 224; 30 L. J. M. C. 12; 3 L. T. 292; 9 W. R. 52; 121 E. R. 426; *sub nom.* *ST. GILES (CHURCHWARDENS, ETC.) v. STRAND UNION GUARDIANS*, 25 J. P. 227; 7 Jur. N. S. 161.

*Annotations*:—*Consd.* *R. v. St. Mary Arches, Exeter* (1862), 1 B. & S. 890. *Folld.* *Thame Union Grdns. v. Wandsworth Union Grdns.* (1871), 36 J. P. 167.

**1713.** ———.]—Poor Law Amendment Act, 1834 (c. 76), s. 56, is a legislative exposition of what relief to children shall be relief to the parents so as to make the latter removable; & therefore relief to a child above the age of sixteen, although unemancipated & residing with the parent is not relief to the parent.

A female above the age of sixteen, but unemancipated & living with her widowed mother in the parish of P., became insane & was removed as a pauper lunatic to an asylum; & afterwards an order for her maintenance was made on the parish of her settlement. At the time of the removal the mother had resided more than five years in P., but during that residence the child, though generally residing with her mother, had, when above the age of sixteen, from time to time been confined in an asylum under an order of a justice as a pauper lunatic at the charge of the parish of P., such confinement being necessary because the mother could not keep her under proper care & control. The time of the several confinements, if deducted from the period of the mother's residence, reduced it below five years:—*Held*: the child being above sixteen, her confinement in the asylum at the charge of the parish was not "relief" to the mother within Poor Removal Act, 1846 (c. 66), s. 1, & the time of her confinement in the asylum, therefore, ought not to be deducted from the mother's residence; & consequently the mother & child were both irremovable, & the order on the parish of settlement bad. *Qu.*: whether, if the child had been under sixteen, her maintenance in the asylum at the charge of the parish would have been "relief" to the mother.—*R. v. ST. MARY, ISLINGTON* (1862), 3 B. & S. 46; 31 L. J. M. C. 233; 6 L. T. 606; 26 J. P. 661; 9 Jur. N. S. 155; 122 E. R. 19.

*Annotations*:—*Refd.* *R. v. Newchurch* (1862), 3 B. & S. 107. *Re* *Merthyr Tydfil Union Grdns.*, [1900] 1 Ch. 516; *Re* *Benson, Knaresborough Grdns. v. Benson* (1918), 82 J. P. 260.

**1714.** ——— **Domestic servant.**]—M., a single woman, aged twenty-eight, having resided in the R. Union as a domestic servant more than a year, was suddenly seized with mania on Sept. 16; the next day her mother fetched her away from

her master's house, he paying the wages up to that day, & took her to her parents' residence in the S. Union. She remained with her parents one night, & the next day was taken to the S. Union house, & on Sept. 26 she was sent to the county lunatic asylum as a pauper lunatic, where she still remained, having continued insane from her first seizure. M.'s settlement was in the W. Union:—*Held*: the order for her maintenance, under 16 & 17 Vict. c. 97, ss. 97, 102, ought to be on the R. Union & not on the W. Union, for that the lunatic having acquired a status of irremovability by a year's residence in R., her mere bodily removal while she was unable to exercise any will of her own was no break of the residence.—*R. v. WHITBY UNION GUARDIANS* (1870), L. R. 5 Q. B. 325; 39 L. J. M. C. 97; 34 J. P. 725; 18 W. R. 785; *sub nom.* *R. v. WHITBY UNION YORKSHIRE GUARDIANS, Re MARSHALL*, 22 L. T. 336.

*Annotations*:—*Expld.* *Newark Union Grdns. v. Glanford Brigg Union Grdns.* (1877), 2 Q. B. D. 522. *Distd.* *Hendon Union v. Hampstead Grdns.* (1893), 62 L. J. M. C. 170. *Refd.* *Guildford Union Grdns. v. St. Olave's Union Grdns.* (1872), 36 J. P. Jo. 53; *Richmond Union Grdns. v. Brentford Union Grdns.* (1899), 63 J. P. 118.

**1715. Lunacy not permanent—Recovery before order for maintenance made—Liability of parish of settlement.**]—*R. v. MANCHESTER GUARDIANS*, No. 1746, *post*.

**1716. Loss of status—Order quashed.**]—*HENDON UNION v. HAMPSTEAD GUARDIANS*, No. 1834, *post*.

**C. Order for Payment.**

*See* Sub-sect. 5, *post*.

**SUB-SECT. 4.—REMOVAL, DISCHARGE AND BURIAL.**

*See* Lunacy Act, 1890 (c. 5), s. 297; Mental Deficiency Act, 1913 (c. 28).

**SUB-SECT. 5.—ORDERS FOR PAYMENT.**

**A. Jurisdiction of Justices.**

*See* Lunacy Act, 1890 (c. 5), ss. 287–294.

**1717. Where jurisdiction arises—Where lunatic in confinement.**]—*R. v. CARNARVON & ANGLESEA UNION GUARDIANS*, No. 1801, *post*.

**1718.** ——— **Validity of confinement immaterial.**]—*FAVERSHAM (CHURCHWARDENS, ETC.) v. ISLE OF THANET UNION GUARDIANS*, No. 1758, *post*.

**1719. County justices—Lunatic within borough having quarter sessions.**]—If a lunatic pauper, chargeable to a parish within a borough, having a separate ct. of quarter sessions, is removed to a licenced house situate without the borough, but within the county in which the borough is situate, two justices of the county may, under 8 & 9 Vict. c. 126, order the costs of maintenance of the pauper in the licenced house to be paid by the parish in which the pauper's settlement has been adjudged, & are bound to enforce that order by issuing a distress warrant.—*R. v. BLAIR* (1849), 13 L. T. O. S. 256; 13 J. P. Jo. 377.

**1720. Where lunatic irremovable.**]—Orders of adjudication of settlement & of maintenance of a pauper lunatic in an asylum, under 8 & 9 Vict. c. 126, do not amount to a removal under Poor Removal Act, 1846 (c. 66), & may be made on the parish in which the pauper is settled, notwithstanding a previous five years' residence in the parish from which he has been removed to the asylum.

Pauper was settled in the parish of R., & was removed from the parish of L., where she had resided more than five years, to a lunatic asylum in the parish of D., under 8 & 9 Vict. c. 126, ss. 58, 62. Two justices subsequently made orders of settlement & maintenance on the parish of R., under 8 & 9 Vict. c. 126, ss. 38, 62:—*Held*: such orders were not prohibited by Poor Removal Act, 1846 (s. 66), s. 1.—*R. v. LEADEN ROTHING (INHABITANTS)* (1849), 12 Q. B. 181; 3 New Sess. Cas. 525; 18 L. J. M. C. 187; 13 L. T. O. S. 137; 13 J. P. 794; 13 Jur. 534; 116 E. R. 835.

**1721. Effect of previous interim order on county.]**—*ALL SAINTS, POPLAR (CHURCHWARDENS, ETC.) v. MIDDLESEX (CLERK OF THE PEACE)*, No. 1815, *post*.

#### B. Form of Order.

See Lunacy Act, 1890 (c. 5), s. 287.

**1722. May be included in order of adjudication of settlement.]**—*R. v. TYRWHITT*, No. 1805, *post*.

**1723. Whether absolute—Maintenance order after adjudication of irremovability.]**—An order of justices adjudging a pauper lunatic to be irremovable from a certain union, & ordering the guardians of that union to repay to the guardians of the union from which the lunatic was sent to the institution for lunatics all moneys paid by the latter in respect of the lodging, maintenance, medicine, clothing, & care of, & the reasonable expenses of the future maintenance, etc., of the lunatic, may be made *ex parte*, & is a final order, & is, by Lunacy Act, 1890 (c. 5), s. 301, subject to appeal to quarter sessions.—*R. v. LONDON JJ., Ex p. EDMONTON UNION* (1896), 60 J. P. 456; *sub nom. R. v. LONDON JJ., Ex p. EDMONTON UNION, R. v. LEE, ETC. JJ., Ex p. EDMONTON UNION*, 40 Sol. Jo. 655, D. C.

**1724. — Where exceeding amount fixed by visiting committee.]**—*GLAMORGAN COUNTY ASYLUM (VISITORS COMMITTEE) v. CARDIFF GUARDIANS*, No. 1691, *ante*.

**1725. Ex parte order—Adjudication of irremovability & maintenance.]**—*R. v. LONDON JJ., Ex p. EDMONTON UNION*, No. 1723, *ante*.

#### C. To Whom Addressed.

**1726. Overseers of parish—Parish forming part of union.]**—*R. v. TYRWHITT*, No. 1805, *post*.

**1727. Clerk of union—Sufficient order on guardians.]**—*R. v. CREDITON (INHABITANTS)*, No. 1802, *post*.

**1728. Churchwardens & overseers—Definition of title in local Act.]**—*R. v. LIVERPOOL (INHABITANTS)*, No. 1846, *post*.

#### D. Validity of Order.

See Lunacy Act, 1890 (c. 5), ss. 287–294.

**1729. By whom made—Justices inquiring into settlement.]**—An order of two justices for the repayment of the costs of removal & maintenance of an insane pauper, under 9 Geo. 4, c. 40, s. 42, can only be made by those justices who have made inquiry into & ascertained the last legal settlement of such pauper. Where therefore an order recited that A., a lunatic, was removed to the lunatic asylum under an order of two justices, whose legal settlement, after due inquiry made & satisfactory evidence obtained, is at D., & adjudicated her settlement to be at D., & ordered the costs of maintenance, etc., to be repaid:—*Held*: (1) the order was bad, as the ct. could not intend that the justices who made the order had themselves taken the evidence & inquired into the place of settlement. (2) where a parish, in which the pauper was not settled, had maintained & removed the

pauper to the lunatic asylum, an order of repayment to this parish could not be made under 9 Geo. 4, c. 40, s. 42, the payment having been made in its own wrong, & the act providing only for repayment to the county treasurer.—*R. v. DARTON (INHABITANTS)* (1840), 12 Ad. & El. 78; 3 Per. & Dav. 483; 9 L. J. M. C. 78; 4 J. P. 542; 4 Jur. 983; 113 E. R. 740.

*Annotation*:—*Generally, Reifd. R. v. Heyop* (1846), 10 Jur. 200.

**1730. Prior examination of lunatic—By justices.]**—*R. v. CARNARVON & ANGLESEA UNION GUARDIANS*, No. 1801, *post*.

**1731. — — —.]**—On appeal against an order for maintenance of a lunatic pauper, under 8 & 9 Vict. c. 126, s. 62, by a parish adjudged to be the last place of legal settlement, the grounds of appeal stated a settlement by reason of the pauper's mother being entitled to & in possession of a freehold tenement situate in resp. parish, & having resided there for forty days up to & at the time of the order, the pauper being unemancipated. It was not stated whether the estate was purchased, or how acquired:—*Held*: (1) upon grounds so generally stated, applts. could not prove that the mother had purchased a freehold estate in the parish, & resided thereon. (2) On such an appeal, it is not a good objection to the order, that the lunatic pauper was not brought before the justice by warrant from him after notice from the relieving officer, according to 8 & 9 Vict. c. 126, s. 48, the enactments in that respect being directory only, & the justice having jurisdiction, in whatever way such lunatic pauper is brought before him.—*R. v. RHYDDLAN (INHABITANTS)* (1850), 14 Q. B. 327; 4 New Mag. Cas. 51; 4 New Sess. Cas. 97; 19 L. J. M. C. 110; 14 L. T. O. S. 464; 14 J. P. 368; 14 Jur. 269; 117 E. R. 129.

*Annotations*:—*As to (2) Consd. Faversham v. Isle of Thanet* (1862), 2 B. & S. 275. *Reifd. R. v. Minster* (1850), 14 Q. B. 349.

**1732. Sufficiency of contents.]**—When a pauper lunatic has been removed to an asylum by an order under 8 & 9 Vict. c. 100, s. 48, justices may adjudicate upon the settlement, under 8 & 9 Vict. c. 126, s. 58, & an order may be made upon the parish of the settlement, under 8 & 9 Vict. c. 126, s. 62, for payment of expenses. Such order of removal cannot be brought up by *certiorari*. If it be so brought up, the objection to the *certiorari* may be taken on the return. It is no valid objection, that the order for payment of expenses sets forth the order of removal, & the adjudication of the settlement, by way of recital, without finding that the statements in such order & adjudication are true. The order may be for payment of a sum specified as reasonable at the time of the order, "or such other weekly sum as the proprietor of the said house shall hereafter, & from time to time, reasonably charge." The order for payment being brought up by *certiorari*, it is no valid objection, that the order of removal appears by affidavit to have been given by a clergyman who was not the officiating clergyman of the parish from which the removal was made. Nor that it does not appear by the order of adjudication that, before adjudication, any notice was given to the parish in which it is adjudged that the pauper is settled. Nor that the order for payment recites an adjudication that, the parish "was the place of the last legal settlement" of the lunatic, without further stating the time of the settlement. Nor that such order does not state the pauper to have been chargeable to the parish from which he was removed. Nor that the



*Sect. 7.—Expenses of pauper lunatics: Sub-sect. 5, the parish of C., the costs of of D., E., F. & G.]*

removal is to a private licenced asylum, but it does not appear that there is no county asylum or HATFIELD

14 Q. B. 298; 3 New Mag. Cas. 180; 3 New Cas. 610; 18 L. J. M. C. 225; 13 L. T. O. S. 13 J. P. 650; 13 Jur. 1070; 117 E. R. 117.  
*Annotations:—Reid. R. v. Crowan* (1849), 14 Q. B. 221; *R. v. Minster* (1850), 14 Q. B. 349.

**1733.** —.]—It is no valid objection to an order of maintenance made, under 8 & 9 Vict. c. 126, s. 62, on a parish adjudged to be the last legal settlement of a pauper lunatic confined in an asylum, that the lunatic is not, on the face of the order, found to be chargeable to the parish whence he was removed, if the order shows that in fact the lunatic has been maintained in the asylum at the expense of such parish. Nor that notice of such chargeability has not been sent to the parish on which the order is made; & if this were necessary, it would be enough to send the examinations on which the order was made, if they show the chargeability.—*R. v. MINSTER (INHABITANTS)* (1850), 14 Q. B. 349; 4 New Sess. Cas. 420; 20 L. J. M. C. 48; 16 L. T. O. S. 261; 15 J. P. 143; 15 Jur. 170; 117 E. R. 138.

*Annotations:—Reid. R. v. Derbyshire JJ.* (1853), 1 C. L. R. 527; *R. v. Crediton* (1858), E. B. & E. 231. *Mentd. R. v. Pinder, Re Greenwood* (1855), 24 L. J. Q. B. 148; *Faversham v. Isle of Thanet* (1862), 2 B. & S. 275.

**1734.** —.]—On appeal against an order for the maintenance of a pauper lunatic under 8 & 9 Vict. c. 126, s. 62, it is no valid ground of objection that the order of justices, recited in the order of maintenance adjudicating the pauper's place of settlement, was made upon hearsay evidence only; such objection being cured by 11 & 12 Vict. c. 31, s. 3.—*R. v. ST. PETER, BARTON UPON HUMBER (INHABITANTS)* (1851), 17 Q. B. 630; 21 L. J. M. C. 23; 18 L. T. O. S. 119; 16 J. P. 212; 15 Jur. 1153; 117 E. R. 1423.

**1735. Order partly valid, partly invalid—Valid part upheld.**—*R. v. MAULDEN (INHABITANTS)*, No. 1696, *ante*.

**1736.** —.]—(1) Under 8 & 9 Vict. c. 126, s. 62, an order may be made for payment of the expenses incurred in & about the examination of a pauper lunatic & his conveyance to the asylum, though more than twelve months may have elapsed since such expenses were incurred.

(2) An order for the repayment of moneys paid for maintenance, medicine, etc., must show upon its face that it is limited to expenses incurred within twelve calendar months previous to the date of the order, & it is not sufficient to show that the moneys have been paid within that period.

(3) Such an order bad as to the repayment of moneys paid for past maintenance, but good as regards future payments & the repayment of expenses incurred in & about the examination & removal of the pauper, may be quashed as to the invalid part, but upheld as to the residue.—*R. v. WINSTER (INHABITANTS)* (1850), 14 Q. B. 344; 4 New Mag. Cas. 90; 4 New Sess. Cas. 116; 19 L. J. M. C. 185; 15 L. T. O. S. 110; 14 J. P. 304; 14 Jur. 744; 117 E. R. 135.

*Annotation:—As to (3) Apld. R. v. Green* (1851), 20 L. J. M. C. 168.

**1737. Operation of subsequent statute.**—An order of justices was made, under 16 & 17 Vict. c. 97, s. 97, on Mar. 24, 1862, adjudging the place of settlement of a lunatic pauper to be in the parish of C., in the D. Union, & ordering the guardians of the Union to pay for & on account

by poor removal. By poor removal. came into operation on Mar. 25, 1862, paupers are made chargeable upon the common fund of the Union:—*Held*: whatever might be the effect of sect. 6 with regard to the apportionment of part & future costs, the order being made before the coming into operation of the new Act, was good in form.—*DROITWICH UNION GUARDIANS & CLAINES PARISH OVERSEERS v. WORCESTER UNION GUARDIANS* (1863), 32 L. J. M. C. 196; 8 L. T. 276; 27 J. P. 630; 9 Jur. N. S. 1151; 11 W. R. 663.

**1738. Effect of prior adjudication of settlement.**—The principle of law, that the same point arising between the same parties shall not be again litigated when once it has been settled by a competent tribunal, applies to orders made under 8 & 9 Vict. c. 126, for the maintenance of a pauper lunatic as well as to orders of removal.

An order adjudging the settlement of a lunatic pauper to be in B. & ordering B. to pay the costs of his maintenance, founded on a settlement acquired in B. by the lunatic in 1831, was made in Oct. 1852, at the instance of the parish of I. It appeared, however, that an order removing the lunatic from I. to B. founded on a birth settlement in 1804, was made on Feb. 7, 1852, & was, on Sept. 27, 1852, on appeal quashed on the merits:—*Held*: the decision of Sept. 1852, estopped I. from obtaining the order of Oct. 1852.—*HESTON OVERSEERS v. ST. BRIDE'S OVERSEERS* (1853), 1 E. & B. 583; 22 L. J. M. C. 65; 17 Jur. 757; 118 E. R. 556; *sub nom. R. v. HESTON (CHURCHWARDENS)*, 20 L. T. O. S. 235; 17 J. P. 408; 1 W. R. 148.

**1739. Abortive appeal—Dismissed on technical grounds.**—An order of justices adjudging the settlement of a pauper to be in a certain parish, showing the settlement to be derivative, is a judgment *in rem* & conclusive as to the settlement of the pauper at the time of the order, although the order has been appealed against & the appeal has not been heard on the merits, but dismissed on a technicality.—*UXBRIDGE UNION v. WINCHESTER UNION* (1904), 91 L. T. 533; 68 J. P. 525; 2 L. G. R. 969, D. C.

**By whom expenses payable.**—See Sub-sect. 3, B., *ante*.

#### E. Enforcement.

See Lunacy Act, 1890 (c. 5), s. 314.

**1740. By distress.**—*R. v. BLAIR*, No. 1719, *ante*.

**1741. Order annulled by statute.**—A lunatic pauper settled in I., but for more than five years resident in M., which was a township maintaining its own poor rate not in a union, was removed to a lunatic asylum. In Sept. 1851 orders were made adjudicating the settlement of the pauper to be in I., & directing I. to pay the expenses of maintenance. After the passing of 16 & 17 Vict. c. 97, I. refused to pay, & the justices issued a distress warrant on the former order:—*Held*: the warrant of distress was illegal, the order of maintenance on I. was annulled by the statute in question, & it was not necessary for I. to take any steps to get rid of the order of maintenance, or to fix the liability on M.—*KNOWLES v. TRAFFORD* (1857), 7 E. & B. 144; 26 L. J. M. C. 188; 29 L. T. O. S. 248; 21 J. P. 452; 3 Jur. N. S. 1018; 5 W. R. 741; 119 E. R. 1201, Ex. Ch.

*Annotation:—Reid. R. v. Chiddingstone* (1862), 2 B. & S. 294.

**1742. By action in county court—Effect of previous adjudication of settlement.**—In 1891 the

guardians of the poor of the Stow Union obtained an order in petty sessions adjudicating the settlement of a pauper lunatic to be N. & ordering the guardians of the N. Union to pay the S. C. Asylum a certain sum for the maintenance & expenses of the lunatic. On appeal to the quarter sessions this order was affirmed, & the appeal was dismissed. The order of quarter sessions was brought up to the High Ct. on *certiorari* & quashed on the ground that one of the magistrates who adjudicated was interested, being a guardian. In Dec. 1896, two justices of the county of S. made an order under Lunacy Act, 1890 (c. 5), s. 287, whereby they adjudged the lunatic to be settled in the Stow Union. A claim was then brought by the S. C. Asylum to recover from the Stow Union the expense of maintenance of the pauper lunatic. The county ct. judge held that he could not go behind the order of Dec. 1896, for although it was merely a provisional order, yet it was good on the face of it, & he therefore gave judgment for pl'ts. Defts. appealed:—*Held*: (1) the county ct. judge was bound to take judicial notice of the order adjudicating the settlement of the pauper lunatic, which was made in June, 1891; that order made in petty sessions was not affected by the quashing on *certiorari* of the affirming order by quarter sessions; (2) the order under Lunacy Act, 1890 (c. 5), s. 287, was merely ministerial, & the judge could go behind it & take judicial notice of the order of settlement which was still in force.—**SUFFOLK COUNTY LUNATIC ASYLUM v. STOW UNION GUARDIANS** (1897), 76 L. T. 494; 61 J. P. 328; 45 W. R. 620; 41 Sol. Jo. 509, D. C.

*Annotations*:—As to (2) *Dbtd.* Glamorgan County Asylum (Visitors Committee) v. Cardiff Grdns., [1911] 1 K. B. 437. *Refd.* Suffolk County Lunatic Asylum Visiting Committee v. Nottingham Union Grdns. (1905), 69 J. P. 120.

**1743.** ———.]—Upon an action brought under Lunacy Act, 1890 (c. 5), s. 314, to recover on an order of justices under sect. 287 for payment of the expenses of maintenance of a pauper lunatic, a county ct. judge, as there was a previous order of adjudication of settlement under s. 289 still in force at the time of action brought, refused to admit evidence that the pauper lunatic had, since the order of adjudication, acquired a fresh settlement or that the order of adjudication was bad, holding that his ct. was not the proper tribunal to decide the question of settlement, & that he must act upon the order of adjudication:—*Held*: this decision was right.—**SUFFOLK COUNTY LUNATIC ASYLUM VISITING COMMITTEE v. NOTTINGHAM UNION GUARDIANS** (1905), 69 J. P. 120; 3 L. G. R. 362, D. C.

*Annotations*:—*Consd.* Glamorgan County Asylum (Visitors Committee) v. Cardiff Grdns., [1911] 1 K. B. 437.

#### F. Notice to Union to be charged.

See Lunacy Act, 1890 (c. 5), ss. 290, 302.

**1744.** Notice of chargeability—Copies of examination must accompany.]—*R. v. MIDDLESEX JJ.*, No. 1820, *post*.

**1745.** ——— Whether necessary.]—*R. v. MINSTER (INHABITANTS)*, No. 1733, *ante*.

**1746.** ——— Must contain address of guardians—Whether court will amend.]—(1) Justices sent a pauper lunatic, residing in the township of M. in the county of L., to the county lunatic asylum of L., where he remained a patient for about three months, when he was discharged. About nine months after, justices made an order adjudicating the settlement of the pauper to be in S. in the union of H., in the county of Y., & ordering the union to pay the expenses of the conveyance to the asylum, & of the lodging, etc., there, under 16 & 17 Vict.

c. 97, s. 99. On appeal against the order for payment, it was objected that such order was bad, inasmuch as by sect. 102 such expenses, in the case of a pauper lunatic who would at the time of the conveyance to the asylum have been exempt from removal to the parish of his settlement by reason of Poor Removal Act, 1846 (c. 66), are to be paid by the parish where the exemption has been acquired, & not by the parish of settlement; & that, under Poor Removal Act, 1846 (c. 66), s. 4, no warrant could be granted for removal of any person becoming chargeable in respect of relief made necessary by sickness, unless it was stated in the warrant that the justices granting it were satisfied that the sickness would produce permanent disability; & that it appeared in this case that the lunacy was not such a sickness:—*Held*: Poor Removal Act, 1846 (c. 66), s. 4, was inapplicable, & the order for payment good.

(2) Under 16 & 17 Vict. c. 97, s. 107, three guardians of M. sent to the union of H. a copy of the order for payment, with the place of confinement, the grounds of adjudication, & the particulars of settlement relied upon. They signed their names to this, adding "guardians of the poor of the said township of M.": but to one of the three names no other address was added:—*Held*: the statement, if not good under sect. 107, was amendable under sect. 112.—*R. v. MANCHESTER GUARDIANS* (1856), 6 E. & B. 919; 26 L. J. M. C. 1; 28 L. T. O. S. 82; 20 J. P. 726; 2 Jur. N. S. 1205; 5 W. R. 20; 119 E. R. 1106.

*Annotations*:—As to (1) *Refd.* Hunslet Overseers v. Dewsbury Union Grdns. & Batley Overseers (1856), 28 L. T. O. S. 99; *Burton v. Eyden* (1873), 42 L. J. M. C. 115.

**1747.** Notice of application for order—Whether necessary.]—*Ex p. MONKLEIGH OVERSEERS*, No. 1806, *post*.

**1748.** ———.]—*R. v. HATFIELD PEVEREL (CHURCHWARDENS & OVERSEERS)*, No. 1732, *ante*.

**1749.** ———.]—A person who had acquired exemption from removal by residence in a certain union, became insane & was sent to a pauper lunatic asylum. Some months afterwards she was released on trial & resided for about seven weeks with her relations in another union, when she got worse & was again received into the asylum. At the time of her release her mental capacity was such that she was incapable of exercising any independent choice as to her residence. A magistrate's order was obtained *ex parte*, under Lunacy Act, 1890 (c. 5), ss. 287, 294, directing payment by the union in which the lunatic had acquired exemption from removal of the expenses of her removal to the asylum & her maintenance there after she had been received into the asylum a second time. On a rule for a *certiorari* to quash the order:—*Held*: the order was rightly made *ex parte*.—*R. v. BRUCE & BRAMLEY GUARDIANS*, [1892] 2 Q. B. 136; 67 L. T. 314; 56 J. P. 567; 40 W. R. 686; 36 Sol. Jo. 542.

*Annotations*:—*Consd.* *R. v. London JJ.*, *Ex p. Edmonton Union* (1896), 60 J. P. 456; *Suffolk County Lunatic Asylum Visiting Committee v. Nottingham Union Grdns.* (1905), 69 J. P. 120.

**1750.** ———.]—**GLAMORGAN COUNTY ASYLUM (VISITORS COMMITTEE) v. CARDIFF GUARDIANS**, No. 1691, *ante*.

#### G. Amount Recoverable.

See Lunacy Act, 1890 (c. 5), ss. 289, 290 (2), 291.

**1751.** Whether limited to expenses incurred within twelve months of order—Expenses of maintenance.]—*R. v. WINSTER (INHABITANTS)*, No. 1736, *ante*.

**1752.** ———.]—Under 16 & 17 Vict. c. 87, s. 96, an order may be made for the payment of



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the expenses of the maintenance of a lunatic for a period of more than twelve months previous to the date of the order.—**FINCH v. YORK GUARDIANS** (1876), 3 Q. B. D. 15; 46 L. J. M. C. 120; 35 L. T. 708; 25 W. R. 42, D. C.

**Annotations:—**Refd. Suffolk County Lunatic Asylum v. Stow Union Grdns. (1897), 76 L. T. 495; Suffolk County Lunatic Asylum Visiting Committee v. Nottingham Union Grdns. (1905) 69 J. P. 120; Glamorgan County Asylum (Visitors Committee) v. Cardiff Union (1910), 79 L. J. K. B. 1146; R. v. Hatherton, *Ex p.* Ormskirk Union, [1912] 1 K. B. 616; R. v. Staffordshire JJ., *Ex p.* Ormskirk Union (1912), 81 L. J. K. B. 894.

**1753. — Expenses of examination & conveyance to asylum.]—R. v. WINSTER (INHABITANTS), No. 1736, ante.**

#### SUB-SECT. 6.—RECOVERY OF EXPENSES.

##### A. From Other Authorities.

*See, now, Lunacy Act, 1890 (c. 5), ss. 286–298, 314; POOR LAW.*

**1754. Right to order for repayment—After adjudication of Settlement—When not made by same justices.]—R. v. DARTON (INHABITANTS), No. 1729, ante.**

**1755. — — —.]—**An order was obtained from two justices adjudging the settlement of the pauper to be in H., & making the usual order for the payment by H. of the past expenses to the guardians of D. Union:—**Held:** notwithstanding 16 & 17 Vict. c. 97, s. 102, & Poor Removal Act, 1846 (c. 66), s. 4, the order of maintenance on H. was good.—**HUNSLET OVERSEERS v. DEWSBURY GUARDIANS** (1856), 26 L. J. M. C. 3, n.; 28 L. T. O. S. 99; 20 J. P. 743; 2 Jur. N. S. 1207, n.

**1756. — When payment under a mistake.]—**A lunatic was sent by her relations from a parish in the Ipswich Union to the asylum at Macclesfield as a private patient. Subsequently they gave notice to the asylum that they would cease paying for her maintenance as a private patient. The clerk to the asylum thereupon gave notice to the guardians of the Macclesfield Union that the lunatic had been transferred to the list of pauper patients chargeable to their union. The guardians accordingly paid a sum for her maintenance:—**Held:** none of the provisions of 16 & 17 Vict. c. 97, applied to the circumstances of the case; the lunatic was not chargeable to the Macclesfield Union; the payment by that union was made under a mistake; & consequently an order upon the Ipswich Union to repay the sum was bad.—**IPSWICH UNION GUARDIANS v. MACCLESFIELD UNION GUARDIANS** (1890), 63 L. T. 526; 55 J. P. 134; 39 W. R. 221, D. C.

*See, now, Lunacy Act, 1891 (c. 65), s. 22.*

**1757. Jurisdiction of justices—To make orders of adjudication & maintenance.]—R. v. CREDITON (INHABITANTS), No. 1802, post.**

**1758. — To inquire into validity of order of admission.]—**(1) 16 & 17 Vict. c. 97, s. 97, provides that it shall be lawful for any two justices of the county or borough in which any asylum, etc., in which any pauper lunatic is or has been confined is situate, to inquire into the last legal settlement of such pauper lunatic, & adjudge such settlement, & order the guardians of the union to which the parish in which such lunatic is adjudged to be settled belongs to pay to the guardians of any union or parish, or to the overseers of any parish, all expenses incurred by or on behalf of such union or parish in or about the examination of the

lunatic, & the bringing him before a justice, & the conveying him to the asylum, & the costs of maintenance for the last twelve months preceding, etc.:—**Held:** it is not competent for the justice making such last-named order of maintenance to inquire into the validity of the order of admission to the asylum, & the existence of such an order gives jurisdiction to make the order of maintenance.

(2) The jurisdiction of justices under sect. 97 of that Act to adjudge the settlement of a pauper lunatic & make an order for his maintenance, attaches where he is *de facto* confined in an asylum; & their order is not invalidated by the fact that he was sent there by a justice who had no jurisdiction.—**FAVERSHAM (CHURCHWARDENS, ETC.) v. ISLE OF THANET UNION GUARDIANS** (1862), 2 B. & S. 275; 121 E. R. 1075; *sub nom.* R. v. FAVERSHAM OVERSEERS, 31 L. J. M. C. 116; 6 L. T. 415; 26 J. P. 310.

**1759. Right of parish to recover from union—Refusal of auditor to re-open accounts.]—**In 1854 a pauper lunatic was sent to an asylum at the charge of the parish of C., in which she had acquired the status of irremovability; her maintenance was charged to C., & allowed in the half yearly audits until Michaelmas, 1860, when the overseer of C. objected that they ought to be charged to the common fund of the Union to which C. belonged. The auditor disallowed the costs for the six months ending Michaelmas, 1860, against the parish, & transferred them to the common union fund account, but refused to re-open the accounts previously audited. On motion to vary the allowance, brought up by *certiorari* under Poor Law Amendment Act, 1844 (c. 101), s. 35, by crediting the parish of C. with the sums paid in previous years & debiting the common fund of the union with those sums:—**Held:** the auditor did right in not re-opening the accounts previously audited.—**R. v. CHIDDINGSTONE (INHABITANTS)** (1862), 2 B. & S. 294; 31 L. J. M. C. 121; 6 L. T. 44; 26 J. P. 246; 121 E. R. 1082.

**1760. Right of authority to time for examination of accounts.]—**The accounts of the guardians for the year ending Sept. 30, 1909, showing a sum to be due from the council to the guardians in respect of the cost of maintenance of pauper lunatics during that year, were lodged with the county council on Dec. 1, 1909. The next meeting of the council after Dec. 1, 1909, was on Feb. 16, 1910, & that was followed by a meeting on Mar. 16. There were in the county nineteen poor law unions whose accounts had to be examined by the council, & the examination would take some weeks. The finance committee at a meeting on Feb. 22, 1910, passed the accounts, & the council at their meeting in Mar. made an order for payment of the amount due, & the amount was paid. The guardians in the meantime brought an action on Jan. 31, 1910, against the council to recover the amount appearing on the accounts to be due:—**Held:** the amount did not become payable until the necessary time had elapsed to make the payment by the county council lawful, that is to say, until the council had a reasonable time to examine the accounts & until after the meetings of the finance committee & the councils, & therefore no cause of action had arisen when the action was commenced.—**CALNE UNION v. WILTS COUNTY COUNCIL**, [1911] 1 K. B. 717; 80 L. J. K. B. 548; 104 L. T. 607; 75 J. P. 42; 9 L. G. R. 5.

##### B. From Lunatic.

**Common law liability to repay.]—See POOR LAW.**

*C. From Lunatic's Estate.**(a) Seizure of Property.*

**1761. Jurisdiction of justices—No power to state case—Summary Jurisdiction Act inapplicable.]—**

(1) Justices acting under Lunacy Act, 1890 (c. 5), s. 299, have no power to state a case, as they are not sitting as a court of summary jurisdiction.

(2) An order can be made under sect. 299 to seize money standing in the lunatic's name in the Post Office Savings Bank.—*Re BETHEL'S APPLICATION* (1899), 80 L. T. 492; 63 J. P. 453; 19 Cox, C. C. 262, D. C.

*Annotation:—As to (1) Rejd. Hagmaier v. Willesden Overseers* (1904), 90 L. T. 683.

**1762. — Money in Post Office Savings Bank.]**

—*Re BETHEL'S APPLICATION*, No. 1761, *ante*.

**1763. — Though lunatic classified as private patient.]—**A person for whose reception & detention in a county lunatic asylum an order has been made under Lunacy Act, 1890 (c. 5), s. 13, is a person "chargeable to a union or local authority" within the meaning of sect. 299 of that Act, & a justice has jurisdiction under the latter sect. to order any property of the lunatic to be seized & applied to the expenses of his maintenance, none the less because at the time of the application for that order the lunatic has been "classified as a private patient" in accordance with Lunacy Act, 1891 (c. 65), s. 3.—*R. v. FULHAM GUARDIANS*, [1909] 2 K. B. 504; 78 L. J. K. B. 1081; 101 L. T. 537; 73 J. P. 397; 7 L. G. R. 881, D. C.

**1764. Right of guardians to levy distress—Against trustees of fund—Where receiver in Lunacy appointed.]—**Where a receiver in Lunacy of funds of a lunatic in a pauper asylum had been appointed, an injunction was granted to restrain the guardians from levying a distress against trustees of the fund to enforce a magisterial order for payment of the fund to the guardians.—*WINKLE v. BAILEY*, [1897] 1 Ch. 123; 66 L. J. Ch. 181; 75 L. T. 577; 61 J. P. 135; 13 T. L. R. 111.

*Annotation:—Rejd. Re Tye* (1899), 81 L. T. 743.

**1765. Liability of guardians for illegal sale—By relieving officer—Where act ratified.]—**On Dec. 9, 1909, pltf. was removed to the depts.' infirmary suffering from temporary insanity. On Dec. 17, 1909, the relieving officer of depts. seized & illegally sold goods of pltf., which she valued at £150, for £4. The guardians knew of the sale in Jan. 1910. On Apr. 1, 1910, depts. informed pltf.'s solr. that the relieving officer had acted without instructions & on his own responsibility, but that they gave her credit for £2 12s. 6d. Pltf., having recovered, claimed damages for wrongful sale & conversion of goods. A jury having found that the guardians had adopted the act of the relieving officer:—*Held*: pltf. was entitled to judgment.—*BARNES v. ST. MARY, ISLINGTON, GUARDIANS* (1911), 76 J. P. 11; 10 L. G. R. 113.

*Annotation:—Mentd. Becker v. Riebold* (1913), 30 T. L. R. 142.

*(b) Funds in Court.*

**1766. Right to order for payment—In respect of past expenses.]—**Order made on a petition presented by guardians of the poor under 10 & 11 Vict. c. 96, for payment to them out of a fund paid in by trustees in which a lunatic was interested of sums expended by the guardians in the support of a lunatic, the Lord Chancellor holding that by the Act the ct. was placed in the position of the trustees, & that the trustees might have made the

payment under Poor Law Amendment Act, 1844 (c. 101), s. 27.—*Re UPFULL'S TRUST* (1851), 3 Mac. & G. 281; 21 L. J. Ch. 119; 42 E. R. 269, L. C.

*Annotations:—Apld. Re Buckley's Trust* (1860), John. 700. *Rejd. Re Irby* (1853), 17 Beav. 334; *Re Harris* (1880), 49 L. J. Ch. 327; *Re Newbegin's Estate, Eggleton v. Newbegin* (1887), 36 Ch. D. 477.

**1767. —**

**Without fresh**

1389, *ante*.

**1768. — — — Out of capital.]—**Certain stock belonging to a lunatic, though not found so by inquisition, had been paid into ct. under 10 & 11 Vict. c. 96. The expenses of the maintenance of the lunatic out of the parish fund, had exceeded the value of the fund in ct. The stock in ct. was ordered to be sold, & the produce to be paid to the clerk of the guardians of the poor of the parish.—*Re PARKER* (1853), 2 W. R. 139.

**1769. — — — — —.]—**Expenses incurred by the overseers for the maintenance of a lunatic paid to them upon petition out of his share in a sum of stock standing in ct.—*Re WARD'S ESTATE* (1854), 2 W. R. 406.

**1770. — — — — —.]—**Pauper lunatic. Past costs & expenses of guardians incurred for the maintenance of the lunatic & his wife, repaid to them out of the corpus of a fund in ct. belonging to the lunatic.

Where the guardians of W. had expended two sums of £132 14s. 0d. & 8 guineas, in the maintenance of a pauper lunatic in an asylum, & also £27 16s. 6d. for the support of his wife; the pauper subsequently became entitled to a sum of £350 3s. 4d. paid into ct.; & a petition was then presented by the guardians, praying the payment to them, out of the corpus of the lunatic's property, of the aforesaid expenses, & of the costs of the petition:—*Held*: they might have such costs & expenses allowed to them out of the corpus of the fund in ct.—*Re DREWERY'S TRUST* (1854), 23 L. T. O. S. 108; 2 W. R. 436.

**1771. — — — — — Discretion of court.]—**

(1) Where a person of unsound mind had been maintained in a lunatic asylum by his parish, a portion of the capital of a fund belonging to him, which had been paid in under Trustee Relief Act, ordered to be applied in defraying the past charges of the parish. *Qu.*: whether under the above circumstances, justices have jurisdiction to order seizure of capital, or only of income.

(2) The ct. has a discretion to order such repayment or not, as it may think most for the benefit of the lunatic.—*Re BUCKLEY'S TRUST* (1860), John. 700; 70 E. R. 601.

*Annotations:—As to (1) Consd. Re Newbegin's Estate, Eggleton v. Newbegin* (1887), 36 Ch. D. 477. *Rejd. Pontypridd Union Grdns. v. Drew*, [1926] 1 K. B. 567.

**1772. — — — — —.]—**Where a person of unsound mind, not found lunatic by inquisition, had been maintained in a lunatic asylum by his parish, the whole of the capital of a fund belonging to him, which had been paid into ct. under Trustee Relief Act, was ordered to be applied, so far as it would extend, in discharge of the past charges of the parish for maintenance.—*Re PHELPS' TRUST* (1873), 28 L. T. 350.

**1773. — — — — —.]—***Re OGILVIE, LEIGH v. OGILVIE* (1895), 39 Sol. Jo. 315.

**1774. — — — — — Out of income.]—***Re BUCKLEY'S TRUST*, No. 1771, *ante*.

**1775. — — — — — Claim by poor law authorities.]—**The ct., in ordering the dividends

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*to order for payment—Proof of maintenance in public asylum necessary.]—Re MCKENZIE, Re LIND, Re CAMPBELL* 14 P. R. 421.—CAN.



*Sect. 7.—Expenses of pauper lunatics: Sub-sect. 6, C. (b), (c), (d) i. & ii., (e), & ...*

of a fund in ct. to be paid for the benefit of a pauper lunatic, refused to allow a claim made by work-house authorities for past maintenance & support.—*Re COLEMAN'S TRUSTS* (1866), 14 L. T. 587.

**1776. ——— To colonial Master in Lunacy.]**—The accrued dividends on a fund settled to the separate use of a married woman who had been for many years an inmate of a pauper lunatic asylum in the colony of Victoria, Australia, were ordered to be paid to the colonial Master in Lunacy towards the payment of expenses incurred for past maintenance; & the future dividends on the same fund were ordered to be paid to the same Master in Lunacy, he being, on the construction of the Colonial Statute, the committee of the lunatic's estate.—*Re BAKER'S TRUSTS* (1871), L. R. 13 Eq. 168; 41 L. J. Ch. 162; 25 L. T. 783; 20 W. R. 325.

**1777. ——— By annual payments.]**—A., B., & C. were paupers in receipt of relief & chargeable on the C. Union, & being of unsound mind, orders were made for their respective reception into the county lunatic asylum as pauper lunatics. The treasurers for the time being of the asylum at various times demanded from the guardians payment for the maintenance & expenses of the lunatics, & the guardians duly paid the amounts so demanded. In Jan. 1905, the lunatics became entitled under a will to certain moneys, which were paid by the exors. & trustees of the will into ct. under Trustee Act, 1893 (c. 53). On a summons being taken out by the guardians asking for recoupment of the cost of the past maintenance of the three lunatics & also to have provision made for their future maintenance out of the funds in ct. belonging to each, an order was made for payment annually to the guardians of the sum certified to have been expended by them in each year, such payments to be deemed to be on account of arrears of maintenance as well as future maintenance.—*Re WILLIAMS' TRUSTS* (1907), 96 L. T. 563; 71 J. P. 209; 5 L. G. R. 542.

**1778. ——— In respect of maintenance of lunatic's wife—Out of capital.]**—*Re DREWERY'S TRUST*, No. 1770, *ante*.

**1779. ——— In respect of future maintenance—By payment of dividends.]**—*Re COLEMAN'S TRUSTS*, No. 1775, *ante*.

**1780. ——— To colonial Master in Lunacy.]**—*Re BAKER'S TRUSTS*, No. 1776, *ante*.

**1781. ——— By annual payments.]**—*Re WILLIAMS' TRUSTS*, No. 1777, *ante*.

(c) *Benefit under Intestacy or Unproved Will.*

**1782. Bankruptcy prior to lunacy—Assignment of property to assignee—Claim by poor law guardian & assignee.]**—A married woman was entitled in reversion to a fund, which did not fall into possession until after her death. During her lifetime, C., her husband, took the benefit of the Insolvent Debtors' Act, & administered to her after her death. Expenses having been subsequently incurred by the parish authorities for maintenance of C. at the county lunatic asylum. Upon the reversionary interest of deceased wife falling into possession:—*Held*: the provisional assignee in insolvency of C. was entitled to have the fund paid to him without deducting the sum claimed by the parish officers for their expenses in maintaining C. in the lunatic asylum, notwithstanding that C. had taken out administration to his wife.—*Re TYLER'S TRUSTS* (1858), 27 L. T. O. S. 119; 2 Jur. N. S. 927; 4 W. R. 524.

**Grant of administration to poor law guardians To enable recovery of expenses.]**—See EXECUTORS, Vol. XXIII., pp. 171, 173, Nos. 1893, 1894, 1916–1921.

(d) *After Death.*

i. *In General.*

**1783. Fund in court.]**—A fund belonging to a pauper lunatic was paid by the trustees into ct. under the 10 & 11 Vict. c. 96. On the petition of the personal representative of the deceased lunatic, an order was made, that the expenses incurred by the parish in the support of the lunatic, etc., be paid out of the fund, & the remainder of the fund be paid over to the personal representative.—*Re MORTON'S TRUST* (1855), 19 J. P. 342.

**1784. ———.]**—*Re MARMAN'S TRUSTS*, No. 1389, *ante*.

**1785. Right of action against personal representatives.]**—A pauper lunatic having died seised of a small amount of real estate:—*Held*: the amount of sums paid by guardians of the union to which the pauper was chargeable, though not the union in which he died, in respect of his maintenance at a lunatic asylum, was a debt recoverable in a creditor's action against his personal & real representatives, though no steps to recover payment of expenses incurred in respect of such maintenance were taken by the guardians in the pauper's lifetime.—*Re WEBSTER, DERBY UNION GUARDIANS v. SHARRATT* (1884), 27 Ch. D. 710; 54 L. J. Ch. 276; 51 L. T. 319.

*Annotations:—Refd.* Lambeth Grdns. v. Bradshaw (1886), 50 J. P. 472; *Re Newbegin's Estate, Eggleton v. Newbegin* (1887), 36 Ch. D. 477; *Re Tye* (1899), 81 L. T. 743. *Mentd.* *Re Clabbon* (1904), 53 W. R. 43; *Birkenhead Union Grdns. v. Brookes* (1906), 70 J. P. 406.

**1786. ———.]**—A pauper lunatic, while being maintained by the guardians of a union, became entitled to a fund, whereupon, on a summons in lunacy by the guardians, who claimed six years' arrears for past maintenance, an order was made by the Ct. in Lunacy appointing a receiver of the fund, & directing him to pay thereout to the guardians part of the arrears & to apply the balance for future maintenance. While under the care of the guardians the lunatic died. There then being a surplus in the hands of the receiver, the guardians commenced a creditors' administration action in the Ch. Div. against the lunatic's administrator to obtain payment of the balance of the six years' arrears:—*Held*: the balance of arrears was a valid legal debt enforceable after the lunatic's death, & the order in lunacy was no bar to the action.—*Re TAYLOR, EDMONTON UNION v. DEELY*, [1901] 1 Ch. 480; 70 L. J. Ch. 332; 84 L. T. 35, C. A.

ii. *Grant of Administration to Guardians.*

**Grants of administration generally.]**—See EXECUTORS, Vol. XXIII., pp. 141 *et seq.*

**1787. Right to grant of administration.]**—Deceased at the time of his death had been for many years supported at a county lunatic asylum, as a lunatic, at the expense of the union to which he belonged. At that time he was beneficially interested in a sum of £400 3 per cent. Consols, standing in the name of trustees. His sister, the only next of kin or person entitled to his property, was also a pauper lunatic. The ct. held that the guardians of the union to which deceased belonged were, under Poor Law Amendment Act, 1849 (c. 103), ss. 16, 17, creditors of deceased, & granted administration to them for the use & benefit of lunatic's next of kin.—*WINDEATT v. SHARLAND* (1871), L. R. 2 P. & D. 266; 41 L. J. P. & M. 9; 35 J. P. 808; *sub nom.* *WINDEATT v. SHARLAND*,

*In the Goods of SHARLAND*, 20 W. R. 211; *sub nom. In the Goods of SHARLAND*, 25 L. T. 574.

**1788.** —.]—Deceased had for over 6 years prior to her death been supported as a pauper lunatic at the county lunatic asylum:—*Held*: the guardians were creditors of deceased within 12 & 13 Vict. c. 103, ss. 16, 17, & as such entitled to administration of her estate.—*LAMBETH GUARDIANS v. BRADSHAW* (1886), 57 L. T. 86; 50 J. P. 472.

**1789.** —.]—B., a pauper lunatic chargeable to the guardians of the Kingston Union, died a spinster & without parents, leaving three brothers & one sister her surviving, all of whom renounced their right to administration. One other brother, who had gone to America in 1871, but who had not been heard of since 1883, was cited by advertisement, under order of this ct. The ct. upon the application of the guardians, made a grant of administration to the clerk to the board as their nominee.—*Re BYRNE* (1888), 52 J. P. 281.

**1790.** —.]—Upon the application of the guardians of the united parishes of St. Giles-in-the-Fields & St. George, Bloomsbury, the ct. made a grant of administration in favour of their nominee to the estate of a pauper lunatic who had died in the county lunatic asylum, & who, at the time of his death, & for some time previously, was chargeable to the said united parishes.—*In the Goods of LUCE* (1890), 54 J.P. 695.

The ct., upon the application of the guardians of the union in which deceased pauper lunatic had died, made to their nominee a grant of administration in respect of the personal estate & effects of such pauper, the guardians being creditors for maintenance & burial expenses, & the next-of-kin, if any, & the Queen's Proctor having failed to appear to citations calling upon them respectively to take the grant.—*In the Goods of REEVES* (1890), 55 J. P. 24.

**1792.** —.]—The ct. upon the application of the guardians, in whose asylum deceased intestate had been, for some time prior to her death, confined as a lunatic, made a grant to their nominee, in respect of the personal estate & effects of deceased.—*In the Goods of LILICRAP* (1891), 55 J. P. 825.

**1793.** — **Subject to affidavit as to husband—Where whereabouts not known.**—The whereabouts of both the husband & son of a woman, who had died as a pauper lunatic, were unknown, & the husband was cited, by advertisements, to accept or renounce administration to her estate, but had not appeared. Upon the motion of the guardians, as creditors for maintenance & funeral expenses, the ct. granted administration to the nominee of the guardians, subject to an affidavit that the husband outlived the deceased.—*In the Goods of KING* (1893), 58 J. P. 464.

**1794.** — **Statute-barred debt—Necessity for notice to next of kin.**—Deceased died intestate & a lunatic in a county lunatic asylum. At the time of his death he was indebted to the guardians. Subsequently the guardians were informed that deceased was entitled to a small amount of property. Their debt was then barred by the Stat. Limitations. The only next of kin of de-

ceased was a lunatic daughter in the same asylum & also indebted to the guardians for maintenance. On an application for a grant of letters of administration to a nominee of the guardians:—*Held*: though a creditor for a statute-barred debt might obtain a grant of letters of administration, notice must be given to the daughter.—*In the Goods of DRUCE* (1899), 68 L. J. P. 120; 81 L. T. 458.

(e) *Application of Statute of Limitations.*

See LIMITATION OF ACTIONS, Vol. XXXII., pp. 320, 321, 517, 518, Nos. 60–62, 1751, 1754, 1756.

*D. From Relations of Lunatic.*

**1795. Liability of husband—Though wife holding protection order.**—A wife had obtained a protection order in 1871, under Matrimonial Causes Act, 1857 (c. 85), s. 21, but had no property, & becoming a lunatic, & being chargeable to the O. union, was removed to an asylum for pauper lunatics. The guardians of O. applied for an order on the husband for maintenance of his wife under Poor Law Amendment Act, 1850 (c. 101), s. 5:—*Held*: the wife's protection order did not discharge the husband, & he was liable to contribute to her maintenance.—*OXFORD GUARDIANS v. BARTON* (1875), 33 L. T. 375; 39 J. P. 725, D. C.

**1796.** — **Sum payable under separation deed—Separate claim for maintenance by guardians—Poor Law Amendment Act, 1850 (c. 101), s. 5.**—Applt. & his wife, who were married in Jan. 1915, entered into a separation deed in Dec. 1915, whereby applt. covenanted to pay her 17s. 6d. weekly, & they thereupon ceased cohabitation. In 1919 the wife was removed to a lunatic asylum & became chargeable to the union, but applt. refused to pay the guardians more than 17s. 6d. a week. On a complaint by an officer of the guardians against applt. under above sect. to show cause why an order should not be made upon him to maintain his wife, the justices held that notwithstanding the separation deed applt. had shown no sufficient cause against an order, & they ordered him to pay the guardians 36s. weekly, the cost of his wife's maintenance in the asylum:—*Held*: the amount to which the guardians were entitled was not limited to the amount fixed by the deed, & the order of the justices was right.—*LLEWELLYN v. TURNER* (1922), 126 L. T. 532; 86 J. P. 59; 66 Sol. Jo. 284; 20 L. G. R. 182, D. C.

**1797. Liability of son—Though order made against husband.**—The fact that an order has been made against the husband of a pauper lunatic, under Poor Law Amendment Act, 1850 (c. 101), s. 5, to pay a weekly sum to the guardians towards the cost of the wife's maintenance in an asylum does not exempt the son of the pauper lunatic from liability under Poor Relief Act, 1601 (c. 2), s. 7, to contribute towards her maintenance.—*COLE v. BROWN*, [1907] 2 K. B. 301; 76 L. J. K. B. 847; 96 L. T. 710; 71 J. P. 335; 5 L. G. R. 727, D. C.

**1798. Liability of father—Domiciled in England—Son maintained as pauper lunatic in Scotland—**

**PART XIII. SECT. 7, SUB-SECT. 6.—D.**

**husband.]**—There is on the part of a husband the support of his wife while confined in a public lunatic asylum where no order has been made for Lunatics

**b. Liability of father.]**—*NEW MONK-LAND PARISH COUNCIL v. ERSKINE*, [1926] S. C. 835.—**SCOT.**

**c. —.]**—A parent, who has means, is a person liable by law to contribute towards his major son's maintenance at a lunatic asylum.—*UNION GOVERNMENT v. CLAASSEN* (1915), O. P. D. 126.—**S. AF.**

**d. Liability of relative under con-**

**tract—Who may sue—Master in lunacy.]**—The master in lunacy may sue, as such upon a contract under seal with a relative of a lunatic patient for payment for his maintenance in a public asylum.—*WILKINSON v. WATSON* (1877), 3 V. L. R. (L.) 239.—**AUS.**

**e. Liability of brother—Extension of liability to estate on death.]**—Pltf. sued deft. for the maintenance of an



*Sect. 7.—Expenses of pauper lunatics: Sub-sect. 6 D. & E.; sub-sect.*

**Right of Scottish authorities to recover.]**—A pauper of the age of twenty-four years, was found destitute in the parish of D. in Scotland. That parish relieved him & under Poor Law (Scotland) Act, 1845 (c. 83), s. 71, claimed & received repayment of the cost of that relief from pltfs., the authorities of a Scottish parish in which the pauper had a legal settlement. Subsequently the pauper was found destitute & insane in the parish of A., also in Scotland. That parish, having caused him to be examined & certified as a lunatic & removed to an asylum, recovered repayment of the expenses of so doing from the pltfs. under Lunacy (Scotland) Act, 1857 (c. 71), s. 76. Pltfs. thenceforward paid for the maintenance of the lunatic in the asylum under ss. 77 of the last-mentioned Act. The lunatic was the son of a domiciled Englishman. On the death of the father leaving assets pltfs. claimed to recover from defts. as his exors. the sums which they had respectively paid to the parishes of D. & A. & the expenses of the lunatic's maintenance in the asylum, as being money which they had been compelled to pay & which the father had been legally compellable to pay:—*Held*: even assuming that the statutes applied to a parent or relation who was a domiciled Englishman, & that the latter statute conferred a right on the parish of settlement to recover from a relation where legally liable apart from that statute, the liability of the parent or relation must be determined by the law of his domicile; by English law a father is not liable for the maintenance of his adult son in the absence of an order of justices under Poor Relief Act, 1601 (c. 2), & defts. were consequently under no liability to pltfs.—**COLDINGHAM PARISH COUNCIL v. SMITH**, [1918] 2 K. B. 90; 87 L. J. K. B. 816; 118 L. T. 817; 82 J. P. 170; 16 L. G. R. 376; 26 Cox, C. C. 260.

*E. From Trade Unions, Friendly and Industrial Societies.*

See Divided Parishes Act, 1876 (c. 61), s. 23.

**1799. Liability of trade union—Application of Divided Parishes Act, 1876 (c. 61), s. 23.]**—A trade union is not a "benefit or friendly society" from which guardians of the poor can claim reimbursement under above sect. in respect of the maintenance of a pauper.—**WINDER v. KINGSTON-UPON-HULL (GOVERNORS FOR POOR, ETC.)** (1888), 20 Q. B. D. 412; 58 L. T. 583; *sub nom.* **WINDER v. HULL (GOVERNORS OF THE POOR)**, 52 J. P. 535, D. C.

**Liability of industrial society.]**—See **INDUSTRIAL, ETC., SOCIETIES**, Vol. XXVIII., p. 126, No. 68.

**Liability of friendly society.]**—See **FRIENDLY SOCIETIES**, Vol. XXV., p. 305, Nos. 131–138.

**SUB-SECT. 7.—ADJUDICATION OF SETTLEMENT.**

*A. In General.*

See Lunacy Act, 1890 (c. 5), ss. 288–302; generally, **POOR LAW**.

**1800. Jurisdiction of justices—When attaching—When lunatic confined in asylum—Whether legality of order of admission considered.]**—Two justices for a borough made an order for the

removal of a lunatic pauper to the county lunatic asylum, under 9 Geo. 4, c. 40, ss. 38, 41. Two county justices under sect. 42 of the same Act, made an order, reciting the former order, & adjudicating the settlement of the pauper. On cause shown against a rule for removing the latter order by *certiorari*:—*Held*: inasmuch as the first order was bad, being made by justices who had no jurisdiction to remove to the county lunatic asylum (because by 9 Geo. 4, c. 40, s. 38 justices can only direct such pauper to be conveyed to the lunatic asylum "for the county or district of united counties for which or any of which they shall act"), the second order was bad also, notwithstanding the provision in sect. 42, that such order may be made where a pauper is confined in the asylum "under any order of any justices."—**R. v. CORNWALL JJ.** (1845), 2 Dow. & L. 775; 1 New Sess. Cas. 499; 14 L. J. M. C. 46; 4 L. T. O. S. 359; 9 J. P. 790; 9 Jur. 372.

*Annotations*:—**Expld.** **R. v. Hatfield Peverel** (1849), 13 Jur. 1070. **Refd.** **R. v. Carnarvon & Anglesea Grdns.** (1849), 14 L. T. O. S. 200.

**1801.** — — — — —.]—(1) *Qu.*: whether on appeal against an order for the maintenance of a lunatic pauper, the order for confining the pauper may be disputed. If it may, it need not show, in the case of a lunatic unfit to be brought before the justice who ordered him to be confined, that the justice proceeded to examine him within three days after notice under 8 & 9 Vict. c. 126, s. 48. *Semble*: the provision as to the three days within which the justice must require the pauper to be brought before him is directory merely.

(2) *Semble*: the jurisdiction of justices to make an order adjudicating the settlement & maintenance of a lunatic pauper is founded on the fact that the lunatic is confined, or is ordered to be confined, in an asylum.—**R. v. CARNARVON & ANGLESEA UNION GUARDIANS** (1849), 14 Q. B. 357, n.; 4 New Mag. Cas. 21; 3 New Sess. Cas. 708; 14 L. T. O. S. 200; 14 J. P. 193; 117 E. R. 142.

*Annotations*:—*As to* (1) **Refd.** **Faversham v. Isle of Thanet** (1862), 2 B. & S. 275. *As to* (2) **Foll.** **Faversham v. Isle of Thanet** (1862), 2 B. & S. 275. **Refd.** **R. v. Minster** (1850), 14 Q. B. 349.

**1802.** — — — — —.]—(1) The validity of an order adjudicating, under the 16 & 17 Vict. c. 97, s. 97, the settlement of a pauper in confinement in an asylum as a lunatic, is not affected by the recital of an insufficient order of admission, as the jurisdiction of the justices to adjudicate attaches on the lunatic being *de facto* in confinement, & the order for admission must be assumed to be in fact good until the contrary be shown.

(2) An order of two justices of a borough recited that, under an order of two justices of the borough, made under the 16 & 17 Vict. c. 97, E. then resident in the parish of St. D. within the said borough, being neither a pauper nor wandering, but a person not under proper care & control, & a proper person to be taken charge of, was, on etc., duly sent to the county lunatic asylum, & has been confined therein, as such pauper lunatic, ever since, at the charge of the said parish; & then proceeded to adjudicate the settlement of E. to be in the parish of C.:—*Held*: good.

(3) An order for the maintenance of a lunatic pauper in confinement, addressed to the guardians of a union & to their clerk, & ordering the clerk to pay, is substantially an order on the guardians

indigent & lunatic brother of deceased in a govt. lunatic asylum for a period prior to the death of deceased during which it was admitted that deceased

was in a position to provide such maintenance:—*Held*: deceased was one of the persons liable by law to contribute, & his estate could be sued for mainte-

nance supplied prior to his death.—**MINISTER OF INTERIOR v. HAVISIDE'S EXECUTORS**, [1916] E. D. L. 244.—**S. AF.**

& in compliance with the 16 & 17 Vict. c. 97, s. 97.—*R. v. CREDITON (INHABITANTS)* (1858), E. B. & E. 231; 27 L. J. M. C. 265; 31 L. T. O. S. 114; 22 J. P. 722; 4 Jur. N. S. 926; 6 W. R. 517; 120 E. R. 494.

*Annotations*:—As to (1) *Reid. R. v. Liverpool, Re Lancaster* (1860), 24 J. P. 646. As to (2) *Expld. Faversham v. Isle of Thanet* (1862), 2 B. & S. 275.

**1803.** — — — — —.] — *FAVERSHAM (CHURCHWARDENS, ETC.) v. ISLE OF THANET UNION GUARDIANS*, No. 1758, *ante*.

**1804.** — — — *Statement of case for high court.*] — *EPPING UNION v. CANTERBURY UNION*, No. 1807, *post*.

**1805. Form of order—Same instrument as order for maintenance.**]—(1) The adjudication of the settlement of a lunatic pauper under 8 & 9 Vict. c. 126, s. 58, & the order for his maintenance under sect. 62 are well made in the same instrument; & an order of maintenance is well directed to the overseers of the parish in which the adjudication finds that the pauper's settlement is.

(2) On appeal against an order for the maintenance of a pauper lunatic, the settlement may be contested.—*R. v. TYRWHITT* (1847), 12 Q. B. 292; 3 New Mag. Cas. 11; 3 New Sess. Cas. 163; 17 L. J. M. C. 141; 11 L. T. O. S. 199; 12 J. P. 583; 12 Jur. 557; 116 E. R. 878.

*Annotations*:—Generally, *Reid. R. v. Chatham* (1848), 3 New Sess. Cas. 235; *R. v. Lancashire JJ.* (1849), 12 L. T. O. S. 513; *R. v. East Ardsley* (1850), 19 L. J. M. C. 133.

**1806. Order made ex parte—Necessity for notice to parish to be charged.**]—It is no ground of objection to an order of justices adjudicating the settlement of a pauper lunatic, or to an order for the costs of his maintenance, made under 8 & 9 Vict. c. 126, that the proceedings before the justices were taken *ex p.*, & without notice to the parish sought to be affected by the orders.—*Ex p. MONKLEIGH OVERSEERS* (1848), 3 New Sess. Cas. 94; 17 L. J. M. C. 76; 10 L. T. O. S. 378; 12 Jur. 354.

*Annotations*:—*Reid. R. v. Carnarvon & Anglesea Grdns.* (1849), 14 L. T. O. S. 200; *R. v. Hatfield Peverel* (1849), 13 J. P. 650; *R. v. Bruce*, [1892] 2 Q. B. 136.

**1807. Amendment of grounds of adjudication—Lunacy Act, 1890 (c. 5), s. 307.**]—The grounds of adjudication accompanying an order of justices under sect. 289 of above Act, adjudicating the settlement of a pauper lunatic to be in the parish of L., in the E. Union, stated that the lunatic resided in the parish of L. for three years & upwards, namely, from Feb. 1892, to about Feb. 1896. Evidence was given by the union obtaining the order that the lunatic had resided continuously in the parish of L. for a period of four years from Apr. 1890; but it was not shown that the lunatic had resided in the parish of L. for a period of three years within the times mentioned in the grounds of adjudication:—*Held*: (1) the ct. were empowered by sect. 307 of above Act to amend the grounds of adjudication so as to let in the residence prior to Feb. 1902, & in the circumstances the grounds should be so amended; (2) the ct. were debarred by sect. 310 of above Act from stating a case upon the point for the opinion of the High Ct.—*EPPING UNION v. CANTERBURY UNION* (1909), 73 J. P. 411.

#### *B. Estoppel by Previous Order.*

*See, generally, ESTOPPEL*, Vol. XXI., pp. 140 *et seq.*

**1808. Whether conclusive as to facts directly decided.**]—*HESTON OVERSEERS v. ST. BRIDE'S OVERSEERS*, No. 1738, *ante*.

**1809.** — — — *& necessary steps to decision.*]—An order of removal, unappealed against or con-

firmed on appeal, is conclusive not only as to the facts directly decided, but as to those facts also that are mentioned in the order, & are necessary steps to the decision of the settlement.

Upon an appeal against an order adjudging the settlement of E., a lunatic pauper, who had been removed from resp. township of L. to an asylum, to be in applt. township of H., resps. proved a former valid order of removal made between the same townships, adjudging the settlement of J., aged eleven years, & K., aged five years (being at the time unemancipated, "the lawful children of W. & E.," the lunatic pauper) to be in applt. township of H. The removal of the two children from resp. township of L. to applt. township took place, & there was no appeal against the order. This was the only evidence relied upon by resps. to prove a settlement of the lunatic pauper in applt. township, derived from her husband:—*Held*: as the adjudication of settlement in both the orders necessarily depended upon the same two facts, namely, the settlement of W., the father, & his marriage with the lunatic pauper before the birth of their two children, the former order unappealed against was conclusive as to those facts, & applt. were estopped from proving that in truth neither the husband of the pauper, nor the pauper herself, had ever gained a settlement in their township.—*R. v. HARTINGTON MIDDLE QUARTER (INHABITANTS)* (1855), 4 E. & B. 780; 3 C. L. R. 554; 24 L. J. M. C. 98; 24 L. T. O. S. 327; 19 J. P. 150; 1 Jur. N. S. 586; 3 W. R. 285; 119 E. R. 288.

*Annotations*:—*Mentd. R. v. Hutchings* (1881), 8 Q. B. D. 300; *De Mora v. Concha* (1885), 29 Ch. D. 268; *Wakefield Corpn. v. Cooke*, [1903] 1 K. B. 417; *Hill v. Clifford*, *Clifford v. Timms*, *Clifford v. Phillips*, [1907] 2 Ch. 236; *Poulton v. Adjustable Cover & Boiler Block Co.*, [1908] 2 Ch. 430.

**1810.** — — — *When unappealed against.*]—Where an order had been obtained on behalf of a parish for conveying a pauper to a lunatic asylum under 9 Geo. 4, c. 40, ss. 38, 41, in which it was stated that the pauper was chargeable to the parish; & a subsequent order was made under sect. 42 of the same statute, adjudging the settlement of the pauper to be in that parish, & requiring the overseers thereof to pay a certain sum of money for the maintenance, etc., of the pauper, & the latter order was appealed against & quashed by the quarter sessions, for want of evidence that the pauper was chargeable to the parish. On appeal from the order of sessions:—*Held*: the statement of chargeability in the first order unappealed from was conclusive as against the parish, it was aggrieved within sect. 46; & the parish ought to have appealed against that order.—*R. v. HOLDSWORTH* (1841), 1 Q. B. 221; 1 Gal. & Dav. 442; 10 L. J. M. C. 57; 5 J. P. 226; 5 Jur. 768; 113 E. R. 1114.

**1811.** — — —.]—Where, in 1833, an order of removal from parish B. to H. was obtained, & the pauper removed, but the copy of order then delivered was defective & bad, yet the order of removal never was appealed against:—*Held*: the objection that the copy was a nullity could not now be set up.—*R. v. WITNEY UNION GUARDIANS* (1864), 28 J. P. 661.

**1812.** — — — *Service of defective copy.*]—*R. v. WITNEY UNION GUARDIANS*, No. 1811, *ante*.

**1813.** — — — *No service on parish to be charged—Original order founded on mistake.*]—On Oct. 1, 1907, upon the application of the guardians of the parish of H. an order was made by two justices adjudicating the settlement of a lunatic then chargeable to the guardians of the parish of H. to be in the parish of L. The application for the



*Sect. 7.—Expenses of pauper lunatics: Sub-sect. 7, B. & C.; sub-sect. 8, A., B. & C. (a).]*

order was made upon a mistake of fact, & the order was not served upon the guardians of the parish of L. nor was it formally abandoned. On Jan. 9, 1908, the guardians of the parish of H. applied for & obtained an order of justices adjudicating the settlement of the lunatic to be in the parish of W., in the W. Union:—*Held*: the existence of the order dated Oct. 1, 1907, did not render invalid the order dated Jan. 9, 1908.—*WANDSWORTH UNION v. HAMMERSMITH PARISH* (1909), 73 J. P. 368.

**1814.** — Fresh facts proving a change of settlement.]—*WEST DERBY UNION v. LIVERPOOL VESTRY* (1882), 46 J. P. Jo. 372.

*Annotation*:—*Reid*. Suffolk County Lunatic Asylum Visiting Committee v. Nottingham Union Grdns. (1905), 69 J. P. 120.

—*See, also*, Nos. 1842–1845, *post*.

**1815.** Interim order—Lunatic adjudged chargeable to county.]—An order of justices, under 16 & 17 Vict. c. 97, s. 98, obtained at the instance of the parish by which a pauper lunatic has been sent to an asylum, & adjudging him to be chargeable to the county in which he is found, on the ground that he is not settled in that parish, & that his parish of settlement cannot be ascertained, is an *interim* & not a final order. The county is, therefore, not estopped by submission to it from afterwards obtaining orders of justices under sect. 99, adjudging the pauper to be settled in the parish which obtained the first order, & requiring that parish to pay for his future maintenance.—*ALL SAINTS, POPLAR (CHURCHWARDENS, ETC.) v. MIDDLESEX (CLERK OF THE PEACE)* (1860), 2 E. & E. 829; 29 L. J. M. C. 186; 24 J. P. 661; 6 Jur. N. S. 823; 121 E. R. 310; *sub nom.* R. v. ALL SAINTS, POPLAR (CHURCHWARDENS & OVERSEERS), 8 W. R. 414; *sub nom.* MIDDLESEX (CLERK OF THE PEACE) v. ALL SAINTS, POPLAR, 2 L. T. 215.

#### C. How Settlement Determined.

*See, generally*, POOR LAW.

**1816.** Idiot adult—Whether parent's settlement followed.]—An idiot does not become emancipated by attaining the age of twenty-one; & consequently, his settlement continues to follow that of his father, gained after he had attained that age, although he was left by his father before he had attained it.—*R. v. MUCH COWARNE (INHABITANTS)* (1831), 2 B. & Ad. 861; 1 L. J. M. C. 4; 109 E. R. 1363.

*Annotation*:—*Apprvd. & Distd.* Salford Grdns. v. Manchester Overseers (1882), 10 Q. B. D. 172.

**1817.** — — — When illegitimate.]—An adult illegitimate idiot who is incapable of taking care of herself acquires a settlement by residing for three years in a town, although such residence is with her mother & her mother's husband as part of their family.

G. was born at W. in 1854, her mother being then unmarried. In 1864 her mother married H. In 1875 G. & her mother & H. went to live at P., where they resided together as one family until 1881, when they removed to M. They continued to reside together there until G. became an inmate of the M. Workhouse. G. was an idiot from her birth, & incapable of taking care of herself:—*Held*: G. had acquired a settlement in P.—*SALFORD GUARDIANS v. MANCHESTER OVERSEERS* (1882), 10 Q. B. D. 172; 52 L. J. M. C. 34; 48 L. T. 119; 47 J. P. 419, D. C.

*Annotation*:—*Highworth & Swindon Union Grdns. v. Westbury-on-Severn Union Grdns.* (1888), 20 Q. B. D. 597.

**1818.** Idiot infant—When father dead & mother re-married—Birth settlement.]—A pauper under the age of sixteen, whose father was dead & whose mother had married again without having acquired a settlement for herself during her widowhood, became chargeable to resp. union, & an order was made for her removal into applt. union in which her mother had been born:—*Held*: the order was bad; at the time of the making of the order of removal the pauper had no "widowed mother" within the meaning of Divided Parishes & Poor Law Amendment Act, 1876 (c. 61), s. 35, whose settlement she could take, & the pauper took her own birth settlement.—*AMERSHAM UNION GUARDIANS v. LONDON (CITY) GUARDIANS* (1887), 20 Q. B. D. 103; 57 L. J. M. C. 6; 58 L. T. 83; 52 J. P. 404; 36 W. R. 141, D. C.

*Annotation*:—*Mentd.* Highworth & Swindon Union Grdns. v. Westbury-on-Severn Union Grdns. (1888), 20 Q. B. D. 597.

**1819.** Soldier—Evidence of attestation paper—As to place of birth.]—*CHERTSEY UNION GUARDIANS v. SURREY (CLERK OF PEACE)*, No. 1699, *ante*.

Status of irremovability.]—*See, generally*, POOR LAW.

Determining liability for lunatic's maintenance.]—*See* Sub-sect. 3, B. (c), *ante*.

#### SUB-SECT. 8.—APPEALS.

##### A. Who may Appeal.

*See* Lunacy Act, 1890 (c. 5), ss. 303–313.

**1820.** Overseers.]—Where an order has been made under 8 & 9 Vict. c. 126, adjudicating the settlement of a lunatic pauper to be in the given parish, & an order for the maintenance of such pauper is also made & served upon the treasurer of the union in which such parish is:—*Held*: (1) the churchwardens & overseers of the parish, being parties aggrieved, have a right to appeal against such order, & the appeal need not to be by the treasurer of the union; (2) applts. are entitled to a copy of the examinations on which the orders were made, for an appeal against the order of maintenance is substantially an appeal against the order of settlement, & the provisions of Poor Law Amendment Act, 1834 (c. 76), s. 79, are incorporated into 8 & 9 Vict. c. 126, so far as they are in their nature applicable to appeals under that Act.—*R. v. MIDDLESEX JJ.* (1847), 11 J. P. 461.

**1821.** — — — Of township.]—Two justices made an order, adjudging the settlement of a lunatic, who had been sent to an asylum, to be in the township of H. in the union of H., addressed to the overseers of the township & the guardians of the union, & ordering the guardians to pay the expenses. The overseers & the guardians separately appealed. At the first sessions the appeal of the guardians was entered & respited, that of the overseers was called on. The sessions refused to hear it on the ground that the overseers had no *locus standi*:—*Held*: the sessions might in their discretion regulate the time of hearing the two appeals so as to secure that they should be heard together & justice done; but they were bound, under 16 & 17 Vict. c. 97, s. 108, to hear the appeal of the overseers of the township, to whom at all events the statute gave an appeal; & a rule for a *mandamus* to enter continuances & hear the appeal was made absolute.—*R. v. WEST RIDING JJ.* (1856), 7 E. & B. 14; 26 L. J. M. C. 41; 3 Jur. N. S. 132; 5 W. R. 73; 119 E. R. 1153; *sub nom.* HALIFAX OVERSEERS v. LEEDS OVERSEERS, 28 L. T. O. S. 122; *sub nom.*

*Re* HALIFAX v. LEEDS, *Ex p.* HALIFAX OVERSEERS, 21 J. P. 164.

*Annotations*:—*Refd.* R. v. Heaton (1859), 28 L. J. M. C. 181; Leatham v. Bolton-le-Sand, (1865), 13 L. T. 218; R. v. Medway Union Grdns. (1868), L. R. 3 Q. B. 383.

1822. ———.]—R. v. MEDWAY UNION GUARDIANS, No. 1831, *post*.

1823. Treasurer of union.]—R. v. MIDDLESEX JJ., No. 1820, *ante*.

1824. Joint appeal of overseers & guardians.]—(1) By order of justices under 8 & 9 Vict. c. 126, s. 62, reciting that the settlement of a lunatic pauper had been adjudged to be in a township within a poor law union, the treasurer of the guardians of such union was directed to pay a sum for the pauper's maintenance:—*Held*: both the officers of the township & the guardians of the union had such an interest in contesting the order that they might jointly appeal against it.

(2) If justices of a county make such order without jurisdiction, the order may be appealed against at the county sessions, & cannot be appealed against at the sessions to which the appeal would have lain had the order been made by the justices who had the jurisdiction.—R. v. LANCASHIRE JJ. (1849), 12 Q. B. 305; 3 New Mag. Cas. 155; 3 New Sess. Cas. 430; 18 L. J. M. C. 121; 12 L. T. O. S. 513; 13 J. P. 519; 13 Jur. 469; 116 E. R. 883.

*Annotation*:—*Consd.* R. v. Lancashire JJ. (1852), 18 Q. B. 361.

#### B. To What Court.

See Lunacy Act, 1890 (c. 5), ss. 303–313.

1825. When to county or borough quarter sessions—Lunatic from borough having quarter sessions—Order by county justices.]—R. v. LANCASHIRE JJ., No. 1824, *ante*.

1826. ———.]—Where an order is made by two county justices, under 8 & 9 Vict. c. 126, s. 62, for the maintenance of a lunatic pauper removed to the county asylum from a borough within the county, having a separate ct. of quarter sessions, the appeal against such order lies exclusively to the borough quarter sessions.—R. v. LANCASHIRE JJ. (1852), 18 Q. B. 361; 21 L. J. M. C. 164; 19 L. T. O. S. 87; 16 J. P. 491; 16 Jur. 478; 118 E. R. 135.

1827. ——— Order by borough justices.]—An order, under 16 & 17 Vict. c. 97, s. 97, adjudging the settlement, etc., of a pauper lunatic confined in the borough lunatic asylum, was obtained by a parish situate wholly within the borough having separate quarter sessions, & was made by two justices of the borough, the asylum being also within the borough:—*Held*: the appeal against the order, under sect. 108, was to the county, & not to the borough quarter sessions.—R. v. WARWICKSHIRE JJ. (1859), 28 L. J. M. C. 249; 33 L. T. O. S. 201; 23 J. P. 757; 5 Jur. N. S. 1292; 7 W. R. 529.

*Annotations*:—*Folld.* R. v. Kent JJ. (1866), L. R. 1 Q. B. 385. *Refd.* R. v. Cambridge Union Grdns. (1861), 1 B. & S. 61.

1828. ——— Union within several jurisdictions.]—By 16 & 17 Vict. c. 97, s. 108, any union or parish may appeal against any order adjudging the settlement of any lunatic confined to an asylum, to the quarter sessions for the county in which the union or parish obtaining the order is situate or if the parish or union extend into several jurisdictions, then to the quarter sessions of the county or borough in which the asylum is situate.

An order under s. 97 adjudging the settlement of a pauper lunatic confined in an asylum, was obtained by a union, consisting of parishes partly in a borough which was wholly in one county but had separate quarter sessions & partly of parishes in the county at large:—*Held*: the appeal against the order, under s. 108 was to the quarter sessions of the county & not to those of the borough in which the asylum was situate.—R. v. KENT JJ. (1866), L. R. 1 Q. B. 385; 7 B. & S. 394; 35 L. J. M. C. 201; 14 L. T. 331; 30 J. P. 612; 14 W. R. 635.

#### C. Against What Orders.

##### (a) In General.

See Lunacy Act, 1890 (c. 5), s. 303–313.

1829. Order for maintenance—Where settlement unascertainable.]—No appeal lay against an order of justices under 8 & 9 Vict. c. 126, ss. 59, 63, adjudging that the settlement of a pauper lunatic sent by parish officers to an asylum could not be ascertained & that such lunatic was chargeable to the county, & directing payment by the county treasurer for the maintenance & other expenses of the lunatic.—WILSON v. LIVERPOOL OVERSEERS (1851), 17 Q. B. 303; 117 E. R. 1295; *sub nom.* R. v. WILSON, 4 New Sess. Cas. 734; 20 L. J. M. C. 232; 17 L. T. O. S. 155; 15 J. P. 659; 15 Jur. 859.

*Annotations*:—*Consd.* R. v. Northampton Recorder (1865), 6 B. & S. 653. *Refd.* All Saints, Poplar v. Middlesex, Clerk of the Peace (1860), 29 L. J. M. C. 186.

1830. ———.]—By 16 & 17 Vict. c. 97, s. 108, if the guardians of a union or parish, or the overseers of a parish, feel aggrieved by an order adjudging the settlement of a lunatic they may appeal to the quarter sessions. By sect. 128, any person who thinks himself aggrieved by any order or determination under the Act, other than orders adjudicating as to the settlement of any lunatic pauper & providing for his maintenance, may appeal to the quarter sessions in the manner & subject to conditions therein mentioned. An order made by two justices of the borough of N. under sect. 96 upon the guardians of the K. Union, in which the parish of M. was comprised, recited that V. was a pauper lunatic duly confined in the N. lunatic hospital, situate in the borough of N., from Apr. 2, 1863, to July 1, 1864, & was sent there from the parish of M. in the K. Union, & upon the application of the treasurer of the hospital, ordered the guardians of the K. Union to pay to the treasurer of the hospital a weekly sum for the maintenance of V. during that period. The settlement of the pauper lunatic had not been ascertained & adjudged under sect. 97:—*Held*: no appeal against this order lay to the quarter sessions under either sect. 108 or sect. 128.—R. v. NORTHAMPTON RECORDER (1865), 6 B. & S. 653; 13 L. T. 199; 122 E. R. 1336; *sub nom.* KETTERING UNION GUARDIANS v. NORTHAMPTON GENERAL LUNATIC ASYLUM COMMITTEE, ETC., 34 L. J. M. C. 198; 29 J. P. 692; 11 Jur. N. S. 999; 13 W. R. 894.

*Annotation*:—*Refd.* Suffolk County Lunatic Asylum Visiting Committee v. Stow Union Grdns. (1897), 61 J. P. 328.

1831. ———.]—By 16 & 17 Vict. c. 97, s. 108, if the guardians of any union or parish, or the overseers of any parish, feel aggrieved by any order adjudging the settlement of any pauper in a lunatic asylum, they may appeal against it. By

#### PART XIII. SECT. 7, SUB-SECT. 8.—C. (a).

1. Order for removal—Appeal by board of guardians.]—EDINBURGH PARISH COUNCIL v. LOCAL GOVERNMENT BOARD FOR SCOTLAND, [1915] S. C. (H. L.) 44; 52 Sc. L. R. 335, H. L.—SCOT.



*Sect. 7.—Expenses of pauper lunatics: Sub-sect. 8, C. (a) & (b), D. & E. Part XIV. Sect. 1.]*

Poor Removal Act, 1861 (c. 55), s. 6, the maintenance of a pauper lunatic in an asylum is to be borne by the common fund of the union; & by sect. 7 the guardians of any union may obtain orders upon the guardians of any other union, or upon the guardians or overseers of any parish not comprised in a union, & may appeal against & defend any orders in respect of any lunatic paupers hereby made chargeable upon the common fund. . . . The guardians of M. Union obtained an order adjudging the settlement of a pauper in a lunatic asylum to be in the parish of A. in the F. Union, & the guardians of F. Union were ordered to pay the expenses of the removal of the lunatic & of his maintenance in the asylum. The overseers of the parish of A. appealed against the order:—*Held*: Poor Removal Act, 1861 (c. 55), ss. 6, 7, did not repeal 16 & 17 Vict. c. 97, s. 108; & the overseers of A. had a right of appeal against the order, as they might still be aggrieved by an order adjudging the settlement of a pauper to be in their parish, though his maintenance while in the lunatic asylum was thrown on the common fund of the union.—*R. v. MEDWAY UNION GUARDIANS* (1868), L. R. 3 Q. B. 383; 9 B. & S. 439; 37 L. J. M. C. 100; 18 L. T. 431; 32 J. P. 728; 16 W. R. 979.

**1832. Order adjudicating settlement.]—***R. v. BANGOR (INHABITANTS)* (1849), 13 J. P. Jo. 267.

**1833. —.]—***EASTBOURNE GUARDIANS v. CROYDON GUARDIANS*, No. 1702, *ante*.

#### *From Adjudication of Irremovability.*

*See Lunacy Act, 1890 (c. 5), ss. 303–313.*

**1834. Whether appeal lies.]—**A pauper lunatic, a single woman, over sixteen years of age, resided with her father as part of his family for some two years & a half in a parish within applt. union. In Oct. 1891, her father moved her with the rest of his family to a parish in resp. union, with no intention of returning. Her mental condition then became worse, & she was placed in a lunatic asylum. In Aug. 1892, an order was made under Lunacy Act, 1890 (c. 5), by two justices, which adjudicated her settlement to be in applt.'s union, & called on the guardians to repay to the guardians of resp. union sums already expended, & to pay her future maintenance to the treasurer of the asylum:—*Held*: (1) the order was appealable; & (2) when she left the parish in applt. union with her father as part of his family, the pauper lunatic put an end to her status of irremovability there, & the order must be quashed.—*HENDON UNION v. HAMPSTEAD GUARDIANS* (1893), 62 L. J. M. C. 170; 37 Sol. Jo. 717; 5 R. 539, D. C.

**1835. —.]—***R. v. LONDON JJ., Ex p. EDMONTON UNION*, No. 1723, *ante*.

**1836. —.]—***EASTBOURNE GUARDIANS v. CROYDON GUARDIANS*, No. 1702, *ante*.

#### *D. Notice of Appeal.*

*See Lunacy Act, 1890 (c. 5), ss. 303–313.*

**1837. Time for.]—**On Mar. 8, 1845, an order for the maintenance of a lunatic pauper was made by two justices under 9 Geo. 4, c. 40, & served on Mar. 13. The next sessions were held on Apr. 13 following, but no appeal against it was then entered. At the sessions, holden by adjournment on July 1 next following, the ct. of quarter sessions refused to receive the appeal:—*Held*: the sessions had done right, as Poor Law Amendment Act, 1834 (c. 76), is not incorporated with & does not apply to 9 Geo. 4, c. 40, & the appeal was,

therefore, too late.—*R. v. WEST RIDING OF YORKSHIRE JJ., Re VINCENT* (1847), 10 Q. B. 763; 16 L. J. M. C. 171; 9 L. T. O. S. 311; 11 J. P. 662; 11 Jur. 1013; 116 E. R. 290; *previous proceedings* (1846), 5 Dow. & L. 16, n.

**1838. —.]—**If an order of maintenance of a lunatic pauper has been made, the twenty-one days within which a notice of appeal must be given will run from the day on which the notice of chargeability, or statement of the grounds on which the adjudication of the settlement or the order of maintenance has been made, has been served; or, when these have not been served, the twenty-one days will run from the time when the order itself has been served.

On Nov. 25, 1852, an order of maintenance of a lunatic pauper was made; & on Feb. 15, 1853, it was served upon applt. parish; but no notice of chargeability, or grounds of removal, or particulars of settlement were at any time served. On Mar. 19, applt. gave notice of appeal for the ensuing Easter sessions:—*Held*: this notice of appeal was too late & it should have been given within twenty-one days after the service of the order.—*R. v. DERBYSHIRE JJ.* (1853), 1 C. L. R. 527; 22 L. J. M. C. 147; 22 L. T. O. S. 80; 17 J. P. Jo.

**1839. Notice given for wrong court.]—**Although a notice of appeal, which refers by mistake to the wrong tribunal, may, under some circumstances, be treated as a notice of appeal to the proper tribunal, yet where the party who has given such a notice acts upon it, & both parties attend in pursuance of it at the wrong tribunal, & the question of jurisdiction is discussed & decided against applt., he cannot afterwards elect to treat the same notice as a notice of appeal to the right ct.—*R. v. SALOP JJ.* (1854), 4 E. & B. 257; 3 C. L. R. 101; 24 L. J. M. C. 14; 24 L. T. O. S. 111; 19 J. P. 149; 18 Jur. 1080; 119 E. R. 99.

*Annotation:—Reid. R. v. Leeds Recorder* (1861), 3 E. & E. 561.

**1840. Description of order.]—***R. v. MAULDEN (INHABITANTS)*, No. 1696, *ante*.

**1841. Grounds of appeal not stated—Court may entertain appeal.]—**Upon an appeal against an order of adjudication of the settlement of a pauper lunatic, the statement of the grounds of appeal was not sent with the notice of appeal, nor was the statement sent within fourteen days of the first day of the sessions to which the notice of appeal related:—*Held*: nevertheless the ct. might enter & respite the appeal.—*BATH UNION GUARDIANS v. WOOLWICH UNION GUARDIANS* (1904), 68 J. P. 240.

#### *E. Practice.*

*See Lunacy Act, 1890 (c. 5), ss. 303–313.*

**1842. Appeal against order for maintenance—Settlement may be contested.]—***R. v. TYRWHITT*, No. 1805, *ante*.

**1843. — Party confined not chargeable to any parish.]—***R. v. RHYDDLAN (INHABITANTS)*, No. 1731, *ante*.

**1844. — Previous order as to settlement—Estoppel.]—***HESTON OVERSEERS v. ST. BRIDE'S OVERSEERS*, No. 1738, *ante*.

**Estoppel by previous order.]—***See Sub-sect. 7, B., ante.*

**1845. Order may be quashed as to part only.]—***R. v. WINSTER (INHABITANTS)*, No. 1736, *ante*.

**1846. Amendment of mistake in order below—Provided order substantially the same.]—**By 16 & 17 Vict. c. 97, s. 97, an order of justices, adjudicating the settlement of a pauper lunatic, is to direct payment of the expenses of his maintenance, etc.,

to be made by the guardians of the parish of settlement, if it be a parish under a board of guardians; if not, by the overseers. Sect. 108 gives an appeal to quarter sessions against such an order; & sect. 113 empowers the sessions, at the hearing of the appeal, to amend any omission or mistake in the drawing up of the order, if satisfied that enough was in proof before the justices making it to have authorised them to have drawn it up correctly.

L. was a parish in which, under a local Act, the rector, churchwardens & overseers, together with twenty-one other persons elected in pursuance of the Act, were constituted the select vestry of, & the board of guardians for L. An order of justices made under 16 & 17 Vict. c. 97, s. 97, adjudging the settlement of a pauper lunatic to be in L. directed payment of the expenses of his maintenance, etc., to be made by the churchwardens & overseers of L.; & was served on the overseers. On an appeal by the overseers to quarter sessions against this order, the sessions amended the order by substituting in it the word "guardians" for the words "churchwardens & overseers":—*Held*: (1) the order of justices was bad, being directed to & served upon a body distinct from the guardians of L., & not upon the guardians of L. under a misnomer; & (2) sessions had not power, under 16 & 17 Vict. c. 97, s. 113, to amend the order as stated: the amendment making the order a new one, & upon new parties who were not before the sessions.—*R. v. LIVERPOOL (INHABITANTS)* (1860), 2 E. & E. 687; 29 L. J. M. C. 137; 2 L. T. 173; 6 Jur. N. S. 1028; 8 W. R. 391; 121 E. R. 258; *sub nom. R. v. LIVERPOOL (INHABITANTS), Re LANCASTER*, 24 J. P. 646.

**1847. Adjournment of appeal.]**—The general power of a ct. of quarter sessions to adjourn to the next sessions the hearing of an appeal, where the particular Act giving the appeal does not limit the hearing & determination of it to one sessions only, extends to cases where the hearing of the appeal has commenced & the evidence is partly before the ct. The sessions have power, in such a case, to adjourn the further hearing to the next sessions, for the purpose of additional evidence being procured: or for any cause which, in their discretion, may render the adjournment expedient. Sessions may exercise this power of adjournment in appeals under 16 & 17 Vict. c. 97; the Act not

limiting the hearing & determination to the sessions for which the appeal is entered, or at which it is first gone into.—*R. v. CAMBRIDGE UNION GUARDIANS* (1861), 1 B. & S. 61; 30 L. J. M. C. 137; 4 L. T. 212; 7 Jur. N. S. 1073; 9 W. R. 599; 121 E. R. 637; *sub nom. CAMBRIDGE UNION GUARDIANS v. BIRMINGHAM GUARDIANS*, 25 J. P. 550.

**1848. Costs—Identification of party liable.]**—By an order of quarter sessions, which appeared to be made upon an appeal by the inhabitants of the parish of S. from an order of two justices adjudging the settlement of a pauper lunatic to be in the said parish, & ordering the overseers of the said parish to pay unto the treasurer of the guardians of a union including the parish of C. the reasonable expenses of maintenance, etc., incurred by the parish of C., the said order of justices was quashed, & the overseers of the parish of C. were ordered to pay to the overseers of S. the costs which they had been put to in & about the said appeal:—*Held*: the order was good, inasmuch as it sufficiently appeared that the overseers of the parish of C. were substantially resps. in the appeal, so as to justify an order upon them for the costs.—*R. v. CHATHAM (INHABITANTS)* (1848), 12 Q. B. 300; 3 New Mag. Cas. 32; 3 New Sess. Cas. 235; 17 L. J. M. C. 161; 11 L. T. O. S. 290; 12 J. P. 790; 12 Jur. 559; 116 E. R. 881.

**1849. — Cannot be awarded by subsequent sessions.]**—Upon an appeal against an order adjudicating the settlement of a lunatic pauper, the sessions at which the appeal was heard confirmed the order, subject to the opinion of this ct. upon a case to be afterwards stated, nothing being then said as to costs. Appls. afterwards abandoned their intention of stating the case, & at a subsequent sessions resps. applied for & obtained an order granting them the costs of the appeal:—*Held*: the sessions at which the appeal was heard & determined alone had jurisdiction to grant costs, & the order of the subsequent sessions was therefore invalid.—*R. v. STAFFORDSHIRE JJ.* (1857), 7 E. & B. 935; 26 L. J. M. C. 179; 29 L. T. O. S. 196; 22 J. P. 209; 3 Jur. N. S. 1148; 5 W. R. 706; 119 E. R. 1494.

*Annotations*:—*Reid. R. v. West Riding of Yorkshire JJ.* (1865), 12 L. T. 380. *Mentd. West London Extension Ry. v. Fulham Union Assmt. Com. & Fulham Overseers* (1870), 22 L. T. 523.

## Part XIV.—Certification, Reception, Treatment and Discharge of Lunatics.

### SECT. 1.—MEDICAL CERTIFICATES CERTIFYING INSANITY.

*See, now, Lunacy Act, 1890 (c. 5), ss. 16, 28.*

**Who may certify.]**—*See Lunacy Act, 1890 (c. 5), ss. 30–32.*

**1850. Necessity for personal examination by doctor certifying.]**—A medical man is not warranted, merely on statements made by the relations of a person supposed to be insane, in sending men to take him into custody & confine him, unless he is satisfied, from those statements, that such a step is necessary, to prevent some immediate injury from being done by the individual, either to himself or to other persons; & if access cannot be had for the purpose of examination, application

should be made to the Lord Chancellor, that the party may be taken up under his authority.—*ANDERDON v. BURROWS* (1830), 4 C. & P. 210, N. P.

*Annotations*:—*Reid. Fletcher v. Fletcher* (1859), 28 L. J. Q. B. 134; *Re B—*, [1891] 3 Ch. 274.

**1851. —**9 Geo. 4, c. 41, provides, that no person, not a parish patient, shall be taken into any house for the reception of lunatics, without a certificate of two medical practitioners, containing certain particulars. Sect. 30 enacts, that any person who shall knowingly & with intention to deceive, sign any such certificate untruly setting forth such particulars, shall be guilty of a misdemeanour; & likewise, that any physician, surgeon, etc., who shall sign any such certificate



*Sect. 1.—Medical certificates certifying insanity.*  
*Sect. 2: Sub-sects. 1 & 2.]*

without having visited & personally examined the patient, shall be guilty of a misdemeanour. An indictment charged that deft., a surgeon, knowingly & with intention to deceive, signed a certificate required by the Act, without having visited & personally examined the patient, contrary to the statute. The jury negatived the intention to deceive, & found deft. guilty, subject to the opinion of the ct. upon the case:—*Held*: in the description of this offence, the averment of intention was surplusage, & such unnecessary matter might be rejected, as well in an indictment on a penal statute as at common law.—*R. v. JONES* (1831), 2 B. & Ad. 611; 9 L. J. O. S. M. C. 98; 109 E. R. 1270.

**1852. — & due inquiries.]**—A medical man, who has merely signed a certificate under the Lunacy Acts & has done nothing more towards causing the confinement of the alleged lunatic, is not liable in trespass. *Semble*: it would be otherwise if he subsequently endeavours to prevent the party's discharge. Nor, if he has merely consulted another medical man who has signed the other certificate, & told him his own idea of the case, is he liable for causing the other to sign such certificate. But if he signs such a certificate without taking due care & making due inquiries, he is liable for the consequences which ensue, & if on his own personal examination he is not satisfied, he is bound to make due inquiries. Nor is he the less liable for the want of such due care & inquiries because he has acted *bond fide*.

It is of great importance that they [the medical profession] should very carefully sign certificates of this kind, & that personal liberty should not be interfered with improperly by any abuse of the power which the law has entrusted to these parties; & on the other hand, it is very important to the medical profession that if a person acts really *bond fide* under the authority of the Act by which these duties are assigned to him, he should not be made responsible for a mere error in judgment or mistake of facts. It is also very important to the interests of the public that persons who are really lunatics should be immediately taken care of.

In a case of this kind malice is not necessary to give the right of action. . . . The true ground of complaint is the negligence of deft. & the want of due care in the discharge of the duty thrown upon him; & if a person assumes the duty of a medical man under this statute & signs a certificate of insanity which is untrue, without making the proper examination or inquiries which the circumstances of the case would require from a medical man using proper care & skill in such a matter, if he states that which is untrue, & damage ensues to the party thereby, he is liable to an action. . . . If a medical man assumes under this statute the duty of signing such a certificate, without making, & by reason of his not making, a due & proper examination, & such inquiries as are necessary, & which a medical man under such circumstances ought to make & is called on to make, not in the exercise of the extremest possible care, but in the exercise of ordinary care, so that he is guilty of culpable negligence, & damage ensues: then an action will lie, although there has been no spiteful or improper motive, & though the certificate is not false to his knowledge. The rule does not apply to a mere error in judgment. What he is required to do is to make an examination; & if it be necessary, to make further inquiries, & not

to act without such inquiries as may be required. There must, to make him liable, be negligence in the discharge of those proper duties which it must be taken he has assumed in undertaking to sign the certificate of insanity (*CROMPTON, J.*).—*HALL v. SEMPLE* (1862), 3 F. & F. 337, N. P.

*Annotations*:—*Consd.* *Everett v. Griffiths*, [1920] 3 K. B. 163. *Refd.* *R. v. Whitfield* (1885), 15 Q. B. D. 122; *Everett v. Griffiths*, [1921] 1 A. C. 631; *Harnett v. Fisher* (1926), 135 L. T. 724.

**1853. What must be stated—Specific facts upon which opinion founded.]**—A return to a *habeas corpus*, directing the keeper of a lunatic asylum to bring up the body of F., certified that F. was, on a certain day received under 2 & 3 Will. 4, c. 107, & that on the day & year aforesaid the keeper received an order & medical certificates, in the form directed by that Act, setting them out. It then further certified, that on Nov. 22, 1845, an order & two medical certificates, under 8 & 9 Vict. c. 100, setting them out, were delivered to the keeper; & concluded, "that E. is now detained under our custody, under & by virtue of the last-mentioned Act of Parliament":—*Held*: the return was sufficient under 2 & 3 Will. 4, c. 107, as it sufficiently appeared that the order & certificates returned were received at the same time with the lunatic, & they were those under which he was received.—*Re FELL* (1845), 3 Dow. & L. 373; 15 L. J. M. C. 25; 9 J. P. Jo. 788; *sub nom. Ex p. FELL*, 6 L. T. O. S. 132, 160.

**1854. — — —.]**—Under 8 & 9 Vict. c. 100, ss. 45, 46, Schedules (B), (C), an order for confinement of a lunatic in a licenced house is not necessarily invalid if the party giving it does not insert statements as to all the particulars in Sched. (B), or state expressly that he does not know them. It is a sufficient statement, as to the "special circumstances," "preventing the insertion of any of above particulars," that the lunatic is "constantly watched by an attendant whom she fears." Under Sched. (C) a medical certificate is sufficient which states, as grounds for the opinion that the party is insane, "that she labours under delusions of various kinds"; & "that she is dirty & indecent in the extreme." A medical practitioner, signing the certificate, instead of the words "from the following fact or facts," inserted, "from the conversation I have had this day with the said" lunatic:—*Held*: sufficient, without more. Where, on return to a *habeas corpus*, it is stated that the party confined is of unsound mind, & unfit & unsafe to be at large, the ct. will not order such party to be discharged from a licenced house, though the order & certificates be not such as to fulfil the requisites of 8 & 9 Vict. c. 100, ss. 45, 46, & Schedules (B), (C).—*Re SHUTTLEWORTH* (1846), 9 Q. B. 651; 2 New Sess. Cas. 470; 16 L. J. M. C. 18; 8 L. T. O. S. 138; 10 J. P. 760; 11 Jur. 41; 115 E. R. 1423.

*Annotations*:—*Consd.* *R. v. Minster* (1850), 14 Q. B. 349. *Refd.* *R. v. Pinder, Re Greenwood* (1855), 24 L. J. Q. B. 148; *Everett v. Griffiths*, [1921] 1 A. C. 631; *Harnett v. Bond*, [1924] 2 K. B. 517.

**1855. — Place of examination.]**—A medical certificate, in the case of a private patient, under 16 & 17 Vict. c. 96, Sched. A, No. 2, for the detention of a lunatic in a house licenced for the reception of lunatics, is bad if it merely state that the medical man examined the alleged lunatic at B., a considerable town, & omit to specify the street & number of the house, or other like particulars respecting the place where such examination was made.

If the alleged lunatic is detained under such a certificate, he will be discharged on a writ of *habeas corpus*, on the ground that the detention is



illegal, unless it be shown that it would be injurious to himself or others to set him at liberty.—*R. v. PINDER, Re GREENWOOD* (1855), 24 L. J. Q. B. 148; *sub nom. Ex p. GREENWOOD*, 25 L. T. O. S. 86; 19 J. P. 262; 1 Jur. N. S. 522.

1856. Duty of doctor to act in good faith & with reasonable care.]—*EVERETT v. GRIFFITHS*, No. 1862, *post*.

## SECT. 2.—RECEPTION ORDERS.

### SUB-SECT. 1.—URGENCY ORDERS.

See Lunacy Act, 1890 (c. 5), s. 11.

1857. Occasions for use—Protection of public or alleged lunatic.]—*Re CATHCART*, No. 1280, *ante*.

### SUB-SECT. 2.—SUMMARY ORDERS.

See Lunacy Act, 1890 (c. 5), s. 13, 22; Lunacy Act, 1891 (c. 65), s. 25.

1858. Discretion of constable, relieving officer or overseer.]—*THOMPSON v. SCHMIDT*, No. 1863, *post*.

1859. Lunatic not under proper care & control—Examinations by justices & doctor.]—Two justices made an order under 16 & 17 Vict. c. 97, s. 68, for the reception into a lunatic asylum as a lunatic of a person who was not a pauper & was not wandering at large, but who was not under proper care & control. S., a relieving officer, received notice that H., who was not a pauper, was insane. S. filled up the form required by the Act, went to the magistrate's clerk's office, & arranged to meet two justices, & on meeting them S. swore to the correctness of the information, & stated on oath that H. was not under proper care & control, that his relations refused to take charge of him, & that he himself believed he was mad. The justices consulted C., a medical man, who, having at an earlier hour on that day examined H., stated that he was satisfied that he was insane. The justices intended to examine H. at a library where he was, but he left before they could do so, & they being informed that he was in a carriage near his lodgings, the two justices went to the carriage & had some conversation with him during five minutes, from which they came to the conclusion that he was insane, & a proper person to be taken care of; & after some further consultation with the medical man, they signed the order for the reception of H. into the County Lunatic Asylum, where he was received & treated as a pauper lunatic for nine days, when he was removed to a London asylum, whence he was two days afterwards discharged as not being insane. On an application by H. for a *certiorari* to quash the order, on the ground that the requirements of 16 & 17 Vict. c. 97, s. 68, had not been satisfied:—*Held*: there had been a sufficient examination of the alleged lunatic; it was not necessary that the examination by the justices should be made in the presence of the medical man, or by the medical man in the presence of the justices; the provisions of sect. 68 had been sufficiently complied with; & the order made by the justices was not made without jurisdiction, & ought not to be quashed.—*R. v. WHITFIELD* (1885), 15 Q. B. D. 122; 54 L. J. M. C. 113; 53

L. T. 96; 49 J. P. 820; *sub nom. R. v. THORNE, ETC.*, *LEWES JJ.*, 1 T. L. R. 437, C. A.

*Annotations*:—*Consd.* *Everett v. Griffiths*, [1921] 1 A. C. 631; *Harnett v. Bond*, [1924] 2 K. B. 517.

1860. — What amounts to proper control.]—*WELSH v. DUCKWORTH* (1902), 18 T. L. R. 633.

*Annotation*:—*Refd.* *Everett v. Griffiths*, [1921] 1 A. C. 631.

1861. Resident pauper lunatic — Workhouse situate outside union to which chargeable—Order made by justice within union.]—By Lunacy Act, 1890 (c. 5), s. 14, provision is made for bringing paupers who are lunatics & proper to be sent to an asylum before "a justice having jurisdiction in the place where the pauper resides." A pauper who was chargeable to a union became a lunatic while residing in the workhouse infirmary, which was situate outside the boundaries of the union:—*Held*: a justice having jurisdiction in the union to which the workhouse belonged had power to deal with the case, since Poor Law Amendment Act, 1844 (c. 101), s. 56, applied, & the workhouse must, therefore, be considered as situated in the parish to which the lunatic was chargeable.—*R. v. BELL*, [1900] 2 Q. B. 391; 69 L. J. Q. B. 622; 82 L. T. 711; 19 Cox, C. C. 515; *sub nom. R. v. BELL, Ex p. LONDON (CITY) UNION*, 64 J. P. 789, D. C.

1862. Degree of care exercisable by justices—Lunacy Act, 1890 (c. 5), s. 16.]—A justice of the peace or chairman of a board of guardians empowered by the Lord Chancellor under Lunacy Act, 1891 (c. 65), s. 25, to sign orders for the reception of persons as pauper lunatics in institutions for lunatics, if at the time of signing a reception order under above sect., he is honestly satisfied that the alleged lunatic is a lunatic & a proper person to be detained, is not liable for negligence.

A justice of the peace or duly authorised chairman of the board of guardians, in discharging his duties under above sect., is acting judicially, & on that ground is protected from an action for negligence. The chairman of a board of guardians duly empowered to make orders for the reception of pauper lunatics signed an order, under above sect., after inquiry & upon the certificate of a medical practitioner, for the reception of *pltf.* as a pauper lunatic in an asylum for lunatics. *Pltf.* brought an action against the chairman & the medical practitioner for negligence in having respectively made the reception order & given the medical certificate. It was admitted that *defts.* acted in good faith:—*Held*: (1) as regards the chairman, as at the time of making the reception order he was honestly satisfied as to *pltf.*'s insanity, no action for negligence lay against him, & he was entitled to judgment; (2) as regards the medical practitioner, on the facts, that there was no evidence fit to be left to the jury of any want of care on his part, & he too was entitled to judgment.—*EVERETT v. GRIFFITHS*, [1921] 1 A. C. 631; 90 L. J. K. B. 737; 125 L. T. 230; 85 J. P. 149; 37 T. L. R. 481; 65 Sol. Jo. 395; 19 L. G. R. 283, H. L.

*Annotations*:—*As to* (1) & (2) *Consd.* *Harnett v. Fisher* (1926), 135 L. T. 724. *Generally, Refd.* *Harnett v. Bond*, [1924] 2 K. B. 517.

1863. Removal to workhouse in urgent cases—Pending summary order of justices—Dangerous lunatic.]—The effect of Lunacy Act, 1890 (c. 5),

## PART XIV. SECT. 1.

1856 i. Duty of doctor to act in good faith & with reasonable care.]—*STRANG v. STRANG* (1849), 11 Dunl. (Ct. of Sess.) 378; 21 Sc. Jur. 108.—*SCOT*.

1856 ii. —.] — *MACKINTOSH v.*

*FRASER* (1860), 22 Dunl. (Ct. of Sess.) 421.—*SCOT*.

## PART XIV. SECT. 2, SUB-SECT. 2.

g. Inquiry & commitment by justice — A judicial proceeding.] — *BUSH v.*

*PARK* (1906), 12 O. L. R. 180; 8 O. W. N. 566.—*CAN*.

h. Liability of magistrate — For negligent & irregular issue of order.] — *DE VILLIERS v. MINISTER OF JUSTICE*, [1916] T. P. D. 463.—*S. AF*.



*Sect. 2.—Reception orders: Sub-sects. 2, 3, 4 & 5.*  
*Sect. 3: Sub-sects. 1, 2, 3 & 4.]*

s. 20, is to vest an absolute discretion in the constable, relieving officer, or overseer with regard to the duty imposed upon him by that sect. Deft. was a medical man, & had attended pltf.'s family for many years as medical man.

weeks. In the autumn of 1890 pltf. became peculiar, & on Nov. 1 his wife applied to the relieving officer for his intervention under

a doctor as to pltf.'s state of mind. The wife thereupon applied to deft. & from what she told him & from his previous knowledge of the history of the case, he wrote the following: "I hereby certify that Mr. T. (i.e., pltf.) is a person of unsound mind, & is dangerous to those about him." The relieving officer then took pltf. to an infirmary where he was confined for two days, & then brought before a magistrate & discharged as being sane. Pltf. brought this action against deft. for negligence in giving the above certificate:—*Held*: deft. was not liable.—*THOMPSON v. SCHMIDT* (1891), 56 J. P. 212; 8 T. L. R. 120, C. A.

*Annotations*:—*Apld.* *Everett v. Griffiths*, [1920] 3 K. B. 163. *Consd.* *Harnett v. Fisher* (1926), 135 L. T. 724. *Refd.* *Everett v. Griffiths*, [1921] 1 A. C. 631.

**1864.** ————.]—*HARWARD v. HACKNEY UNION & FROST* (1898), 14 T. L. R. 306; 62 J. P. Jo. 227, C. A.

*Annotations*:—*Apld.* *Everett v. Griffiths*, [1920] 3 K. B. 163. *Refd.* *Everett v. Griffiths*, [1921] 1 A. C. 631.

**1865.** ———— *Lunatic wandering at large.*—*MORRIS v. ATKINS & BROOKER* (1902), 18 T. L. R. 628, C. A.

*Annotation*:—*Refd.* *Everett v. Griffiths*, [1920] 3 K. B. 163.

### SUB-SECT. 3.—ORDERS ON PETITION.

*See, now, Lunacy Act, 1890 (c. 5), ss. 6–10.*

**Who may make reception order.**—*See Lunacy Act, 1890 (c. 5), ss. 4 (1), 9, 10.*

**1866. Effect of alterations in receiving order.**—Pltf. was taken to & detained in deft.'s asylum as a person of unsound mind under an order signed by pltf.'s husband & containing a statement of questions & answers concerning pltf. To the question "Age" the answer was "Fifty." To the question "Whether first attack," the answer was "For the last twenty years has been subject to what is termed hysteria." To the question "Age (if known) on first attack" the answer was "Thirty." To the question "When & where previously under care & treatment": the answer was "During this period of twenty years has been constantly under treatment." A few days after pltf. had been received into the asylum the last answer was altered by adding to it the words "For hysteria by" several doctors whose names were

No copy of the order as so altered was sent to the Comrs., nor did they sanction the alteration. Afterwards pltf.'s husband wrote a letter to deft. begging him to discharge pltf. "as soon as you may think it advisable." Notwithstanding this letter deft. detained pltf. for a considerable time. Pltf. having brought an action against deft. for

assaulting & imprisoning her, deft. relied upon 8 & 9 Vict. c. 100, ss. 99, 105:—*Held*: the answers were a sufficient compliance with the requirements of 16 & 17 Vict. c. 96, s. 4, & Sched. A, No. 1; the alteration not being of a material part of the order did not invalidate the order; the letter written by pltf.'s husband to deft. was not an order of discharge within the meaning of 8 & 9 Vict. c. 100,

*Annotations*:—*Mentd.* *Re Smith's Estate, Clements v. Ward* (1887), 35 Ch. D. 589; *Hulley v. Silversprings Bleaching Co.*, [1922] 2 Ch. 268.

**1867. Statement of particulars—Privileged as made in judicial proceedings.**—A justice of the peace, or other judicial authority, to whom an application is made, under the Lunacy Act, 1890 (c. 5), on a petition for an order for the reception & detention of a lunatic, is acting judicially, & consequently defamatory statements made in the course of the proceedings are not actionable.—*HODSON v. PARE*, [1899] 1 Q. B. 455; 68 L. J. Q. B. 309; 80 L. T. 13; 47 W. R. 241; 15 T. L. R. 171; 43 Sol. Jo. 223, C. A.

*Annotations*:—*Refd.* *Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405; *Everett v. Griffiths*, [1920] 3 K. B. 163. *Mentd.* *Law v. Llewellyn*, [1906] 1 K. B. 487.

**Privilege in actions for libel.**—*See LIBEL & SLANDER*, Vol. XXXII., p. 108, No.

### SUB-SECT. 4.—EFFECT OF ORDER.

*See Lunacy Act, 1890 (c. 5), s. 35, 37 (1).*

**1868. Authority for detention—Or recapture.**—*NORRIS v. SEED*, No. 1877, *post*.

**1869. ——— Lunatic retaken under power in leave of absence order.**—Pltf., having been received into & detained as a lunatic in a house licenced for the reception of lunatics under a duly certified reception order, was granted leave of absence on trial, under Lunacy Act, 1890 (c. 5), s. 55 (3) (b), for twenty-eight days. The order granting the leave empowered the manager of the licenced house to take back pltf. at any time before the expiration of the said period if his mental condition required it. On the second day of his leave pltf. went to the office of the Comrs. in Lunacy & asked to see one of the Comrs. The Comr., after seeing him, telephoned to the manager of the licenced house that pltf. was not in a fit state to be at large, & detained pltf. for two or three hours while the manager sent a motor with two attendants to take him back to the licenced house. Thereafter pltf. was detained in that house & other institutions for lunatics from Dec. 14, 1912, till he escaped on Oct. 15, 1921. He then brought an action against the Comr. & the manager, charging them jointly & severally with false imprisonment. The case was tried before a judge & jury. The jury found that pltf. on the day he was taken back was not of unsound mind or dangerous to himself or others, & was fit to be at large; that the Comr. alone caused him to be detained until the attendants came, & did so for the purpose of pltf. being detained at the licenced house; & that the manager honestly believed that pltf. was of unsound mind, & that it was in pltf.'s interest that he should be taken back to confinement, but that he had not exercised reasonable care. The judge directed the

**PART XIV. SECT. 2, SUB-SECT. 4.**  
**k. Authority for detention.**—The keeper of a private madhouse cannot

receive & detain a patient, unless there have been issued by the sheriff both an order & a license for such reception &

detention.—*STRANG v. STRANG* (1849), 11 Durl. (Ct. of Sess.) 378; 21 Sc. Jur. 108.—**SCOT.**

jury that it was open to them, if they thought fit, to treat the subsequent long detention of pltf. as a direct consequence of defts.' acts & as the result of the findings of the jury, gave judgment against the Comr. for £5,000, & against both defts. for £20,000.

The Ct. of Appeal having ordered a new trial in the case of the Comr. & directed judgment to be entered in favour of the manager, pltf. appealed :—*Held* : (1) although on the findings of the jury as to pltf.'s mental condition, the Comr. was liable in damages for wrongful detention, the subsequent detention of pltf. at the various institutions for lunatics was not the direct consequence of the Comr.'s wrongful act ; (2) the re-assumption of the control of pltf. by the manager was a *novus actus interveniens*, & consequently the liability of the Comr. did not extend beyond that period ; (3) there was no foundation for the charge against the manager of detaining pltf. without lawful authority. The manager was the judge of the question whether the patient's mental condition required that he should be taken back before the expiration of his leave of absence ; the power reserved by the leave of absence order to retake the patient was capable of being exercised outside the licenced house wherever the patient could be found, & thereafter the patient could be detained under the existing reception order ; (4) there was no evidence to support the finding of the jury that the manager had failed to exercise reasonable care.—*HARNETT v. BOND*, [1925] A. C. 669 ; 94 L. J. K. B. 569 ; 133 L. T. 482 ; 89 J. P. 182 ; 41 T. L. R. 509 ; 69 Sol. Jo. 575, H. L.

#### SUB-SECT. 5.—DURATION OF ORDER.

**As authority to convey to asylum.]**—See Lunacy Act, 1890 (c. 5), s. 36.

**1870. As authority to detain—Pending authority for discharge—Sanity of party detained.]**—Upon an issue & record raising the question of illegal detention in a madhouse, evidence of illegal treatment while there :—*Held* : inadmissible. Even assuming that a person is of sound mind when conveyed under proper authority to a lunatic asylum, it would not be illegal on the part of the keepers of that asylum to detain him until they had proper authority for his discharge.—*MACKINTOSH v. SMITH & LOWE* (1865), 4 Macq. 913, H. L.

—*See, now*, Lunacy Act, 1890 (c. 5), s. 38 ; Lunacy Act, 1891 (c. 65), s. 7.

**Continuation on special report.]**—See Lunacy Act, 1891 (c. 65), s. 7.

### SECT. 3.—CARE AND TREATMENT.

#### SUB-SECT. 1.—REPORTS ON AND VISITS TO PRIVATE PATIENTS.

*See* Lunacy Act, 1890 (c. 5), s. 39.

#### SUB-SECT. 2.—MEDICAL ATTENDANCE.

*See* Lunacy Act, 1890 (c. 5), ss. 43–45.

#### SUB-SECT. 3.—VISITS OF FRIENDS AND CORRESPONDENCE.

*See* Lunacy Act, 1890 (c. 5), ss. 41, 42, 47.

**1871. Access by solicitor of lunatic—To obtain signature to affidavit required by rules of court.]**—A married woman, confined in an asylum, gave

instructions to her solr. to institute proceedings against her husband for judicial separation, & the solr. attended with a comr. for oaths in order to obtain from the proposed petitioner the necessary affidavit in verification of the petition, which had been approved & signed by her previously. The superintendent of the asylum, acting upon printed instructions purporting to be signed by the secretary & addressed from the office of the Comrs. in Lunacy, refused to allow the solr. & comr. for oaths to see the proposed petitioner, & upon application being made by the solr. to the Comrs. in Lunacy, they upheld the refusal of the superintendent. The ct. upon motion, & upon affidavit, proving notice, made an order, the Comrs. in Lunacy having notice & not opposing, that the Comrs. should forthwith authorise the superintendent of the asylum to permit the solr. & comr. for oaths to have access to the proposed petitioner.—*Re PETITION FOR JUDICIAL SEPARATION, Ex p. BEECHAM*, [1901] P. 65 ; *sub nom. Re BEECHAM & LUNACY COMRS.*, 70 L. J. P. 20 ; 84 L. T. 63.

#### SUB-SECT. 4.—RESTRAINT.

**Mechanical restraint.]**—*See* Lunacy Act, 1890 (c. 5), s. 40.

**1872. Common law right.]**—God forbid that a man should be punished for restraining the fury of a lunatic, when that is the case (*LORD MANSFIELD*).—*BROOKSHAW v. HOPKINS* (1773), Loft, 243 ; 98 E. R. 630.

**1873. —.]**—At common law, & apart from the lunacy statutes, a medical man may justify measures necessary to restrain a dangerous lunatic. So also, if he be called in to attend a person suffering under delirium tremens, he may justify such measures as are reasonably necessary, either to cure him or to restrain him from doing mischief, so long as the fit lasts, or it is likely to return.

If pltf. was, at the time of the original restraint, a dangerous lunatic, in such a state that it was likely that he might do mischief to any one, deft. would be justified in putting a restrain upon him, not merely at the moment of the original danger, but until there was reasonable ground to believe that the danger was over (*BRAMWELL, B.*). *SCOTT v. WAKEM* (1862), 3 F. & F. 328.

**1874. —.]**—In an action against two medical men for having, with other persons unlawfully entered the house of pltf. & assaulted & imprisoned her therein, they pleading only not guilty, & leave & licence ; & the case being that she had called them both in as her medical attendants ; & had asked them to send a nurse ; & that they, at the desire of her friends, sent not only a female nurse, but also a male attendant, who were both engaged by pltf.'s friends, but to whom defts. gave directions, & against whom pltf. alleged certain acts of violent restraint & coercion ; the defence being that she was suffering under delirium tremens, & that there was no more restrain than necessary as a part of medical treatment :—*Held* : if this were so, even assuming that defts. were responsible for the acts of the attendants, there was a justification in law, had it been so pleaded ; though, *semble* : the defence arose also under a plea of leave & licence, supposing, at all events, there was no express revocation of the retainer by pltf. in a lucid interval.—*SYMM v. FRASER* (1863), 3 F. & F. 859.

**1875. — Must not exceed necessity.]**—*R. v. ROBERTS* (1853), cited in Halsbury's Laws of England, Vol. XIX., at p. 517.



*Sect. 3.—Care and treatment: Sub-sects. 5 & 6. Sects. 4 & 5. Part XV. Sects. 1, 2 & 3.]*

**SUB-SECT. 5.—ABSENCE ON TRIAL, OR FOR HEALTH, OR CHANGE OF RESIDENCE.**

*See Lunacy Act, 1890 (c. 5), ss. 55, 56; Lunacy Act, 1891 (c. 65), ss. 9, 10.*

**1876. Discretion of manager to retake during leave of absence.]—HARNETT v. BOND, No. 1869, ante.**

**SUB-SECT. 6.—REMOVAL.**

*See Lunacy Act, 1890 (c. 5), ss. 58–71.*

**SECT. 4.—ESCAPE AND RECAPTURE.**

*See Lunacy Act, 1890 (c. 5), ss. 85–89.*

**1877. Recapture within fourteen days—Validity of original reception order—Though party not in fact insane.]—Trespass for assaulting, etc., & carrying away E. then & still being the wife of pltf., & detaining her against his wife, etc., whereby pltf. lost her society, etc. Plea, under 8 & 9 Vict. c. 100, that deft. was a proprietor of a house duly licenced under that Act, & that he received an order in pursuance of that Act, for the reception of the said E. as a lunatic (the order, which was set out in the plea, described the patient as E., a person of insane mind); that the order was accompanied by two medical certificates, stating the said E. to be a person of unsound mind; that deft., then as such proprietor, took charge of & received into the house the said E. "then being the patient then named in the said order & certificate" & detained**

her until her escape from the asylum, & from the detention & custody of deft.; & that deft., within fourteen days after her escape, gently laid his hands upon her, & retook her, & carried her away to the said house, & there detained her, as he lawfully might, which are the said trespasses, etc.:—*Held*: the order & certificate afforded a good justification to deft., although the person named in them was, in fact, not insane. *Semble*: in such case, where the wife is really not insane, the husband's remedy is by *habeas corpus*, or by application to the comrs.—*NORRIS v. SEED* (1849), 3 Exch. 782; 18 L. J. Ex. 300; 13 L. T. O. S. 122; 13 J. P. 586; 13 Jur. 830.

**SECT. 5.—DISCHARGE.**

*See Lunacy Act, 1890 (c. 5), ss. 72–82.*

**1878. Discretion of commissioners to refuse discharge.]—The Comrs. of Lunacy have a discretion to refuse to order the discharge of a lunatic from detention notwithstanding the production to them of the certificates of two medical practitioners certifying under Lunacy Act, 1890 (c. 5), s. 49, that the lunatic may be discharged without risk of injury to himself or the public.—*R. v. LUNACY COMRS.*, [1897] 1 Q. B. 630; 66 L. J. Q. B. 387; 76 L. T. 353; 61 J. P. 278; 45 W. R. 505; 13 T. L. R. 285, D. C.**

*Annotation:—Mentd. R. v. Marshland, Smeeth & Fen District Comrs.*, [1920] 1 K. B. 155.

**1879. What amounts to order to discharge—"As soon as you think desirable."—*LOWE v. FOX*, No. 1866, ante.**

**1880. Pauper lunatic—Delivery to relative undertaking care.]—*Re STENEULT* (1894), 29 L. Jo. 345, D. C.**

## Part XV.—Offences, Penalties and Proceedings.

**SECT. 1.—IN GENERAL.**

*See Lunacy Act, 1890 (c. 5), ss. 315–332.*

**1881. Contempt of court—Marriage with lunatic so found.]—*ASH'S CASE*, No. 141, ante.**

**1882. — Refusal to produce alleged lunatic for examination.]—*WENMAN'S (LORD) CASE* (1721), 2 Eq. Cas. Abr. 584; 1 P. Wms. 701; 22 E. R. 491, L. C.**

*—See CONTEMPT OF COURT, Vol. XVI, p. 37, Nos. 381, 382.*

**1883. Reception of single lunatic—Omission to transmit necessary certificates—Onus of proof of transmission on keeper.]—8 & 9 Vict. c. 100, requires every person receiving a single lunatic into his or her care to obtain & transmit to the Lunacy Comrs. certain orders & certificates, which are upon receipt at their office entered & filed. In the books in which the receipt of such orders,**

etc., were entered, no notice was found of any such having been received from deft. Notice was given to deft. to produce any orders, etc., he might have received, entitling him to take charge of the alleged lunatic:—*Held*: although, as a general rule, a deft. must have his guilt proved, & not be called upon to establish his innocence, yet seeing that the proof was in the nature of negative proof, & that, if he had received the documents & not transmitted them, they would be in his possession, & that, after notice to produce them had been given, he had not produced them, there was a sufficient case to go to the jury.—*R. v. HARRIS* (1867), 10 Cox, C. C. 541.

*See, now, Lunacy Act, 1890 (c. 5), s. 316.*

**1884. Reception into unlicensed house—Bonâ fide belief in sanity.]—Deft. was convicted under 8 & 9 Vict. c. 100, s. 44, of receiving two or more**

**PART XIV. SECT. 3, SUB-SECT. 5.**

**l. Absence for health — Permission to travel.]—*Re HACKETT* (1854), 3 L. Ch. R. 375.—IR.**

**PART XIV. SECT. 4.**

**m. False representation of insanity of escaped lunatic—Bonâ fide issue of warrant of arrest by medical superintendent—Statutory protection in action for trespass.]—*DOBBYN v. DECOW* (1875), 25 C. P. 18.—CAN.**

**PART XIV. SECT. 5.**

**n. Irregular commitment — Discre-**

**tion of court to refuse discharge.]—On an application for an order discharging a person from confinement in an insane asylum the ct. has a discretion, however irregular the proceedings leading to the confinement may have been, to refuse the application, if satisfied that appct. is at the time of the application insane & dangerous to be at large.—*Re KING* (1916), 35 W. L. R. 132; 11 W. W. R. 132.—CAN.**

**o. Lunatic confined before inquiry—Application by committee—**

**Mode of proceeding.]—*Re FLANAGAN* (1845), 2 Jo. & Lat. 343.—IR.**

**p. Lunatic not so found.]—The Lord Chancellor will set at liberty a person not found lunatic by inquisition, but confined in an asylum as an ordinary lunatic, on being satisfied of the sanity of the person so confined.—*Re GODFREY* (1892), 29 L. R. Ir. 278.—IR.**

**q. Certificate & order of discharge—Presumption of validity.]—*JOHNSON v. PUBLIC TRUSTEE* (1903), 22 N. Z. L. R. 561.—N.Z.**

lunatics into her house, not being a registered asylum or hospital, or a house duly licensed under the above Act, or under any previous Act, but it was specially found by the jury who convicted, that though the persons so received were lunatic, deaf, honestly, & on reasonable grounds, believed that they were not lunatic:—*Held*: such belief was immaterial, & the conviction was right.

We affirm the direction of STEPHEN, J., when he told the jury that the word "lunatic" would include every one whose mind was so affected by disease that it was necessary for his own good to put him under restraint," in the sense that by "restraint" is meant restraint *ejusdem generis* with that applied to lunatics in asylums (POLLOCK, B.). —R. v. BISHOP (1880), 5 Q. B. D. 259; 49 L. J. M. C. 45; 42 L. T. 240; 44 J. P. 330; 28 W. R. 475; 14 Cox, C. C. 404, C. C. R.

**Annotations :—***Mentd. Cundy v. Le Cocq.* (1884), 13 Q. B. D. 207; *R. v. Tolson* (1889), 23 Q. B. D. 168; *Sherras v. De Rutzen*, [1895] 1 Q. B. 918; *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *Hobbs v. Winchester Corpn.*, [1910] 2 K. B. 471; *Leslie v. Reliable Advertising & Addressing Agency*, [1915] 1 K. B. 652.

- ———.]—R. v. IRVING (1898), 62 J. P. 459.

*See, now, Lunacy Act, 1890 (c. 5), s. 315 (1).*

1886. Obstruction to statutory visitation.]—R. v. JONES (1894), 48th Report of Commissioners in Lunacy (Parliamentary Papers, Vol. 43), 104.

*See, now, Lunacy Act, 1890 (c. 5), s. 321 (1), (2).*

**SECT. 2.—ILL-USAGE OF LUNATIC.**

*See, now, Lunacy Act, 1890 (c. 5), s. 322.*

1887. Person having care of lunatic—Necessity for proof of duty to take care.]—An indictment charged that while a person of unsound intellect was under the care of deft., deft. treated such persons improperly & neglectfully in certain stated particulars. It was held not to be a substantive charge; & judgment was arrested. Another count charged that the same person was the illegitimate child of deft., a female, who had means for the comfortable support & maintenance of both, whereupon it became her duty to take proper care of him, but that she did not take proper care of him, but kept & confined him in a dark, cold, & unwholesome room, neglected to provide him with proper clothing, permitted him to become dirty, allowed the room to become foul so as to cause unwholesome smells, & kept him without proper air, warmth, & exercise necessary for his health, to his damage & peril. Judgment arrested: first, because no duty was shown; secondly, because it was not shown that the conduct of deft. had or must have occasioned actual injury.—*R. v. PELHAM* (1846), 8 Q. B. 959; 15 L. J. M. C. 105; 7 L. T. O. S. 251; 10 J. P. 616; 10 Jur. 659; 2 Cox, C. C. 17; 115 E. R. 1135.

*Annotations* :—**Reid**. *R. v. Heppingstall* (1858), 32 L. T. O. S. 337 ; *R. v. Ryland* (1867), L. R. 1 C. C. R. 99.

1888. — Care arising from natural duty—  
Husband of lunatic.]—The law obliges a husband  
to take care of his wife independently of her being  
a lunatic; he does not take care of her because  
she is a lunatic, but because she is his wife  
(PARKE, B.).

The prisoner was tried & convicted on an indictment under 16 & 17 Vict. c. 96, s. 9, charging that he, having the care & charge of his wife, a lunatic, did abuse & ill-treat her; & also containing a count for a common assault:—*Held*: the prisoner was not a person having the care or charge of a lunatic within the meaning of the statute,

inasmuch as its provisions were not intended to apply to persons whose care or charge arises from natural duty, & so much of the conviction as related to the counts under the statute must be quashed.—*R. v. RUNDLE* (1855), Dears. C. C. 482; 3 C. L. R. 659; 24 L. J. M. C. 129; 25 L. T. O. S. 118; 19 J. P. 293; 1 Jur. N. S. 430; 3 W. R. 403; 6 Cox, C. C. 549; 169 E. R. 813, C. C. R.

**Annotations :—Distd. R. v. Porter** (1864), Le. & Ca. 394.  
**Dbtd. Buchanan v. Hardy** (1887), 18 Q. B. D. 486.

**1889.** — — — **Parents.]**—The parents of a lunatic who resides with them under their care are persons "having the care or charge" of a lunatic within 16 & 17 Vict. c. 96, s. 9, & may be convicted under that sect. for ill-treating such lunatic.—**BUCHANAN v. HARDY** (1887), 18 Q. B. D. 486; 56 L. J. M. C. 42; 51 J. P. 741; 35 W. R. 453, D. C.

*See, now, Lunacy Act, 1890 (c. 5), s. 322.*

**1890. — Care voluntarily assumed—Brother.]**  
—A man who has voluntarily taken upon himself the care of a lunatic brother in his own private house is a person “having the care & charge” of a lunatic within 16 & 17 Vict. c. 96, s. 9, & is liable to be indicted for ill-treating him.—*R. v. PORTER* (1864), Le. & Ca. 394; 4 New Rep. 71; 33 L. J. M. C. 126; 10 L. T. 306; 28 J. P. 389; 10 Jur. N. S. 547; 12 W. R. 718; 9 Cox, C. C. 449; 169 E. R. 1445, C. C. R.

*Annotations* :—**Apld.** *R. v. Smith & Smith* (1880), 42 L. T. 160. **Consd.** *Buchanan v. Hardy* (1887), 18 Q. B. D. 486.

**1891.** — — — —.]—The two prisoners, brothers of the lunatic, took a house, & their mother & a lunatic sister lived with them. They supported the household, but received no payment for or on account of any special charge of their lunatic sister. The ill-treatment of the lunatic was fully proved:—*Held*: the two prisoners were persons having the care, or charge, or concerned, or taking part in the custody, care, or treatment of a lunatic within 16 & 17 Vict. c. 96, s. 9.—*R. v. SMITH & SMITH* (1880), 42 L. T. 160; 44 J. P. 314; 14 Cox, C. C. 398, C. C. R.

1892. — Failure to provide medical attention.]  
—R. v. HOTHER (1906), 70 J. P. Jo. 89.

**Restraint of lunatic.]—**See Part XIV., Sect. 3, sub-sect. 4, *ante*.

### SECT. 3.—STATUTORY PROTECTION.

*See, now, Lunacy Act, 1890 (c. 5), s. 330.*

**1893. Protection does not extend to party making order.]—**Declaration for assaulting & imprisoning pltf. Plea: that, before & at the time, etc., pltf. had conducted himself as a person of unsound mind & incompetent to take care of himself, & proper to be taken charge of & detained under due care & treatment; that two medical certificates had been given, by persons duly authorised, according to the provisions of 8 & 9 Vict. c. 100, & 16 & 17 Vict. c. 96, certifying that pltf. was of unsound mind & proper to be taken charge of & detained: that deft. had notice of the certificates, & had reasonable & probable grounds for believing, & did believe them to be true, & that pltf. was of unsound mind, etc., & that deft., being the uncle of pltf., & a proper person to cause him to be taken in charge & detained, did for the causes aforesaid cause him to be taken charge of & detained as a person of unsound mind, etc.:—*Held*: on demurrer, a bad plea; inasmuch as, at common law, deft. would be justified only if pltf. were actually insane at the time, which the plea did not allege; & the protection given by



**Sect. 3.—Statutory protection. Part XVI. Sects 1, 2, 3 & 4. Part XVII. Sects. 1 & 2.]**

8 & 9 Vict. c. 100, s. 99, to parties duly & *bonâ fide* acting under certificates & an order for confinement does not extend to the party making the order.—**FLETCHER v. FLETCHER** (1859), 1 E. & E. 420; 28 L. J. Q. B. 134; 32 L. T. O. S. 255; 23 J. P. 469; 5 Jur. N. S. 678; 7 W. R. 187; 120 E. R. 967.

*Annotation*:—**Consd. Everett v. Griffiths**, [1921] 1 A. C. 631.

**1894. Exercise of reasonable care—Power of court to stay proceedings.]—WILLIAMS v. BEAUMONT & DUKE** (1894), 10 T. L. R. 543, C. A.

*Annotations*:—**Consd. Everett v. Griffiths**, [1920] 3 K. B. 163. **Reid. Harnett v. Bond**, [1924] 2 K. B. 517.

**1895. ———.]—STEVENSON v. POTTER** (1894), 29 L. Jo. 200, D. C.

**1896. ———.]—Pltf. was received as an alleged lunatic into a workhouse of which deft. was the master under an order of a relieving officer made under Lunacy Act, 1890 (c. 5), s. 20, & requiring deft. to receive & detain her in the workhouse for a period of three days. During that period a justice visited & examined pltf. but made no order regarding her, but the medical officer of the workhouse, before the expiration of the three**

**days, gave a certificate in writing under Lunacy Act, 1890 (c. 5), s. 24, for her detention for fourteen days from its date. Pltf. was detained in the workhouse for six days from the date of the certificate, when she was discharged by order of the medical officer. Pltf. having brought an action for false imprisonment on the ground that her detention beyond the original period of three days was unauthorised, in the absence of an order of a justice:—Held: the Act gave special protection to officers & others acting under its powers in cases where, although they might have misconstrued, the Act, & although they might have done things which they had no jurisdiction to do, they had acted in good faith and in a reasonable manner. On the facts there was no evidence that deft. had acted otherwise than in good faith & with reasonable care, even assuming that the further detention of pltf. beyond the original three days was unauthorised in the absence of an order of a justice.**

**Semble: the further detention of pltf. beyond the original three days was authorised by the medical officer's certificate.—SHACKLETON v. SWIFT**, [1913] 2 K. B. 304; 82 L. J. K. B. 607; 108 L. T. 400; 77 J. P. 241; 11 L. G. R. 462, C. A.

## Part XVI.—Mental Deficiency.

### SECT. 1.—IN GENERAL.

*See, now, Mental Deficiency Act, 1913 (c. 28).*

**1897. Who may petition—Mother of defective—Necessity for consent of father.]—(1) A “feeble-minded person” of full age is not “without visible means of support,” within Mental Deficiency Act, 1913 (c. 28), s. 2 (1) (b) (i), merely because he has no means of his own & is incapable of earning his own living & is living with his parents, who are not legally liable to maintain him in their home.**

**(2) Either parent of a “defective” can present a petition under Mental Deficiency Act, 1913 (c. 28), s. 2, but if it is presented by the mother, & the father can be found, his written consent or proof that it is unreasonably withheld is required by reason of Mental Deficiency Act, 1913 (c. 28), s. 6.—R. v. RADCLIFFE (JUDGE), Ex p. OXFORDSHIRE COUNTY COUNCIL**, [1915] 3 K. B. 418; 84 L. J. K. B. 2196; 113 L. T. 991; 79 J. P. 546; 31 T. L. R. 610; 13 L. G. R. 1192, D. C.

**1898. Administration of estate—Under Lunacy Act, 1890 (c. 5), s. 116 (1)—Person confined under Idiots Act, 1886 (c. 25).]—The expression “lawfully detained as a lunatic though not so found by inquisition,” as used in Lunacy Act, 1890 (c. 5), s. 116 (1) (c), means “lawfully detained” under the provisions of the Acts of Parliament of this country; & consequently there is jurisdiction to make administrative orders in the case**

**of a person of unsound mind not so found who is detained in accordance with the Idiots Act, 1886 (c. 25).—Re WHALLEY**, [1906] 1 Ch. 565; 75 L. J. Ch. 328; 94 L. T. 423; 54 W. R. 349; 50 Sol. Jo. 289, L. JJ.

**1899. “Without visible means of support”—Defective of full age living with parents—Mental Deficiency Act, 1913 (c. 28), s. 2 (1) (b).]—R. v. RADCLIFFE (JUDGE), Ex p. OXFORDSHIRE COUNTY COUNCIL, No. 1897, ante.**

**1900. Justices sitting as judicial authority—Power to state a case.]—A body of justices, sitting as a judicial authority under Mental Deficiency Act, 1913 (c. 28), is not a ct. of summary jurisdiction, having power to state a case for the opinion of the High Ct. under the Summary Jurisdiction Acts.—NEWMAN v. FOSTER** (1916), 86 L. J. K. B. 360; 115 L. T. 871; 80 J. P. 471; 15 L. G. R. 124; 25 Cox, C. C. 593, D. C.

### SECT. 2.—MAINTENANCE.

*See Mental Deficiency Act, 1913 (c. 28), ss. 43 (1), 44 (1), (3), (4).*

**1901. “Place of residence”—Meaning of.]—L., a defective within Mental Deficiency Act, 1913 (c. 28), was found guilty of an offence committed in Sept. 1914, within the area of the London County Council. The county in which L., had she**

### PART XV. SECT. 3.

**1894 i. Exercise of reasonable care—Power of court to stay proceedings.]—McLAUGHLIN v. FOSBERY** (1904), 1 C. L. R. 546.—AUS.

**r. — Protection of committee extends to agents.]—Persons acting under the instructions of the committee of a lunatic, who in good faith & with proper care convey the lunatic to an asylum, are not liable to an action,**

**although they are not enumerated in the persons protected by Lunacy Act, 1898, s. 171.—McLAUGHLIN v. WESTGARTH** (1906), 75 L. J. P. C. 117.—AUS.

**t. — Protection of principal officer extends to subordinates.]—NOLAN v. WARD**, [1920] V. L. R. 604.—AUS.

**a. Action for wrongful confinement—Public officer acting for private party—Public office no protection.]—STRANG v. STRANG** (1849), 11 Dunl.

**(Ct. of Sess.) 378; 21 Sc. Jur. 108.—SCOT.**

**b. — Privilege of law-agent.]—MACKINTOSH v. FRASER** (1859), 21 Dunl. (Ct. of Sess.) 783; 31 Sc. Jur. 421.—SCOT.

### PART XVI. SECT. 2.

**c. Provision of necessities—Persons liable.]—GLASGOW SCHOOL BOARD v. GLASGOW PARISH COUNCIL**, [1916] S. C. 26.—SCOT.

been a pauper, would have been deemed to have acquired a settlement within the law relating to the poor was Kent. Subsequently to 1910 L. was in the care of a rescue society, who found situations for her, but she never retained any situation for more than a short time. In Jan. & May, 1912, situations were found for her in London. Evidence was also given that in Apr. 1914, she was in service in London, & from Apr. till July, 1914, she was living in London, & after that date she was seen several times in London:—*Held*: these facts did not constitute a case of doubt within the Mental Deficiency Act, 1913 (c. 28), s. 44 (4), & therefore, L.'s residence must, by virtue of Mental Deficiency Act, 1913 (c. 28), s. 44 (1), be presumed to be within the County of London.—*KENT COUNTY COUNCIL v. LONDON COUNTY COUNCIL* (1915), 84 L. J. K. B. 1781; 113 L. T. 832; 79 J. P. 486; 13 L. G. R. 1070; 25 Cox, C. C. 122, D. C.

**1902.** ———.]—The words "reside" & "place of residence" in Mental Deficiency Act, 1913 (c. 28), ss. 43, 44, 69, mean physical residence, that is, the place where the person in question eats, drinks, & sleeps; & unless & until a doubt arises as to such residence, no question of Poor Law settlement has to be considered. The word "resides" in sect. 69 is used in the same sense as in sect. 44, & a person living in a certified institution "resides" there within the meaning of those sects.—*BERKSHIRE COUNTY COUNCIL v. READING BOROUGH COUNCIL*, [1921] 2 K. B. 787; 90 L. J. K. B. 939; 125 L. T. 410; 85 J. P. 173; 19 L. G. R. 386, D. C.; *sub nom.* *BERKS COUNTY*

*COUNCIL v. READING BOROUGH COUNCIL, SAME v. LONDON COUNTY COUNCIL*, 37 T. L. R. 642.

**1903. Enforcement of maintenance order—In court of summary jurisdiction.]**—Where a judicial authority other than a judge of a county ct. makes an order on a person liable to maintain a mental deficient to contribute towards his maintenance in an institution, the order may be enforced by a judgment summons against that person in a ct. of summary jurisdiction, & that ct. may adjudicate the amount due.—*R. v. GRAHAM-CAMPBELL, Ex p. GREENWOOD*, [1922] 1 K. B. 257; 91 L. J. K. B. 306; 126 L. T. 368; 86 J. P. 5; 38 T. L. R. 99; 20 L. G. R. 37, D. C.

#### SECT. 3.—OFFENCES AGAINST DEFECTIVES.

**Omission to supply necessities.]**—See CRIMINAL LAW, Vol. XV., p. 865, No. 9491.

**Rape on mental defectives.]**—See CRIMINAL LAW, Vol. XV., pp. 845, 846, Nos. 9300–9304.

**Neglect of mental defectives.]**—See CRIMINAL LAW, Vol. XV., pp. 795, 796, Nos. 8599, 8600.

**Education of mental defectives.]**—See EDUCATION, Vol. XIX., p. 569, Nos. 98, 99.

#### SECT. 4.—OFFENCES COMMITTED BY DEFECTIVES.

**Whether sufficient defence.]**—See CRIMINAL LAW, Vol. XIV., p. 61, Nos. 271, 272.

## Part XVII.—Criminal Lunatics.

### SECT. 1.—IN GENERAL.

**1904. Detention in asylum after conviction & before sentence—Subsequent release on conditions—Application for sentence to be passed.]**—*R. v. CENTRAL CRIMINAL COURT JJ. & BOULTON, Ex p. COLLINS* (1899), 43 Sol. Jo. 280, D. C.

**Criminal capacity—Insanity—In general.]**—See CRIMINAL LAW, Vol. XIV., pp. 55, 56, Nos. 218–222.

——— **Partial insanity.]**—See CRIMINAL LAW, Vol. XIV., pp. 56–59, Nos. 223–252.

——— **Onus of proof.]**—See CRIMINAL LAW, Vol. XIV., pp. 59, 60, Nos. 253–260.

——— **Nature of proof.]**—See CRIMINAL LAW, Vol. XIV., pp. 60–62, Nos. 261–278.

——— **Method of proof.]**—See CRIMINAL LAW, Vol. XIV., pp. 62, 63, Nos. 279–288.

**Mental eccentricity as ground for mitigation of sentence.]**—See CRIMINAL LAW, Vol. XIV., pp. 473, 474, Nos. 5106–5107.

**Insanity distinguished from drunkenness.]**—See CRIMINAL LAW, Vol. XIV., pp. 63, 64, Nos. 291–295.

**Accused standing mute on arraignment.]**—See CRIMINAL LAW, Vol. XIV., p. 249, Nos. 2424–2430.

**Unfitness to plead owing to insanity.]**—See

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**Power of grand jury to ignore bill—On ground of insanity.]**—See CRIMINAL LAW, Vol. XIV., p. 441, No. 2296.

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vince to assume the custody & care of persons acquitted of criminal charges upon the ground of insanity, which duty, by the common law of

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**Sect. 2.—Appointment and removal. Sects. 3 & 4:**  
**Sub-sect. 1.]**

should execute the office by himself or his deputy. It was then provided, that in the absence of any of the aldermen for the time being, the bailiffs & capital burgesses might elect one or more of the burgesses to supply the vacancy or vacancies. These substituted aldermen had no power to appoint deputies. There then followed a clause which directed that the aldermen for the time being, during the time they should remain in their offices, should be justices of the peace within the borough:—*Held*: this charter did not enable the aldermen elected for the year to delegate their office of justice of the peace, & therefore a deputy alderman was not a justice of the peace for the borough. *Qu.*: whether, since 27 Hen. 8, c. 24, s. 2, the Crown can delegate to a subject the power of appointing a justice of the peace.—*JONES v. WILLIAMS* (1825), 3 B. & C. 762; 1 C. & P. 669; 2 Dow. & Ry. M. C. 537; 5 Dow. & Ry. K. B. 654; 3 L. J. O. S. K. B. 112; 107 E. R. 916.

5. ————] — Pltf., a resident inhabitant of the parish of W. in the county of Hertford, was summoned to appear at the Shire Hall of the county before defts., who were appointed justices of the county under a commission, which gave them authority to act as such as well within the liberty of St. Alban as without, to answer a charge of assault committed by him within the liberty. Pltf., not having appeared to the summons, was convicted in a penalty with costs, under 9 Geo. 4, c. 31; & the same not having been paid, he was committed by defts. to the liberty house of correction. By a charter of Edward IV., the King granted to the Abbots of St. Alban the right to appoint their own justices of the peace within the liberty; & the charter contained a non-intromittant clause prohibiting all other justices from in any way interfering with the justices so appointed. By 27 Hen. 8, c. 24, s. 2, the power of all grants of liberties to make justices was put an end to; & it was thereby enacted, that, for the future, all such justices should be made by letters patent under the Great Seal. Sect. 17 of that Act provided that all justices of the peace thereafter to be made by the Crown should sit & hold their sessions in the same places as the justices of the liberties commonly used; & that no person or persons within the said liberties, or any of them, should thereafter in any wise be compelled by authority of that Act to appear out of the said liberties before any other justices of assize, gaol, delivery, or of the peace, than before such justices as should be named & assigned to sit & be by the King within the said liberties, etc. By 31 Hen. 8, c. 13, it was enacted that all monasteries & abbeys, & also the cts., liberties, & privileges belonging to the same, should be vested in the King. By 32 Hen. 8, c. 20, after reciting that the liberties, etc., of divers monasteries had been assigned to the King's Ct. of Augmentations, & that it had not been fully declared in what wise the liberties, privileges, & franchises which the late owners of

the same sites had, used, & exercised, should be used & exercised, it was enacted that such liberties, privileges, etc., which the late owners had, used, & exercised three months next before the said sites, etc., came to the King, should be revived in the King, & that the same liberties, etc., should be used & exercised by such stewards, etc., or other officers, as the King might appoint, in like manner as they were lawfully exercised by the ministers before they came to the hands of the King. By charter of James I., 1612, the King granted to G. & T. all that our liberty to the late monastery of St. Alban, with all & singular its rights, etc., in so ample a manner & form as any abbot, etc., of any late abbey ever had, used, or enjoyed. The premises contained in the charter descended to the present Marquis of S. By 27 Geo. 3, c. 11, it is provided, that it should be lawful for any justice or justices of the peace, within his or their respective jurisdictions, to commit either to the common gaol or to any house of correction within his or their respective jurisdictions, as to such justice or justices should seem most proper, such vagrants & other criminals, offenders, & persons charged with or convicted of small offences, as by any law then in force or thereafter to be made, he or they were or should be authorised to commit to the common gaol:—*Held*: (1) the justices for the liberty had not exclusive jurisdiction within the liberty; & therefore, defts., who were appointed justices for the county under the commission which gave them authority to act as such within the liberty as well as without, had jurisdiction over the offence with which pltf. was charged, though committed within the liberty; (2) as the liberty house of correction was locally situate within defts.' jurisdiction, they were empowered to commit pltf. to it.—*ARNOLD v. GAUSSEN* (1853), 8 Exch. 463; 22 L. J. Ex. 180; 20 L. T. O. S. 292; 17 J. P. 184; 155 E. R. 1431.

*Annotation*:—As to (2) *Refd.* *Arnold v. Dimsdale* (1853), 2 E. & B. 580.

6. ————] — **Exercised on advice of responsible minister.**—(1) Legally & constitutionally, a justice of the peace is appointed & removed by the Sovereign, acting, as in every other exercise of the prerogative, by the advice of a responsible minister. Although the Queen's pleasure is not actually taken in practice on the appointment of a justice of the peace, he is supposed to be appointed by her as much as a judge of the Superior Cts.; & the commission of the peace under which quarter sessions are held is her commission as much as the commission of oyer & terminer, or other commission under which the judges sit at the assizes. So, if a *supersedeas* under the Great Seal goes to remove a magistrate from the commission of the peace, although practically issued by the Lord Chancellor without any command by the Queen, it is, in point of Law, the act of the Sovereign (*LORD CAMPBELL, C.J.*).

(2) To the Secretary of State for the Home Department, belongs peculiarly the maintenance of the peace within the kingdom, with the superintendence of the administration of justice, as far as

laws providing for the appointment of justices of the peace.—*R. v. BUSH* (1888), 15 O. R. 398; 4 Cart. 690.—

c. ————] — *By Governor.*—*R. v. RENO & ANDERSON* (1868), 4 P. R. 281.—*CAN.*

d. ————] — The power to appoint police magistrates is vested in the Lieutenant-Governors of the Provinces under B. N. A. Act, s. 92.

—*RICHARDSON v. RANSOM* (1885), 10 O. R. 387; 4 Cart. 630.—*CAN.*

e. ————] — *Ex p. GALLAGHER* (1897), 34 N. B. R. 329.—*CAN.*

f. ————] — *By provincial executive.*—*R. v. HORNER* (1876), 2 Cart. 317.—*CAN.*

g. ————] — *ELLIS v. TORONTO JUNCTION TOWN* (1896), 28 O. R. 55; 24 A. R. 192.—*CAN.*

h. ————] — *By local government.*—The

local govt. has the right to appoint justices of the peace.—*Ex p. WILLIAMSON* (1884), 24 N. B. R. 64.—*CAN.*

i. ————] — *p. PERKINS* (1884), 24 N. B. R. 66.—*CAN.*

1. *Determination of authority* — *Name omitted in new commission.*—A new commission of the peace, in which the name of one of the former justices is omitted, does not determine his authority until he has express or

the royal prerogative is involved in it. He is himself a magistrate, & has a power of commitment by warrant to prison for just cause. How can it be said that such a functionary has not a corresponding duty when a memorial such as that which we are now considering is presented to him? In the discharge of his duty he might have caused the inquiry prayed for here to have been made, & the allegations being duly substantiated & verified, he might have communicated upon the subject with the Lord Chancellor, & done what would have amounted to "a recommendation to Her Majesty that the magistrate be removed from the commission of the peace (LORD CAMPBELL, C.J.).—HARRISON v. BUSH (1855), 5 E. & B. 344; 3 C. L. R. 1240; 25 L. J. Q. B. 25; 25 L. T. O. S. 194; 1 Jur. N. S. 846; 3 W. R. 474; 119 E. R. 509.

*Annotations:—Generally, Mentd.* Dickson v. Wilton (1859), 1 F. & F. 419; Campbell v. Spottiswoode (1863), 3 B. & S. 769; Fryer v. Kinnersley (1863), 15 C. B. N. S. 422; Whiteley v. Adams (1863), 15 C. B. N. S. 392; Lawless v. Anglo-Egyptian Cotton & Oil Co. (1869), 17 W. R. 498; Henwood v. Harrison (1872), L. R. 7 C. P. 606; Dickeson v. Hilliard (1874), L. R. 9 Exch. 79; Waller v. Loch (1881), 7 Q. B. D. 619; Allbutt v. General Council of Medical Education & Registration (1889), 23 Q. B. D. 400; Hebditch v. MacIlwaine, [1894] 2 Q. B. 54; Brown v. Houston, [1901] 2 K. B. 855; London Assocn. for Protection of Trade v. Greenlands, [1916] 2 A. C. 15; Adam v. Ward, [1917] A. C. 309.

See Justices of the Peace Act, 1906 (c. 16), ss. 1, 2.

**7. Removal—Crown's exclusive power—Exercised on advice of responsible minister.]—**HARRISON v. BUSH, No. 6, *ante*.

**8. — Grounds of removal—Drunkenness.]—**R. v. GLOCESTER CORPN. (1616), 3 Bulst. 189; 81 E. R. 159.

*Annotations:—Mentd.* R. v. Glide (1691), 12 Mod. Rep. 27; Sharp v. London Corpn. (1714), Gilb. 255.

— **Bankruptcy.]—**See Part II., Sect. 2, sub-sect. 2, *post*.

**Crime.]—**See Part II., Sect. 2, sub-sect. 2, *post*.

**Of ex officio justices.]—**See Justices of the Peace Act, 1906 (c. 16), s. 4.

### SECT. 3.—JUSTICES EX OFFICIO.

**9. Secretary of State.]—**ENTICK v. CARRINGTON, No. 2, *ante*.

**10. — For home affairs.]—**HARRISON v. BUSH, No. 6, *ante*.

**11. Mayor of borough.]—***Qu.*: whether a mayor of a borough, who is made a statutory justice, is in the position of a justice of the quorum, or only of a justice *simpliciter*.—R. v. LLANGIAN (INHABITANTS) (1863), 4 B. & S. 249; 2 New Rep. 240; 32 L. J. M. C. 225; 8 L. T. 422; 27 J. P. 566; 10 Jur. N. S. 16; 11 W. R. 776; 122 E. R. 453.

**12. —.]—**The mayor of a borough under 5 & 6 Will. 4, c. 76, which had no separate commission of the peace, acted as a justice of the peace for the borough:—*Held*: under sect. 57 he had power so to act.—WILSON v. STRUGNELL (1881),

7 Q. B. D. 548; 50 L. J. M. C. 145; 45 L. T. 219; 45 J. P. 831; 14 Cox, C. O. 624.

*Annotations:—Mentd.* Herman v. Jeuchner (1885), 15 Q. B. D. 561; Consolidated Exploration & Finance Co. v. Musgrave, [1900] 1 Ch. 37; R. v. Porter, [1910] 1 K. B. 369.

**13. — Precedence.]—**5 & 6 Will. 4, c. 76, s. 57, enacts "that the mayor for the time being of every borough shall be a justice of the peace of & for such borough, & shall continue to be such justice of the peace during the next succeeding year after he shall cease to be mayor"; "& such mayor shall, during the time of his mayoralty, have precedence in all places within the borough":—*Held*: this sect. refers to social, not magisterial, precedence; & therefore does not entitle a mayor, during his mayoralty, to take precedence, & to preside at all meetings of the borough justices, held in the borough, at which a chairman is required.—*Ex p.* BIRMINGHAM (MAYOR) (1860), 3 E. & E. 222; 30 L. J. Q. B. 2; 3 L. T. 270; 24 J. P. 712; 9 W. R. 34; 121 E. R. 425; *sub nom.* *Ex p.* LLOYD (MAYOR OF BIRMINGHAM), 6 Jur. N. S. 1094.

*Annotation:—Refd.* Lawson v. Reynolds, [1904] 1 Ch. 718.

— **.]—**LAWSON v. REYNOLDS, No 30, *post*.

**15. Recorder of borough.]—**The recorder is a justice of the peace *virtute officii*.—R. v. MASTERS (1848), 2 Car. & Kir. 930; 1 Den. 332; T. & M. 1; 3 New Sess. Cas. 326; 18 L. J. M. C. 2; 12 L. T. O. S. 154; 12 J. P. 758; 12 Jur. 942; 3 Cox, C. C. 178; 169 E. R. 268, C. C. R.

*Annotations:—Mentd.* R. v. Martin (1849), 13 Jur. 368; R. v. Raycroft (1849), 13 J. P. 183; R. v. Hawkins (1850), 15 L. T. O. S. 307; R. v. Watts (1850), 2 Den. 14.

— **.]—**See Municipal Corporations Act, 1882 (c. 50), s. 163.

**Chairman of county council.]—**See Local Government Act, 1888 (c. 41), s. 2; Justices of the Peace Act, 1906 (c. 16), s. 5 (2), Sched.

**Chairman of urban or rural district council.]—**See Local Government Act, 1894 (c. 73), s. 22; Justices of the Peace Act, 1906 (c. 16), s. 5 (2), Sched.

### SECT. 4.—COUNTY JUSTICES.

#### SUB-SECT. 1.—IN GENERAL.

**16. Who are—Justices of "riding."]**—HALL v. SKARROK HUNDRED (1658), 2 Sid. 44; 82 E. R. 1247.

See, now, Justices of the Peace Act, 1906 (c. 16), s. 5 (1).

**17. — Justices of "county of a city."]**—Where an Act of Parliament gives jurisdiction to justices of a county, & an order is made under it by justices of the county of a city, which county & city are co-extensive by statute, the order is valid though the justices describe themselves merely as justices "in & for the said city," for the ct. will take notice that the city is also a county.—R. v. ST. MAURICE (INHABITANTS) (1851), 16 Q. B. 908; 4 New Sess. Cas. 696; 20 L. J. M. C. 221; 17 L. T. O. S. 62; 15 J. P. 534; 15 Jur. 559; 117 E. R. 1130.

implied notice of the new commission.—TURNER v. DOYLE (1833), N. B. Dig. 472.—CAN.

m. — *When fresh appointment legally made.]—**Ex p.* COUGHLAN, *Ex p.* McDONALD (1883), 23 N. B. R. 308.—CAN.

n. *County police magistrate—Acting as town magistrate—Effect of statutory appointment of town magistrate.]—*R. v. CAHILL, *Ex p.* TAIT (1904), 37 B. R. 18.—CAN.

#### PART I. SECT. 3.

o. *Reeve.]—*The reeves of municipalities in unorganised districts are, under the legislation relating thereto, *ex officio* justices of the peace in their respective municipalities.—R. v. MCGOWAN (1892), 22 O. R. 497.—CAN.

p. *Superintendent & commissioner of Indian affairs.]—*HUNTER v. GILKISON (1885), 7 O. R. 735.—CAN.

q. *Commissioner of police.]—*GELLER v. LOUGHRIN (1911), 19 O. W. R. 212; 24 O. L. R. 18; 2 O. W. N. 1159; 18 Can. Crim. Cas. 461.—CAN.

#### PART I. SECT. 4, SUB-SECT. 1.

r. *Jurisdiction — In parishes within county.]—*A justice appointed for a county has jurisdiction to try in a parish of the county an offence committed in another parish in the county.—R. v. PLANT, *Ex p.* MORNEAULT,



4.—*County justices: Sub-sects. 1 & 2, A. & B.; sub-sect. 3. Sect. 5: Sub-sects. 1 & 2.*

18. — Justices of "county of a town."—In Poor Law Amendment Act, 1834 (c. 76), s. 38, which enacts that every justice of the peace residing in any union & acting for the "county, riding, or division" in which the same may be situated shall be an *ex officio* guardian of such union, the word "county" includes county of a town, & justices acting for a county of a town with a separate commission of the peace, & residing within the union, are entitled to vote & act as *ex officio* guardians equally with resident justices for the county at large.—*R. v. PEARCE* (1880), 5 Q. B. D. 386; 49 L. J. M. C. 81; 28 W. R. 568; 44 J. P. Jo. 216.

*Jurisdiction.*—See Part IV., Sect. 2, *post*.

—In boroughs within county.—See Part IV., Sect. 3, *post*.

#### SUB-SECT. 2.—JURISDICTION WITHIN BOROUGH.

##### A. Boroughs having Exclusive Jurisdiction.

19. *Jurisdiction of county justices excluded.*—As the King may by his letters patent make a county, & exempt this from any other county, so may he in the making of it save & except to him & his successors such part of the jurisdiction of privilege which the other county from which it is exempted, had in it before; as in divers places of the realm, the gaol of a town which is a county of itself, or which is a place privileged from the county, is the gaol of the county, & the place where the assizes or gaol-delivery is held, is within the county of the town, & yet serve also for the county at large as in the Sessions-Hall at Newgate, which serves as well for the county of Middlesex as for London, & yet it stands in London, but by usage it has always been so, & nothing can be well prescribed unto by usage which cannot have a lawful beginning by award or grant, & this by the division of London from Middlesex at the beginning might be so. But it seems that by this commission for the county a thing which happens in the town cannot be determined, albeit it be felony committed in the hall during the sessions, but by a commission for the town it may.—*GLOUCESTER TOWN CASE* (1593), Poph. 16; 79 E. R. 1138.

20. —.]—If the charter of a city give to the justices an exclusive jurisdiction, the justices for the county cannot interfere.—*TALBOT v. HUBBLE* (1741), 7 Mod. Rep. 326; 2 Stra. 1154; 87 E. R. 1270.

*Annotations:*—*Consd.* *Blankley v. Winstanley* (1789), 3 Term Rep. 279. *Refd.* *R. v. Sainsbury* (1791), 4 Term Rep. 451.

21. —.]—By a local paving Act relating to the parish of B., which parish became part of the borough of Bath, by Municipal Corporations Act, 1876 (c. 76), the rate assessed is directed to be paid by the occupiers of houses, who are thereby required to pay them to the collectors appointed under the Act, & the rate is to be enforced by distress warrant of a justice of the county of

Somerset. The ancient charter of the borough of Bath had a non-intromittant clause, & under Municipal Corporations Act, 1876 (c. 76), s. 111, a separate ct. of quarter sessions was granted to the borough:—*Held*: (1) all jurisdiction of the county justices within the parish of B. was taken away; (2) the non-payment of paving rates, assessed on an occupier of a house in the parish of B., was "an offence committed within the borough against the provisions of the local Act"; & under 7 Will. 4, & 1 Vict. c. 78, s. 31, it was cognisable by the borough justices.—*R. v. SUTCLIFFE* (1849), 13 Q. B. 833; 13 J. P. 520; 13 Jur. 840; 116 E. R. 1482; *sub nom.* *PALMER v. SUTCLIFFE*, 3 New Sess. Cas. 634; *sub nom.* *Re BATHWICK PAVING ACT*, 18 L. J. Q. B. 301.

*Annotation:*—*Refd.* *Ex p. Burwash* (1850), 1 L. M. & P. 60.

22. —.]—All magisterial jurisdiction over places or precincts, which by 2 & 3 Will. 4, c. 64, are included within the metes & bounds of any borough mentioned in Municipal Corporations Act, 1835 (c. 76), scheds. A, B, is, from the passing of the latter Act, vested exclusively in the borough justices.—*R. v. GLOUCESTERSHIRE JJ.* (1836), 4 Ad. & El. 689; 7 C. & P. 338, n.; 1 Har. & W. 682; 6 Nev. & M. K. B. 115; 5 L. J. M. C. 79; 111 E. R. 947.

*Annotation:*—*Mentd.* *R. v. New Sarum* (1845), 1 New Mag. Cas. 372.

23. *Charter referring to district not within borough.*—A charter granting jurisdiction to borough magistrates over a district not within the borough does not exclude the county justices without express words, & though such charter contain words of reference to former charters in which exclusive jurisdiction is given to the borough justices within the borough, & add that they shall have jurisdiction within the new district *in tam amplis modo et forma*, etc., yet if there be in the latter charter a saving clause of the rights of the Crown & of all other persons, the borough magistrates have only a concurrent jurisdiction with the county justices.—*BLANKLEY v. WINSTANLEY* (1789), 3 Term Rep. 279; 100 E. R. 574.

*Annotations:*—*Refd.* *Arnold v. Gaussen* (1853), 8 Exch. 463; *R. v. Beacontree JJ.*, *R. v. Wright* (1915), 84 L. J. K. B. 2230. *Mentd.* *Rennell v. Lincoln* (Bp.) (1825), 3 Bing. 223.

##### B. Boroughs not having Exclusive Jurisdiction.

See Municipal Corporations Act, 1882 (c. 50), ss. 154 (1), 158.

24. *Concurrent jurisdiction of county justices.*—By charter the mayor & some of the aldermen of London have jurisdiction in Southwark; but as the charter contains no non-intromittant clause as to the justices of the county of Surrey, the latter have a concurrent jurisdiction with the former. Where two sets of magistrates have a concurrent jurisdiction, & one appoints a meeting to grant ale licenses, their jurisdiction attaches, so as to exclude the others appointing a subsequent meeting; but they may all meet together on the first day; but if, after such appointment, the other

*Ex p. TARDIFF* (1906), 2 E. L. R. 17; 37 N. B. R. 500.—CAN.

#### PART I. SECT. 4, SUB-SECT. 2.—A.

19 i. *Jurisdiction of county justices excluded.*—*R. v. ROW* (1864), 14 C. P. 307.—CAN.

19 ii. —.]—*Re McDONOUGH* (1870), 30 U. C. R. 288.—CAN.

19 iii. —.]—*R. v. HUGHES* (1884), 5 R. & G. 194.—CAN.

19 iv. —.]—*R. v.* (1888), 15 O. R. 110.—CAN.

19 v. —.]—*R. v. ROE* (1888), 16 O. R. 1.—CAN.

19 vi. —.]—*R. v. DUERING* (1901), 21 C. L. T. 588; 2 O. L. R. 593.—CAN.

19 vii. —.]—*R. v. ALEXANDER, R. v. SHOULDICE* (1913), 25 W. L. R. 290; 5 W. W. R. 17; 13 D. L. R. 385; 11 Alta. L. R. 227.—CAN.

19 viii. —.]—*R. v. NAR SINGH* (1909), 10 W. L. R. 523; 14 B. C. R. 192.—CAN.

*restored for specified*

*statutory offence.*—*R. v. LEE* (1888), 15 O. R. 353.—CAN.

a. *Jurisdiction of other borough justices excluded.*—*R. v. HOLMES* (1907), 9 O. W. R. 750; 14 O. L. R. 124.—CAN.

#### PART I. SECT. 4, SUB-SECT. 2.—B.

24 i. *Concurrent jurisdiction of county justices.*—*R. v. RILEY* (1884), 12 P. R. 98.—CAN.

24 ii. —.]—*R. v. CLARK* (1888), 15 O. R. 49.—CAN.

24 iii. —.]—Deft. was convicted

set of magistrates meet on a subsequent day & grant other licenses, their proceeding is illegal, & the subject of an indictment.—*R. v. SAINSBURY* (1791), 4 Term Rep. 451; Nolan, 8; 100 E. R. 1113.

*Annotations*:—*Consd. Brown v. Nicholson* (1858), 5 C. B. N. S. 468; *Lawson v. Reynolds*, [1904] 1 Ch. 718. *Expld. R. v. Beacontree Division of Essex JJ.*, *R. v. Wright*, [1915] 3 K. B. 388. *Refd. R. v. Ellis & Greenwood* (1842), 12 L. J. M. C. 20; *Arnold v. Gaussen* (1853), 8 Exch. 463; *Candlish v. Simpson* (1861), 1 B. & S. 357. *Mentd. R. v. Bidwell* (1847), 2 Car. & Kir. 564; *Re Royal British Bank* (1857), 29 L. T. O. S. 148.

**25. — To act as justices within borough.]—**How far the justices of peace belonging to a corpn. shall be said to have a jurisdiction, or not, exclusive of the justices of the county at large.

Where there are no exclusive words in a charter, the justice at large may act within the borough, but cannot act as justices for the borough (LORD HARDWICKE, C.J.).—*R. v. ARCHER* (1734), 2 Barn. K. B. 424; 94 E. R. 595.

**26. — To act as justices for borough.]—***R. v. ARCHER*, No. 25, *ante*.

**27. — —.]—***R. v. GIBSON, ETC.*, JJ. & BIRKDALE DISTRICT COUNCIL (1896), 40 Sol. Jo. 604, D. C.

**28. — To deal with complaints against corporate officers—Refusing to deliver up papers.]—**Under Municipal Corporations Act, 1835 (c. 76), ss. 60, 65, county magistrates may determine complaints against corporate officers refusing to deliver up papers, though such officers reside within the precincts of the corpn., & the corpn. have magistrates.—*Re GATESHEAD JJ.* (1836), 6 Ad. & El. 550, n.; 112 E. R. 211.

**29. — To deal with matters relating to borough—Arising outside borough.]—**The rules of a friendly society were inrolled at the quarter sessions for the county. The meetings of the society were at Leeds, which had a separate ct. of quarter sessions & the expulsion of a member took place there; but members might reside out of the borough, & the act for which the member was expelled took place out of the borough:—*Held*: justices of the county had jurisdiction to make the order.—*R. v. GRANT* (1849), 14 Q. B. 43; 3 New Mag. Cas. 183; 4 New Sess. Cas. 13; 19 L. J. M. C. 59; 13 L. T. O. S. 301; 13 J. P. 408; 13 Jur. 1026; 117 E. R. 17.

*Annotations*:—*Refd. Ex p. Long* (1854), 24 L. T. O. S. 73; *Bache v. Billingham*, [1894] 1 Q. B. 107.

**30. — — Arising in borough.]—**Where a borough has no separate commission of the peace & no ct. of quarter sessions, & its charter contains no non-intromittant clause prohibiting the county justices from acting within the borough, the county justices & borough justices have co-ordinate jurisdiction in all matters arising within & relating to the borough.

In such a case, when once a matter has been earmarked as county business or borough business by the issue of a proper summons to appear before the county or the borough tribunal, as the case may be, the county justices or the borough justices, as the case may be, have seisin of it to the exclusion of the other set of justices, although the latter have concurrent jurisdiction & may sit with them to hear the matter.

In such a case, when once a matter arising within the limits of the borough has been earmarked as county business, the mayor of the borough, though a county justice as well as a borough justice, is not entitled under Municipal Corporations Act, 1882

(c. 50), s. 155, to act, *virtute officii*, as chairman of the county justices.—*LAWSON v. REYNOLDS*, [1904] 1 Ch. 718; 73 L. J. Ch. 451; 90 L. T. 278; 68 J. P. 254; 52 W. R. 375 20 T. L. R. 293; 2 L. G. R. 749.

**31. Borough justices exercising jurisdiction—Private meeting of county justices.]—**An information was laid before two justices for the borough of M., by applt. against resp., for selling excisable liquors by retail without license, pursuant to 9 Geo. 4, c. 61, s. 1. Resp. sold the liquors at his house in the borough of M., & was licensed by the excise, & by the justices of the borough. The borough of M. was an ancient borough before Municipal Corporation Act, & is so since that Act; & licenses for the borough had always been granted in the same manner as in the present case:—*Held*: (1) the fact that the borough of M. had not a separate commission of the peace did not make the license void; (2) the fact that the justices for the division of the county in which M. is situate, had appointed their annual licensing meeting for Sept. 8 for the borough, & the justices for the borough appointed theirs for Sept. 7, on which day resp.'s license was granted by them, did not make the license void.—*BROWN v. NICHOLSON* (1858), 5 C. B. N. S. 468; 28 L. J. M. C. 49; 32 L. T. O. S. 160; 22 J. P. 803; 5 Jur. N. S. 99; 7 W. R. 88; 141 E. R. 190.

*Annotation*:—*As to* (2) *Refd. Candlish v. Simpson* (1861), 1 B. & S. 357.

**32. — To deal with matters earmarked as county business.]—***LAWSON v. REYNOLDS*, No. 30, *ante*.

**33. Right of borough justices to take part in hearing.]—**Order of committal quashed, on the ground that the borough justices were entitled to sit with the county justices upon the hearing of a summons made returnable before the county justices for perjury alleged to have been committed in the borough.—*R. v. WILLIAMSON, ETC.*, DURHAM JJ. (1891), 7 T. L. R. 534.

*Annotation*:—*Refd. Lawson v. Reynolds*, [1904] 1 Ch. 718.

#### SUB-SECT. 3.—JURISDICTION WITHIN LIBERTY.

**34. Liberty not having exclusive jurisdiction—Justices sitting outside liberty—Offence committed within liberty.]—***ARNOLD v. GAUSSEN*, No. 5, *ante*.

**35. — — —.]—***ARNOLD v. DIMSDALE*, No. 1727, *post*.

### SECT. 5.—BOROUGH JUSTICES.

#### SUB-SECT. 1.—IN GENERAL.

**Classification of boroughs.]—***See* LOCAL GOVERNMENT, pp. 43–99; Municipal Corporations Act, 1882 (c. 50), s. 170; Sheriffs Act, 1887 (c. 55), s. 36.

**Appointment & qualification of magistrates.]—***See* Municipal Corporations Act, 1882 (c. 50), s. 157 (3); Justices of the Peace Act, 1906 (c. 16), s. 5 (2), Sched.

**Oaths of office.]—***See* Nos. 37, 38, 895, *post*; Promissory Oaths Act, 1871 (c. 48), s. 2.

#### SUB-SECT. 2.—THE RECORDER.

*See* Municipal Corporations Act, 1882 (c. 50), s. 163.

**36. Power to remove clerk of the peace.]—**By Municipal Corporations Act, 1835 (c. 76),

*v. SWAN*, 24 C. L. T. 239.—CAN.

### PART I. SECT. 5, SUB-SECT. 2.

b. Power of corporation to remove.]

for selling intoxicating liquor at Sydney in the county of Cape Breton. Sydney is an incorporated town within the of Cape Breton. The con-

victing magistrate was appointed to be "a stipendiary magistrate in the county of Cape Breton":—*Held*: the magistrate had jurisdiction.—*R.*



**Sect. 5.—Borough justices: Sub-sect. 2.** **Sect. 6.**  
**Part II. Sect. 1: Sub-sects. 1 & 2. Sect. 2**  
**Sub-sect. 1, A. (a) & (b) i.]**

s. 103, where a borough has a separate court of quarter sessions, the power of appointing the clerk of the peace is in the council of the borough; & by sect. 105, the ct. of quarter sessions, of which the recorder is sole judge, "shall have cognisance of all crimes, offences, & matters whatsoever cognisable by any ct. of quarter sessions of the peace for counties"; provided, among other things, that no recorder, by virtue of his office, shall have power, "to exercise any of the powers therein specially vested in the council":—*Held*: the power of removing the clerk of the peace was in the recorder.—*R. v. HAYWARD* (1862), 2 B. & S. 585; 31 L. J. M. C. 177; 6 L. T. 285; 26 J. P. 580; 9 Jur. N. S. 45; 121 E. R. 1190; *sub nom.* *R. v. HEYWARD*, 10 W. R. 558.

**Regulations of weights & measures.] — See WEIGHTS & MEASURES.**

**Income tax on emoluments of office.]—See INCOME TAX, Vol. XXVIII., p. 89, No. 522.**

#### SECT. 6.—ENTRY ON OFFICE.

*See* Promissory Oaths Act, 1868 (c. 72), s. 6; Promissory Oaths Act, 1871 (c. 48), s. 2.

**37. Oath of office—Failure or refusal to take—**

**Effect of on judicial acts.]—**The acts of a justice of the peace, who has not duly qualified, are not absolutely void; & therefore, persons seizing goods, under a warrant of distress, signed by a justice who had not taken the oaths at the general sessions, nor delivered in the certificate required, are not trespassers.—*MARGATE PIER CO. v. HANNAM* (1819), 3 B. & Ald. 266; 106 E. R. 661.

*Annotations:—Refd.* *R. v. Humphery* (1839), 10 Ad. & El. 335; *Morrell v. Martin* (1841), 3 Man. & G. 581. *Mentd.* *R. v. London Corpn.* (1829), 9 B. & C. 1; *Marks v. Frogley* (1898), 67 L. J. Q. B. 605; *Montreal Street Ry. v. Normandin*, [1917] A. C. 170.

**38. ———.]—***Quo warranto* will not lie against a county treasurer to show by what authority he held the office, if he has been *de facto* elected by the justices in quarter sessions, nor will *mandamus* lie to the justices in sessions to make a new election of a county treasurer, on the ground that one of the justices who had voted at the election had not taken the qualification oath, prescribed by 18 Geo. 2, c. 20, prior thereto, for the acts of the justice are not void, although he may be liable to penalties.—*R. v. HEREFORDSHIRE JJ.* (1819), 1 Chit. 700.

*Annotation:—Mentd.* *Darley v. R.* (1846), 12 Cl. & Fin. 520.

**39. ——— Liability for.]—***R. v. HEREFORDSHIRE JJ.*, No. 38, *ante*.

**Fees payable on administration of oath.]**

—*See* Part XI., Sect. 3, sub-sect. 2, D., *post*.

## Part II.—Qualifications and Disqualifications.

### SECT. 1.—DISQUALIFICATION TO BE A MAGISTRATE.

#### SUB-SECT. 1.—PROFESSION OR OFFICE.

**40. Sheriff.]—**A justice of the peace who is appointed sheriff cannot, during his year of office act as a justice of the peace for the county of which he is sheriff. This disqualification extends to financial matters or county business, as well as to criminal questions.—*Ex p. COLVILLE* (1875), 1 Q. B. D. 133; 45 L. J. M. C. 108; 24 W. R. 456, D. C.

*See, now*, Sheriff's Act, 1887 (c. 55), s. 17.

**41. Coroner.]—**A justice of the peace does not become disqualified from acting as such, by reason of his being elected coroner for the county or division for which he so acts as justice.—*DAVIS v. PEMBROKESHIRE JJ.* (1881), 7 Q. B. D. 513, D. C.

**42. Clerk to justices.]—**(1) The position of clerk to justices is incompatible with that of justice of the peace; & therefore where a person who held the office of clerk to justices was elected to another office which carried with it the position of justice of the peace, his acceptance of the latter office vacated that of clerk to the justices.

(2) A solr. who has ceased to practice as such, & has transferred his business to others, but continues to take out his certificate as a solr. under the belief that it is necessary for him to do so as registrar of a county ct., is not disqualified from acting as a justice of the peace under the Justices Qualification Act, 1871 (c. 18).—*R. v.*

*DOUGLAS*, [1898] 1 Q. B. 560; 67 L. J. Q. B. 406; 78 L. T. 198; 62 J. P. 277; 46 W. R. 377; 14 T. L. R. 267; 19 Cox, C. C. 6; *sub nom.* *R. v. DOUGLAS*, *Ex p. WALKER*, 42 Sol. Jo. 327, D. C.

**43. Solicitor—Ceasing to practice—Continuing to take out certificate—Registrar of county court.]—***R. v. DOUGLAS*, No. 42, *ante*.

—*See, now*, Justices of the Peace Act, 1906 (c. 16), s. 3.

#### SUB-SECT. 2.—BANKRUPTCY OR CRIME.

**Bankruptcy.]—***See* Bkpcy. Act, 1883 (c. 52) s. 32 (1); Bkpcy. Act, 1890 (c. 71), s. 9.

**Crime—Treason or felony.]—***See* Forfeiture Act 1870 (c. 23), s. 2.

—**Corrupt practice at election.]—***See* Corrupt & Illegal Practices Prevention Act, 1883 (c. 51) s. 6 (3); Municipal Elections Corrupt & Illegal Practices Act, 1884 (c. 70), s. 2 (2).

### SECT. 2.—DISQUALIFICATION TO ACT AS MAGISTRATE.

#### SUB-SECT. 1.—INTEREST AND BIAS.

##### A. Interest.

##### (a) General Rule.

**44. No man can be a judge in his own cause.]—***GREAT CHARTE PARISH & KENNINGTON PARISH*

—*R. v. PATTERSON* (1900), 33 N. S. R. 425.—CAN.

**c. Right to recover for services rendered as counsel.]—***LAURENCE v. TOWN OF TRURO* (1894), 26 N. S. R. 231.—CAN.

#### PART II. SECT. 1, SUB-SECT. 1.

**d. Acting as solicitor or counsel.]**

—The prohibition in B. C. Municipal Act, 1914 (c. 52), s. 399, goes to the jurisdiction, & where at a trial on a charge of unlawfully selling liquor the prosecuting counsel was also a stipendiary magistrate the conviction was quashed.—*R. v. WESSELL*, [1924] 4 D. L. R. 139; [1924] 3 W. W. R. 233; 34 B. C. R. 119; *reversg.*, 33 B. C. R. 375.—CAN.

**e. County treasurer—Proceedings to maintenance of pauper.]—***PICOT OVERSEERS FOR DISTRICT NO. 7* *PICOT OVERSEERS FOR DISTRICT NO. 1* (1903), 36 N. S. R. 326.—CAN.

#### PART II. SECT. 2, SUB-SECT. 1 A. (a).

**44i. No man can be judge in own cause.]—**No judge should inter-

(1742), 2 Stra. 1173; 93 E. R. 1107; *sub nom.* R. v. GREAT CHART (INHABITANTS), Burr. S. C. 194.

*Annotations*:—*Reid.* R. v. Essex JJ. (1816), 5 M. & S. 513; R. v. Cheltenham Comrs. (1841), 1 Q. B. 467; Grand Junction Canal Co. v. Dimes (1849), 12 Beav. 631. *Mentd.* R. v. Madley (1744), 2 Stra. 1198; Isle of Wight Ferry Co. v. Ryde Comrs. (1862), 7 L. T. 391.

45. —.]—If any one of the magistrates hearing a case at sessions be interested in the result, the ct. is improperly constituted, & an order made in the case will be quashed on *certiorari*. It is no answer to the objection, that there was a majority in favour of the decision without reckoning the vote of the interested party. Nor that the interest party withdrew before the decision, if he appear to have joined in discussing the matter with the other magistrates. On appeal against an order, under 4 & 5 Vict. c. 59, s. 1, directing the surveyor of the highways to pay the comrs. of a turnpike trust a sum of money to be laid out in the actual repairs of the turnpike road, the justices making such order are interested parties. So is a magistrate to whom money is owing which is secured upon the turnpike tolls.—R. v. HERTFORDSHIRE JJ. (1845), 6 Q. B. 753; 1 New Mag. Cas. 183; 1 New Sess. Cas. 470; 14 L. J. M. C. 73; 4 L. T. O. S. 291; 9 J. P. 198; 9 Jur. 424; 115 E. R. 284.

*Annotations*:—*Reid.* R. v. Surrey JJ. (1855), 19 J. P. Jo. 755; R. v. L. C. C., *Ex p.* Akkersdyk, *Ex p.* Fermentia, [1892] 1 Q. B. 190; Frome United Breweries Co. v. Bath JJ., [1926] A. C. 586. *Mentd.* R. v. Aberdare Canal Co. (1850), 14 Q. B. 854; Hayman v. Rugby School (1874), L. R. 18 Eq. 28.

46. —.]—R. v. FARRANT, No. 52, *post*.

47. —.]—R. v. LONDON COUNTY COUNCIL, *Re* EMPIRE THEATRE, No. 85, *post*.

#### (b) Pecuniary Interest.

##### i. In General.

48. General rule.]—R. v. RAND, No. 84, *post*.

49. —.]—R. v. FARRANT, No. 52, *post*.

50. —.]—R. v. LONDON COUNTY COUNCIL, *Re* EMPIRE THEATRE, No. 85, *post*.

51. Amount of interest necessary to disqualify.]—R. v. RAND, No. 84, *post*.

52. —.]—A magistrate had visited, as medical attendant, a person who alleged that he had been assaulted. He strongly advised his patient not to prosecute, & afterwards received a

communication from the person alleged to have committed the assault, in which an apology was tendered, & a desire expressed for an amicable settlement. It was alleged that he would be a necessary witness for the prosecution:—*Held*: he was not disqualified from sitting to hear a summons taken out for the alleged assault, either on the ground of interest or because he might be called as a witness.

It is a most important legal principle that no one should be judge in his own cause; that no one shall sit as judge when he has the smallest pecuniary interest in the dispute before him (STEPHEN, J.).—R. v. FARRANT (1887), 20 Q. B. D. 58; 57 L. J. M. C. 17; 57 L. T. 880; 52 J. P. 116; 36 W. R. 184; *sub nom.* R. v. TAUNTON (MAYOR), 4 T. L. R. 87, D. C.; *previous proceedings, sub nom. Re* TAUNTON (MAYOR), 4 T. L. R. 43, D. C.

*Annotations*:—*Reid.* R. v. Cumberland JJ., *Ex p.* Mid. Ry. (1888), 58 L. T. 491. *Mentd.* Allison v. General Council of Medical Education & Registration, [1894] 1 Q. B. 750.

53. —.]—R. v. HAMMOND, No. 60, *post*.

54. — Interest only indirect.]—R. v. MCKENZIE, No. 59, *post*.

55. What amounts to pecuniary interest—Magistrate a custom-house officer—Entitled to salvage—Proceedings to estimate salvage.]—R. v. DAVIS (1772), Lofft, 62; 98 E. R. 534.

56. — Interest as mortgagee.]—R. v. HERTFORDSHIRE JJ., No. 45, *ante*.

57. — Shareholders of company party to proceedings—Rating appeal.]—A justice, being a shareholder in a railway co., took part in the decision of an appeal on the part of the co., against a poor rate, when the rate was quashed. It appeared that this fact was known to resps.' attorney at the time of the appeal, & he did not expressly object to the justice taking part in the proceedings:—*Held*: the order of sessions was thereby invalidated, & the objection was not waived by the knowledge of resps.' attorney, & his not objecting.—R. v. CAMBRIDGESHIRE JJ., *Ex p.* STEEPLE MORDEN OVERSEERS (1855), 25 L. T. O. S. 128; 3 W. R. 418.

58. — — —.]—Upon an appeal by a water co. against an assessment to a poor rate, the presiding judge, the deputy-recorder reduced the rate & gave costs to applts. It afterwards

in the hearing of a case involving his own interest & the decision of a judge interested at all need not be accepted even by a party in whose favour the magistrate would be likely to decide.—PRAHRAN MUNICIPAL COUNCIL v. CLOUGH (1862), 1 W. & W. 238.—AUS.

i. Information laid before interested justice—Case heard by another.]—R. v. STONE (1892), 23 O. R. 46.—CAN.

#### PART II. SECT. 2, SUB-SECT. 1.—A. (b) i.

48 i. General rule.]—VENKATAPATHI NAYANIVARU v. MAHOMED SAHIB (1913), 1 L. R. 38 Mad. 531.—IND.

54 i. Amount of interest necessary to disqualify—Interest only indirect.]—The fact that the fines imposed by a police magistrate appointed by a municipal corpn. are paid into the Consolidated Municipal Fund, & that he holds another office under the corpn., the salary of which is drawn from such fund, does not incapacitate him as magistrate by reason of interest in the prosecution.—R. v. HART (1887), 2 B. C. R. 264.—CAN.

r. What amounts to pecuniary interest—Shareholders of company party to proceedings.]—A limited liability co. brought an action against P. in the Small Debts Ct. to recover a small sum of money; two members of the

Ct. were shareholders in the co.:—*Held*: the justices were disqualified by interest from adjudicating in the action.—R. v. LOWE, *Ex p.* PETERSON, [1912] S. R. Q. 138.—AUS.

h. — — —.]—HODGSON v. DAWSON (1868), 1 P. E. I. 282.—CAN.

k. — — — Inland revenue collector.]—R. v. DIBBLE, *Ex p.* SHAW (1883), 23 N. B. R. 30.—CAN.

l. — — —.]—*Ex p.* GROVES (1883), 23 N. B. R. 38.—CAN.

m. — — — Inspector under Liquor License Act.]—The fact that B., a convicting justice for an offence against the provisions of The Liquors License Act, 1896, is an inspector under the Act, but not for the district where the offence is alleged to have been committed, is not such an interest as to disqualify him or cause bias.—*Ex p.* MICHAUD (1896), 34 N. B. R. 123.—CAN.

n. — — — Magistrate certifying for insurance purposes—Magistrate affected by loss.]—GANONG v. AETNA INSURANCE CO. (1864), 11 N. B. R. (6 All.) 75.—CAN.

o. — — — Magistrate lessee of land underlying insured property.]—McROSSIE v. PROVINCIAL INSURANCE CO. (1873), 34 U. C. R. 55.—CAN.

p. — — — Magistrate insured under disputed policy—Interest assigned to

party to suit.]—The person to whom a policy of insurance is issued, & in whose name the action thereon is brought, is not qualified as a magistrate not concerned in the loss, though he has assigned the goods, & with them all his beneficial interest in the policy.—STEVENS v. PHOENIX INSURANCE CO. (1894), 32 N. B. R. 394.—CAN.

q. — — — Magistrate holder of liquor license.]—DANAHER v. PETERS, O'REGAN v. PETERS (1889), 17 S. C. R. 44; 4 Cart. 425.—CAN.

r. — — —.]—A justice of the peace is disqualified from trying information for violation of Canada Temperance Act, in a county in which he is a licensed vendor of intoxicating liquors.—*Ex p.* LAUGHEY (1889), 28 N. B. R. 656.—CAN.

t. — — — Magistrate's fees payable from special fund—Fund raised for prosecution of particular offence.]—R. v. HOLYOKE, *Ex p.* MCINTYRE (1913), 13 E. L. R. 210; 13 D. L. R. 225; 42 N. B. R. 135.—CAN.

a. — — — Fees payable by town council—Fines recovered payable to council.]—R. v. WOODROOF (1912), 11 E. L. R. 373; 20 Can. Crim. Cas. 17; 6 D. L. R. 300.—CAN.

b. — — — Magistrate paid salary—Salary not dependent on fines imposed.]—Where a police magistrate, appointed under R. S. O., 1887, c. 72, is paid a



2.—*Disqualification to act as magistrate: Subsect. 1, A. (b) i. & ii., & (c).]*

appeared that the deputy-recorder was at the time of the trial of the appeal the registered shareholder of five shares in the co., though he was at the time under a contract to dispose of them; & as he swore) believed he had no beneficial interest whatever in the co.:—*Held*: he was an interested party, & was incompetent to try the appeal.—*R. v. STORKS* (1857), 29 L. T. O. S. 107; 5 W. R. 563.

59. ——— *Prosecution under Conspiracy & Protection of Property Act, 1875 (c. 86).]*—In a prosecution under above Act, s. 7, where the prosecutor was the local agent of a shipping federation, whilst the justices were shareholders in shipping cos. whose ships were insured in societies which were members of the federation:—*Held*: the justices' interest was too indirect to sustain an allegation of pecuniary interest or bias on their part.—*R. v. MCKENZIE*, [1892] 2 Q. B. 519; 61 L. J. M. C. 181; 67 L. T. 201; 56 J. P. 712; 41 W. R. 144; 8 T. L. R. 712; 36 Sol. Jo. 667; 17 Cox, C. C. 542; 5 R. 10, D. C. *Annotations*:—*Mentd. Ex p. Wilkins* (1895), 64 L. J. M. C. 221; *Lyons v. Wilkins*, [1899] 1 Ch. 255; *Smith v. Moody*, [1903] 1 K. B. 56; *R. v. Hulme* (1913), 9 Cr. App. Rep. 77.

60. ——— *Railway company—Conviction for offence under Railways Clauses Consolidation Act 1845 (c. 20).]*—Where justices convict for an offence under above Act, any interest they may have as shareholders in the railway in question, however small, is sufficient to vitiate their judgment.—*R. v. HAMMOND* (1863), 3 New Rep. 140; 9 L. T. 423; 27 J. P. 793; 12 W. R. 208.

——— *Brewery company.]*—See INTOXICATING LIQUORS, Vol. XXX., p. 24, Nos. 154–156.

61. ——— *Liability of justices to costs—Refusal of clerk to record order as to payment—Subsequent investigation of such refusal.]*—*WILDES v. RUSSELL*, No. 886, *post*.

62. *Adjudication by member of local authority—In exercise of statutory power.]*—*R. v. HANDSLEY*, No. 125, *post*.

*Proceedings under licensing laws.]*—See Licensing (Consolidation) Act, 1910 (c. 24), s. 40.

ii. *Interest as Ratepayer.*

*Trial of offences against certain statutes—Enforceable by local authorities.]*—See Justices of the Peace Act, 1867 (c. 115), s. 2; Public Health Act, 1875 (c. 55), s. 258; Public Health (London) Act, 1891 (c. 76), s. 122.

——— *Highways Acts.]*—See HIGHWAYS, Vol. XXVI., p. 457, No. 1737.

63. *Adjudication in matters affecting rates—Removal order.]*—*R. v. RISHTON (INHABITANTS)*

salary by the municipality instead of by fees, such salary being in no way dependent on any fines which he may impose, he has no pecuniary interest in the fines, & so is not thereby disqualified.—*R. v. FLEMING* (1895), 27 O. R. 122.—CAN.

c. ——— *Sum of money voted to magistrate—For enforcing Act.]*—The vote of a sum of money to a magistrate for his services in enforcing Canada Temperance Act is not a ground for quashing a conviction by such magistrate under the Act on the ground that he is disqualified by interest.—*Ex p. McCoy* (1896), 33 N. B. R. 605.—CAN.

d. ——— *Magistrate & counsel partners in firm of attorneys.]*—It is not a ground of disqualification that the justice & the counsel who conducted the prosecution are partners in business as attorneys, provided they have no joint interest in the fees earned by the

counsel on the prosecution, or in any fees payable to the justice on the trial of the information.—*Re MacDonald, R. v. GRIMMER* (1886), 25 N. B. R. 424.—CAN.

62i. *Adjudication by member of local authority—In exercise of statutory power.]*—Justices, who are also aldermen & as such interested in the fine being paid into the city treasury, are disqualified from hearing complaint by city inspector of nuisances.—*Ex p. O'Connor* (1869), 8 N. S. W. S. C. R. (L.) 142.—AUS.

e. *Interest question for jury.]*—*CUSICK v. MCRAE* (1854), 11 U. C. R. 509.—CAN.

PART II. SECT. 2, SUB-SECT. 1.—  
A. (b) ii.

f. *Adjudication in matters affecting rates—Appeals against rate.*

(1813), 1 Q. B. 480; 10 L. J. M. C. 103, n.; 113 E. R. 1217; *sub nom. R. v. WINCHESTER*, cited in 5 Jur. at

*Annotation*:—*Expld. R. v. Cheltenham Comrs.* (1841), 1 Q. B. 467.

64. ——— *Appeal from.]*—*GREAT CHARTE PARISH & KENNINGTON PARISH* (1742), 2 Stra. 1173; 93 E. R. 1107; *sub nom. R. v. GREAT CHART (INHABITANTS)*, Burr. S. C. 194.

*Annotations*:—*Reid. R. v. Essex JJ.* (1816), 5 M. & S. 513; *R. v. Cheltenham Comrs.* (1841), 1 Q. B. 467; *Grand Junction Canal Co. v. Dimes* (1849), 12 Beav. 631. *Mentd. R. v. Madley* (1744), 2 Stra. 1198; *Isle of Wight Ferry Co. v. Ryde Comrs.* (1862), 7 L. T. 391.

65. ——— *On an appeal to the sessions against an order of removal, those justices who are rated to the relief of the poor in either of the contending parishes, cannot vote. If an order of removal be confirmed on an appeal & it be afterwards determined, on a question reserved for the opinion of this ct., that so many of the justices at the sessions were disabled to vote as to reduce the number to a minority, this ct. will not quash the original order, but will send the case back to the sessions directing them to enter a continuance to the next sessions, in order that they may quash it.]*—*R. v. YARPOLE (INHABITANTS)* (1790), 4 Term Rep. 71; 100 E. R. 900.

66. ——— *Where an appeal against an order of removal is adjourned on the ground of the justices being equally divided, this ct. will not grant a certiorari, for the purpose of quashing the order of removal & the order of adjournment, upon affidavits showing that the apparent equality of votes was occasioned by the vote of a magistrate who was a rated inhabitant of resp. parish, & had joined in making the order of removal.]*—*R. v. MONMOUTHSHIRE JJ.* (1828), 8 B. & C. 137; 6 L. J. O. S. M. C. 87; 108 E. R. 994; *sub nom. R. v. USKE (INHABITANTS)*, 2 Man. & Ry. K. B. 172.

*Annotations*:—*Expld. R. v. Cheltenham Comrs.* (1841), 1 Q. B. 467. *Reid. Colam v. Manfield* (1872), 26 L. T. 661; *R. v. Walsall Overseers* (1878), 3 Q. B. D. 457.

67. ——— *R. v. BRECKNOCKSHIRE JJ.* (1873), 42 L. J. M. C. 135; 37 J. P. Jo. 404.

68. ——— *Appeals against rate—Petty & special sessions.]*—Where corpn. justices consist of a greater number than four, an appeal lies to them at sessions against a poor rate, although there be less than four who are devoid of interest in the question.—*R. v. ESSEX JJ.* (1816), 5 M. & S. 513; 105 E. R. 1139.

*Annotation*:—*Folld. Ex p. Workington Overseers*, [1894] 1 Q. B. 416.

69. ——— *Justices, ratepayers of a parish, are not disqualified from sitting in special sessions for hearing appeals against poor rates assessed in same parish.*

So far as petty & special sessions are concerned,

Adjudicating justices who have only an interest as ratepayers in an appeal against rates heard before them are not thereby disqualified from adjudicating upon such appeals.—*PRAHRAN CORPN. v. CARTER* (1889), 15 V. L. R. 228.—AUS.

g. ——— *CORNWALLIS OVERSEERS v. GRANVILLE OVERSEERS* (1871), Cong. Dig. 815.—CAN.

h. *Adjudication on breach of bye-law.]*—A justice who is a ratepayer is not disqualified by interest from hearing complaint for breach of municipal bye-laws.—*JEWELL v. YOUNG* (1863), 2 W. & W. 243.—AUS.

k. *Adjudication on sale of liquor offences.]*—Deft. was convicted before a stipendiary magistrate of selling intoxicating liquors contrary to law. The stipendiary magistrate was a ratepayer of the town, & received a fixed

I am of opinion that justices are not disqualified from doing the poor law work by reason of their having poor rates in the place in respect of which the work is done. As to quarter sessions, it appears to me that the only disqualification is with respect to their own parish (WRIGHT, J.).—*R. v. BOLINGBROKE*, [1893] 2 Q. B. 347; 62 L. J. M. C. 180; 69 L. T. 717; 58 J. P. 118; 42 W. R. 128; 37 Sol. Jo. 732; 5 R. 536, D. C.

*Annotation*:—*Folld. Ex p. Workington Overseers*, [1894] 1 Q. B. 416.

.]—A gas co. appealed to the London quarter sessions against the assessment of their property in several parishes in the metropolis. One of the justices who heard & determined the appeals was a member of the borough council & chairman of the assessment committee of a borough in another part of the metropolis which was served by a different gas co.:—*Held*: there was no such reasonable suspicion of bias as to disqualify the justice for deciding the appeals to quarter sessions.—*R. v. LONDON JJ., Ex p. SOUTH METROPOLITAN GAS CO.* (1908), 98 L. T. 519; 72 J. P. 137; 24 T. L. R. 274; 52 Sol. Jo. 238; 6 L. G. R. 324; 2 Konst. Rat. App. 642, C. A.

*Annotation*:—*Apld. R. v. Middlesex JJ., Ex p. Hendon Union* (1908), 6 L. G. R. 739.

71. ———.] — Justices sitting in special sessions to hear an appeal from an assessment committee, as to an assessment to a poor rate, are within 16 Geo. 2, c. 18, s. 1, & are not disqualified from adjudicating on the appeal by reason of their being themselves chargeable with the rate in respect of which the appeal is brought.—*Ex p. WORKINGTON OVERSEERS*, [1894] 1 Q. B. 416; 70 L. T. 143; 58 J. P. 381; 42 W. R. 177; 10 T. L. R. 173; 9 R. 135, C. A.

72. ———. Quarter sessions.]—A paving Act empowered comrs. to lay rates, giving to parties grieved an appeal to quarter sessions, whose order was to be final; & no order, rate, etc., was to be removed by *certiorari*. On appeal against a rate three of the eleven magistrates were partners in a co. to which belonged certain premises assessed to the rate in the name of the occupier. The sessions quashed the rate:—*Held*: a question in the cause having been decided by a ct. improperly constituted, on account of the interest of the three magistrates, the clause prohibiting *certiorari* did not operate: & this ct. had the order of sessions brought up by *certiorari* & quashed it on affidavit of the above facts. Although the affidavits did not satisfy the ct. that the magistrates had acted partially. But, if a party to the appeal, knowing of the interest, expressly or impliedly assent to the interested magistrate acting, such party cannot afterwards make the objection.—*R. v. CHELTENHAM COMRS.* (1841), 1 Q. B. 467; 1 Gal. & Dav. 167; 10 L. J. M. C. 99; 5 Jur. 867; 113 E. R. 1211.

*Innotations*:—*Consd. R. v. Hertfordshire JJ.* (1845), 6 Q. B. 753. *Refd. Ex p. Acland* (1847), 9 L. T. O. S. 146; *Fuller v. Brown* (1849), 13 L. T. O. S. 301; *R. v. Aberdare Canal Co.* (1850), 14 Q. B. 854; *R. v. Middlesex JJ.* (1854), 18 J. P. Jo. 390; *R. v. Surrey JJ.* (1855), 19 J. P. Jo. 708, 755; *Graham v. Berry* (1865), 3 Moo. P. C. C. N. S. 207; *Colonial Bank of Australasia v. Willan* (1874), L. R. 5 P. C. 417.

alary as stipendiary, payable out of the funds of the town, to which half the penalty imposed became payable:—*Held*: the magistrate was disqualified by interest from acting in the matter.—*TUPPER v. MURPHY* (1890), 3

1. ———.] — The police magistrate not disqualified from trying complaints for violations of Liquor License Act by reason of his being a rate-

payer.—*Ex p. DRISCOLL* (1888), 27 N. B. R. 216.—CAN.

m. ———.] — A magistrate is not disqualified from adjudicating upon an information laid under Liquor & License Act, 1896, by reason of being a ratepayer of the county, & the penalty sought to be recovered being payable into the county funds.—*Ex p. FLANNAGAN* (1897), 34 N. B. R. 326; 2 Can. Crim. Cas. 513.—CAN.

73.

No. 69, ante.

74. ———. Borough sessions — Order of recorder.]—On appeal, against a valuation of ratable property under a local Act to the sessions for the borough of C., the recorder, who tried the appeal, reduced the rate, & ordered that the costs should be paid by resps. The amount of costs not being then ascertained, he adjourned the case to the next sessions. At these a deputy recorder presided. The costs were in fact taxed by the recorder, who reduced them; but the order for costs was drawn up at the sessions at which the deputy recorder presided, & formally entered as of such sessions, the deputy recorder, however, not otherwise taking any part in the matter. Resps. were the parish officers of a parish comprised in a union which comprehended several other parishes; & the deputy recorder was a rated inhabitant in one of such other parishes. All the parishes contributed to a common fund for the relief of the poor:—*Held*: the order for costs must be considered as the order of the deputy recorder, & was voidable on account of his interest, & 16 Geo. 2, c. 18, s. 1, was inapplicable, as applying only to cases where justices act as such, in the making of orders out of ct., & not to the exercise of appellate jurisdiction.—*R. v. CAMBRIDGE RECORDER* (1857), 8 E. & B. 637; 27 L. J. M. C. 160; 30 L. T. O. S. 164; 4 Jur. N. S. 334; 6 W. R. 80; 21 J. P. Jo. 803; 120 E. R. 238.

*Annotations*:—*Refd. Read v. Freeman* (1860), 7 Jur. N. S. 546; *Colonial Bank of Australasia v. Willan* (1874), L. R. 5 P. C. 417; *R. v. Farrant* (1887), 20 Q. B. D. 58.

75. ———. Appeal against order for allowance of overseers' accounts.]—Upon an appeal against an order for the allowance of overseers' accounts, a magistrate, a rated inhabitant of the parish, cannot vote either on the determination of the appeal, or on a question as to granting a case for the opinion of this ct.—*R. v. GUDRIDGE* (1826), 5 B. & C. 459; 8 Dow. & Ry. K. B. 217; 4 Dow. & Ry. M. C. 35; 108 E. R. 171.

*Annotations*:—*Refd. R. v. Monmouthshire JJ.* (1828), 8 B. & C. 137; *Colam v. Manfield* (1872), 26 L. T. 661.

76. ———. Summons for removal of obstruction on highway.]—*R. v. GAISFORD*, No. 102, post.

#### (c) Interest Other Than Pecuniary.

77. Interest as lessor of defendant.]—ANON. (1698), 1 Salk. 396; 91 E. R. 343.

*Annotation*:—*Refd. Great Charter & Kennington Parishes* (1742), 2 Stra. 1173.

78. ———. Corporate borough as lessor.]—The complainant claimed a right of fishery in the water under a demise from the mayor, aldermen, & burgesses of the borough of C. & in the deed which he put in to prove his claim, there was a reservation of a right of fishery to "the mayor, aldermen & councillors for the time being." The deed was executed by the corpn.; but not by the lessee. One of the justices who convicted was, at the time of the conviction mayor of C., & the other an alderman:—*Held*: nevertheless, they had no such interest in the subject-matter of complaint, as deprived them of jurisdiction to

n. ———.] — *Ex p. GORMAN, ETC.* (1898), 34 N. B. R. 397.—CAN.

o. ———.] — *Ex p. HEBERT* (1898), 34 N. B. R. 455.—CAN.

p. ———.] — *Re GILLIS* (1907), 3 E. L. R. 565.—CAN.

q. ———.] — *McNEIL v. MCGILLIVRAY* (1907), 42 N. S. R. 133; 4 E. L. R. 187.—CAN.



**Sect. 2.—Disqualification to act as magistrate: Subsect. 1, A. (c), & B.**

hear & decide it.—*FULLER v. BROWN* (1849), 3 New Mag. Cas. 172; 3 New Sess. Cas. 603; 13 L. T. O. S. 301; 13 J. P. 445.

**79. Interest as master—Prosecution against servant.]—***R. v. HOSEASON* (1811), 14 East, 605; 104 E. R. 734.

**80. Interest as litigant.]—***R. v. HERTFORDSHIRE JJ.*, No. 45,

**81. —.]—**(1) At a special sessions for appeals against a poor rate, the chairman of the magistrates, who was himself applt. in one of the cases for hearing, took part in the decision of all the cases except his own. When his own case was called on, he left the bench & went to the body of the ct. & conducted the case himself. On a rule for a *certiorari* to bring up all the orders for the purpose of quashing them:—*Held*: the chairman, being a litigant in a matter similar to the other matters before the ct., was disqualified from acting as a justice, & the orders were bad.

(2) Before the sessions were held, applts. gave notice to the clerk of the justices that objection would be made "if any justices who were rated in Yarmouth heard the appeals." At the hearing this objection, & no other, was made, & it was overruled by the justices:—*Held*: applts. were not precluded by the form of their notice from contending, in support of the rule for a *certiorari*, that the chairman, even if not disqualified by reason of his being rated, was disqualified by reason of his being himself a litigant: although this latter objection was not specifically mentioned in the notice, or made before the justices.—*R. v. GREAT YARMOUTH JJ.* (1882), 8 Q. B. D. 525; 51 L. J. M. C. 39; 46 J. P. 518; 30 W. R. 460, D. C.

*Annotations*:—As to (1) *Refd.* *R. v. Spedding*, etc. JJ. (1885), 2 T. L. R. 163; *R. v. Stockport JJ.* (1896), 60 J. P. 552; *R. v. L. C. C., Ex p. South Metropolitan Gas Co.* (1907), 5 L. G. R. 1064. *Generally, Mentd.* *R. v. L. C. C., Ex p. Akkersdyk, Ex p. Fermentia*, [1892] 1 Q. B. 190.

**82. Interest as riparian owner—Fishery prosecution.]—***R. v. SPEDDING, ETC., JJ.*, No. 120, *post*.

### B. Bias.

#### (a) In General.

**83. General rule.]—**On an application to the licensing justices of a county borough for the

#### PART II. SECT. 2, SUB-SECT. 1.—A. (c).

**80 i. Interest as litigant.]—***Ex p. RYAN* (1890), 30 N. B. R. 256.—CAN.

**80 ii. —.]—**The disqualification of a justice of the peace arising from an action pending against him ceases when he has recovered judgment, though an execution has issued which is unsatisfied.—*Ex p. RYAN* (1890), 32 N. B. R. 377.—CAN.

**80 iii. —.]—**If the mere fact of existing litigation is relied on as the disqualification of a presiding justice on the ground of bias, the litigation must be really pending.—*R. v. KAY, Ex p. WILSON* (No. 1) (1908), 38 N. B. R. 498.—CAN.

**80 iv. —.]—***R. v. KAY, Ex p. GALLAGHER* (1908), 38 N. B. R. 498; 5 E. L. R. 153.—CAN.

**80 v. —.]—***R. v. LORRIMER* (1909), 7 E. L. R. 117.—CAN.

**r. Interest as trustees & conservators of common—Prosecution for trespass on common.]—**Justices being trustees & conservators of common, cannot adjudicate on a summons for trespassing on the common.—*R. v.* (1878), 4

**t. Interest as licenced auctioneers.]—**Two of the four convicting justices were licenced auctioneers for the county, & persisted in sitting after objection taken on account of interest, though the case might have been disposed of by one justice:—*Held*: they were disqualified, & in quashing the conviction on that ground, the ct. ordered them to pay the costs.—*R. v. CHAPMAN* (1882), 1 O. R. 582.—CAN.

**a. Magistrate solicitor of husband—Examination of wife in capacity of magistrate.]—**The solr. of the husband, being city recorder, was held not to be disqualified to take, as a magistrate, the examination of a married woman for the conveyance of her land.—*ROMANES v. ROMANES* (1870), 17 Gr.

**b. Interest as land agent of party.]—**Where one of the magistrates sitting on the bench was the land agent of a party interested in the case the proceedings were not thereby invalidated.—*R. v. CORE JJ.* (1857), 30 L. T. O. S.

**c. Prosecution by racing club—Magistrate steward of club.]—***RYAN v. STANFORD* (1897), 15 N. Z. L. R. 390.—N. Z.

renewal of an old on-licence the justices referred the matter to the compensation authority of the borough under Licensing (Consolidation) Act, 1910 (c. 24), s. 19, & at a further meeting they resolved that a solr. should be instructed to appear before the compensation authority & oppose the renewal on their behalf. The solr. duly appeared & opposed & the compensation authority refused the renewal, subject to payment of compensation. Three of the justices who sat & voted as members of the compensation authority had been parties to the resolution of the licensing justices authorising a solr. to appear on their behalf:—*Held*: the three justices were disqualified from sitting on the compensation tribunal on the ground of bias, & the decision of the tribunal must be set aside.

If there is one principle which forms an integral part of English law it is that every member of a body engaged in a judicial proceeding must be able to act judicially; & it has been held over & over again that, if a member of such a body is subject to a bias, whether financial or other, in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal (*LORD CAVE, C.*).—*FROME UNITED BREWERIES CO. v. BATH JJ.*, [1926] A. C. 586; 95 L. J. K. B. 730; 135 L. T. 482; 90 J. P. 121; 42 T. L. R. 571; 24 L. G. R. 261, H. L.; *revsq. S. C. sub nom. R. v. BATH COMPENSATION AUTHORITY*, [1925] 1 K. B. 685, C. A.

**84. Bias must be real—Not merely possible.]—**Though any pecuniary interest, however small, in the subject-matter disqualifies a justice from acting in a judicial inquiry, the mere possibility of bias in favour of one of the parties does not *ipso facto* avoid the justice's decision; in order to have that effect the bias must be shown at least to be real. The corpn. of B. were the owners of waterworks, & were empowered by statute to take the water of certain streams without permission of the mill-owners, on obtaining a certificate of justices that a certain reservoir was completed, of a given capacity, & filled with water. An application was made to justices accordingly, which was opposed by the mill-owners; but after due inquiry the justices granted the certificate. Two of the justices were trustees of a hospital & friendly society respectively, each of which had lent money to the corpn. on bonds charging the corporate fund. Neither of the

#### PART II. SECT. 2, SUB-SECT. 1.—B. (a).

**83 i. General rule.]—**A justice is disqualified from sitting in cases where he is widely suspected of bias.—*SHARP v. CAREY* (1897), 23 V. L. R. 248.—AUS.

**83 ii. —.]—**The suspicion of bias necessary in order to disqualify a magistrate, & to invalidate his decision must be supported by circumstances which would reasonably warrant a considerable number of persons in entertaining it.—*R. v. MOLESWORTH, RENER'S CASE* (1898), 23 V. L. R. 582.—AUS.

**83 iii. —.]—***GILBERT v. GULLIVER*, [1918] V. L. R. 185.—AUS.

**83 iv. —.]—**The function of magistrates in returning for trial is judicial, & prohibition will lie if bias or want of jurisdiction is established.—*R. (REA) v. DAVISON*, [1913] 2 I. R. 342.—IR.

**84 i. Bias must be real—Not merely possible.]—***AMAR SINGH v. SAHHA SINGH* (1925), 1 L. L. R. 6 Lah. 396.—IND.

**84 ii. —.]—**In order to disqualify a justice from adjudicating on the ground of bias, there must be a

justices could by any possibility have any pecuniary interest in these bonds; but the security of their *cestuis que trust* would be improved by anything improving the borough fund, & the granting of the certificate would indirectly produce that effect, as increasing the value of the waterworks. There was no ground to doubt that the justices had acted *bonâ fide*:—*Held*: the justices were not disqualified from acting in the granting of the certificate.—*R. v. RAND* (1866), L. R. 1 Q. B. 230; 7 B. & S. 297; 35 L. J. M. C. 157; *sub nom.* *R. v. RAND*, *R. v. BRADFORD JJ.*, 30 J. P. 293.

*Annotations*:—*Distd.* *R. v. Meyer* (1875), 1 Q. B. D. 173. *Consd.* *R. v. Farrant* (1887), 20 Q. B. D. 58. *Appld.* *R. v. Cumberland JJ.*, *Ex p. Mid. Ry.* (1888), 58 L. T. 491; *R. v. Sunderland JJ.*, [1901] 2 K. B. 357. The whole law on the subject may really be found laid down in the cases of *R. v. Rand & R. v. Meyer* (VAUGHAN WILLIAMS, L.J.). *Consd.* *R. v. London County JJ.*, *Ex p. South Metropolitan Gas Co.* (1907), 97 L. T. 716. *Refd.* *R. v. M. S. & L. Ry.* (1867), L. R. 2 Q. B. 336; *R. v. Deal (Mayor & JJ.)*, *Ex p. Curling* (1881), 45 L. T. 439; *R. v. L. C. C.*, *Re Empire Theatre* (1894), 71 L. T. 638; *R. v. Middlesex JJ.*, *Ex p. Hendon Union* (1908), 6 L. G. R. 739; *Frome United Breweries Co. v. Bath JJ.*, [1926] A. C. 586. *Mentd.* *Hayman v. Rugby School* (1874), L. R. 18 Eq. 28.

85. — — —.]—One of those principles which must guide a person in a judicial position is that he must not be both accuser & judge. If there is on a tribunal anybody who is an accuser, & who, although he is accuser, acts also as judge, his presence on that tribunal is fatal to its jurisdiction, & it is of no importance that had he been absent the decision would have been the same. The mere presence of a person who is accuser & judge vitiates the decision of the tribunal. . . . One principle is that anybody is disqualified to act on any judicial matter in reference to which he had any pecuniary interest or any real bias. This is undoubtedly the law, but the bias which disqualified must be in connection with the litigation in question. It must be a "real bias" in the matter itself. The mere possibility of a bias will not disqualify (CHARLES, J.).—*R. v. LONDON COUNTY COUNCIL, Re EMPIRE THEATRE* (1894), 71 L. T. 638; 11 T. L. R. 24; 39 Sol. Jo. 63; *sub nom.* *R. v. LONDON COUNTY COUNCIL, Ex p. EDWARDES*, 15 R. 66, D. C.

*Annotation*:—*Refd.* *R. v. Huggins, Ex p. Clancy* (1895), 15 R. 203.

86. Evidence of bias—Justice surveyor of highway—Matter concerning office of surveyor.]—Order of sessions quashed, because it concerned one of the justices named in the stile of ct.—*FOXHAM TITHING WILTS CASE* (1705), 2 Salk. 607; *Holt*, K. B. 517; *Sett. & Rem.* 173; 91 E. R. 514.

*Annotations*:—*Consd.* *R. v. Cheltenham Comrs.* (1841), 1 Q. B. 467. *Refd.* *Great Charte & Kennington Parishes* (1742), 2 Stra. 1173; *R. v. Essex JJ.* (1816), 5 M. & S. 513.

87. — Active steps taken by justice—On behalf of one party to proceedings.]—*Ex p. CHAMBERLAIN, R. v. NORFOLK JJ.* (1870), 34 J. P. Jo. 773.

88. — — —.]—*R. v. CUMBERLAND JJ., Ex p. MIDLAND RY. CO.*, No. 156, *post*.

real likelihood of bias.—*P. (TAVERNER) v. TYRONE JJ.*, [1909] 2 I. R. 763; 43 I. L. T. 262.—*IR.*

87 i. Evidence of bias—Active steps taken by justice—On behalf of one party to proceedings.]—*R. v. BROWN* (1888), 16 O. R. 41.—*CAN.*

87 ii. — — —.]—*R. v. BIETEL (Sask.)*, [1920] 2 W. W. R. 384; 51 D. L. R. 721; 32 Can. Crim. Cas. 258.—*CAN.*

88 i. — Expression of strong — — —.]—*R. v. KLEMP* (1885), 10 O. R. 3.—*CAN.*

88 ii. — — —.]—*Re BAIN (Man.)*, [1919] 2 W. W. R. 709.—*CAN.*

93 iii. — — —.]—Where a magistrate had intimated that he would convict any one charged before him of an offence under Canada Temperance Act, whether there was any evidence or not, if he thought in his own mind the party so charged was guilty, a conviction was quashed on the ground that the magistrate was unfit & incompetent to try the case.—*R. v. RAND* (1913), 13 E. L. R. 450; 15 D. L. R. 69; 47 N. S. R. 556; 22 Can. Crim. Cas. 1117.—*CAN.*

93 iv. — — —.]—*R. (O'LEARY) v. COUNTY CORK JJ.* (1911), 45 I. L. T. 3.—*IR.*

89. — — —.]—*R. v. TAYLOR, ETC., JJ. & LAIDLER, Ex p. VOGWILL* (1898), 14 T. L. R. 185; 42 Sol. Jo. 235, D. C.

90. — — — Resignation of company directorship—To avoid disqualification.]—*R. v. HAIN LICENSING JJ.* (1896), 12 T. L. R. 323; 40 Sol. Jo. 458, D. C.

*Annotations*:—*Refd.* *R. v. Sunderland JJ.*, [1901] 2 K. B. 357; *R. v. Woodhouse*, [1906] 2 K. B. 501.

91. — Membership of interested class.]—*R. v. RAND*, No. 84, *ante*.

92. — — —.]—Upon the hearing of a summons under M. S. Act, 1854 (c. 120), s. 361, a qualified pilot, belonging to the pilotage district within which the offence was committed, has, by reason of his membership of the class in whose interest the proceedings are taken, such an interest as will disqualify him from acting as a justice, even though by reason of the peculiar nature of his employment as a pilot he is not brought into competition with unqualified pilots, & has consequently no personal interest in the conviction.—*R. v. HUGGINS*, [1895] 1 Q. B. 563; 64 L. J. M. C. 149; 43 W. R. 329; *sub nom.* *R. v. HUGGINS, ETC., GRAVESEND JJ., Ex p. CLANCY*, 72 L. T. 193; 59 J. P. 104; 11 T. L. R. 205; 39 Sol. Jo. 234; 7 Asp. M. L. C. 566; 18 Cox, C. C. 94; 15 R. 203.

*Annotations*:—*Distd.* *R. v. Burton, Ex p. Young*, [1897] 2 Q. B. 468; *R. v. Suffolk JJ., Ex p. Manners* (1906), 2 Konst. Rat. App. 480.

93. — Expression of strong views.]—To entitle a person to a rule *nisi* for a writ of *certiorari* to remove a conviction of him into the High Ct. for the purpose of being quashed, it is not enough to allege that the justices or one of them had strong views on the subject appertaining to the offence of which deft. is convicted. Accordingly where the affidavits in support of the application stated that the chairman of the justices had made remarks during the hearing of the summons against deft. for driving a motor car at a greater speed than twelve miles an hour, which remarks were alleged to indicate a strong bias against motor cars generally & had also strongly expressed his views when similar charges had been before the bench on previous occasions, the ct. held this was an insufficient ground on which to grant a rule *nisi* for a writ of *certiorari* to remove the conviction into the High Ct.—*Ex p. WILDER* (1902), 66 J. P. 761, D. C.

94. — — —.]—In this case a rule had been granted for *certiorari* to bring up & quash a conviction for exceeding the speed limit under Motor Car Act, 1903 (c. 36), s. 9, on the ground that the justices showed bias. Appct. had stated in his affidavit that during the hearing of the summons two of the justices had open before them a book containing a record of appct.'s previous conviction. Appct. stated that those two justices showed a considerable amount of animation & feeling, repeatedly interrupting the proceedings with remarks which showed that they were pre-

d. — Expression of personal ill will towards defendants.]—*R. (DONOGHUE) v. COUNTY CORK JJ.*, [1910] 1 I. R. 271.—*IR.*

e. — Action by accused against magistrate.]—A *bonâ fide* action brought by the husband of deft. against a stipendiary magistrate, before whom an information is laid for a violation of Canada Temperance Act, is sufficient to disqualify him.—*Ex p. GALLAGHER* (1898), 34 N. B. R. 413.—*CAN.*

f. — — —.]—An action against a justice of the peace by a party against whom an information is laid, does not necessarily disqualify the justice.—



**Sect. 2.—Disqualification to act as magistrate :**  
**sect. 1, B. (a) & (b) i.]**

occupied with evidence not before the ct., & that they accused the appct.'s solr. of misleading the ct. On its appearing that at the hearing appct. had given evidence of a previous conviction against him, stating that though on that occasion he had been driving a 30 horse-power engine & not an 8 horse-power engine as on this occasion the evidence against him was precisely the same that he had driven his car 220 yards in fifteen seconds, i.e., at thirty miles an hour, & that the justices were of opinion that appct.'s solr. had denied a previous conviction, the rule was discharged.—*R. v. SPARKS, ETC., SURREY JJ.* (1909), 73 J. P. 485, D. C. ; *previous proceedings, sub nom. Ex p. PORTER*, 73 J. P. Jo. 336, D. C.

*Annotation:—Apld. R. v. Hankey JJ.* (1910), 55 Sol. Jo. 77.

95. — **Suggesting further offence by accused.]**  
*—Ex p. HICKMAN* (1906), 70 J. P. Jo. 66, D. C.

96. — **Allegation of previous convictions in summons.]**—*R. v. HANKEY JJ.* (1910), 55 Sol. Jo. 77, D. C.

97. **Admission of clerk to justices to consultation—Bias of clerk.]**—Arising out of a collision between a motor vehicle belonging to appct. & one belonging to W., a summons was taken out by the police against appct. for having driven his motor vehicle in a manner dangerous to the public. At the hearing of the summons the acting clerk to the justices was a member of the firm of solrs. who were acting for W. in a claim for damages against appct. for injuries received in the collision. At the conclusion of the evidence the justices retired to consider their decision, the acting clerk retiring with them in case they should desire to be advised on any point of law. The justices convicted appct., & it was stated on affidavit that they came to that conclusion without consulting the acting clerk, who in fact abstained from referring to the case :—*Held* : the conviction must be quashed, as it was improper for the acting clerk, having regard to his firm's relation to the case, to be present with the justices when they were considering their decision.—*R. v. SUSSEX JJ., Ex p. MCCARTHY*, [1924] 1 K. B. 256 ; 93 L. J. K. B. 129 ; 88 J. P. 3 ; 68 Sol. Jo. 253 ; 22 L. G. R. 46 ; *sub nom. R. v. HURST, Ex p. MCCARTHY*, 130 L. T. 510 ; 40 T. L. R. 80 ; 27 Cox, C. C. 590, D. C.

**(b) Membership of Local Authority.**

**i. In General.**

98. **Whether disqualified—Magistrate a party to institution of proceedings—Affiliation order—**

*Ex p. SCRIBNER* (1893), 32 N. B. R. 175.—CAN.

g. — **For judicial misconduct—Writ issued but not actually served.]**—*R. v. BYRON, Ex p. BATSON* (1906), 37 N. B. R. 383 ; 1 E. L. R. 364.—CAN.

h. — **Magistrate previously superseded in office by accused—& committed for trial.]**—*Re STUART, Ex p. PEEK* (1908), 39 N. B. R. 131 ; 6 E. L. R. 274.—CAN.

k. — **Signature of petition against granting license.]**—Signing a petition praying that no license be issued to a party subsequently charged with an offence against Liquor License Act does not disqualify a magistrate so signing from trying the charge.—*Ex p. ANBUSKIRK* (1907), 38 N. B. R. 335 ; 4 E. L. R. 224.—CAN.

l. — **Magistrate employer of complainant.]**—The mere circumstance that a trying magistrate is the master

of the complainant does not deprive the magistrate of his jurisdiction, though it is expedient that such a complaint should be referred to another magistrate.—*Re BASAPA'S PETITION* (1884), 1 L. R. 9 Bom. 172.—IND.

m. **Prosecution of license holders—Magistrates members of licensing courts.]**—*GORMAN v. WRIGHT*, [1916] S. C. (J.) 44.—SCOT.

n. **Consanguinity.]**—*PEPPIN v. GRAYSON & Co., LTD.*, [1910] S. R. Q. 383.—AUS.

o. — **]**—*CAMPBELL v. MCINTOSH* (1872), 1 P. E. I. 423.—CAN.

p. — **]**—*Re HOLMAN* (1878), 3 R. & G. 375.—CAN.

q. — **]**—*R. v. LANGFORD* (1888), 15 O. R. 52.—CAN.

r. — **]**—*Ex p. VICTORY* (1893), 32 N. B. R. 249.—CAN.

t. — **]**—*R. v. STEELE* (1895), 26 O. R. 540.—CAN.

**Magistrate ex officio guardian of union.]**—A magistrate residing within a poor law union, is only a guardian *ex officio* under the Poor Law Amendment Act, while he is acting as such guardian.

Two magistrates made an order of filiation under 2 & 3 Vict. c. 85, upon the complaint of the guardians of the T. union. Both the magistrates resided within the T. union, & were therefore guardians *ex officio* of it, & one of them was a rated inhabitant of a township within the T. union, but not that in favour of which the order was made ; one of the magistrates had no other occasions acted as a guardian *ex officio*, but neither had acted as guardian in anything respecting this matter :—*Held* : the order was good.—*R. v. CANT* (1842), Car. & M. 521 ; 2 Mood. C. C. 271 ; 6 J. P. 248, C. C. R.

99. — **Information instituted by watch committee—Magistrate member of watch committee.]**—A borough magistrate of a town which has a municipal corpn., of the watch committee of which he is a member, is not thereby disqualified from adjudicating upon an information instituted with the sanction of such watch committee, even though the fine imposed in the case goes into the borough fund.—*R. v. PETTITMANGIN* (1864), 9 L. T. 683 ; 10 Jur. N. S. 797, n. ; *sub nom. Ex p. PETTITMANGIN*, 28 J. P. 87.

*Annotations:—Distd. R. v. Hodgson* (1864), 28 J. P. 484. *Mentd. Leeson v. General Medical Council* (1889), 38 W. R. 303.

100. — **Prosecution for fouling water-course.]**—H., the owner of a farm in the parish of Edmonton, bounded by the river Lee entered into an agreement with the Enfield Local Board of Health under which H., received the sewage of the Enfield district & disposed of it over his farm. After a few months disagreements arose, & the Enfield Board took legal proceedings against H. to enforce the agreement. While these were still pending H. after notice given to the board diverted the sewage from his farm through a pipe into the old open channel or watercourse in the parish of Edmonton through which the sewage had been used to flow into the river Lee. On this the Edmonton Local Board of Health threatened proceedings against the Enfield Board for the nuisance ; & the Lee Conservancy took out summonses under their Act against H. for having opened the pipe into the channel, etc., & for continuing the use of it. On the summonses coming on for hearing M. who was the chairman of the Enfield Local Board & had taken an active part in its proceedings sat with three other justices on the bench. H. objected to M. sitting as a justice but he remained ; & H. was

a. — **]**—*R. v. MAJOR* (1897), 29 N. S. R. (17 R. & G.) 373.—CAN.

b. — **]**—*R. v. BIGGAR, Ex p. McEWEEN* (1906), 37 N. B. R. 372 ; 1 E. L. R. 352.—CAN.

c. — **]**—*R. (MURRAY & WORTLEY) v. ARMAGH COUNTY JJ.* (1915), 49 I. L. T. 56.—IR

d. **Objection must be made at commencement of hearing.]**—*Re HANLAN* (1921), 64 D. L. R. 110 ; 50 O. L. R. 20.—CAN.

**PART II. SECT. 2, SUB-SECT. 1.—**  
**B. (b) i.**

e. **Whether disqualified—Member of local board—Enforcement of local board's order.]**—A member of a Local Board of Health is disqualified from sitting as a justice to adjudicate upon a proceeding to enforce an order of such Board.—*R. v. LLOYD, Ex p. GODFREY* (1875), 1 V. L. R. L. 120.—AUS.

*Magistrate chairman of*



convicted in penalties. A rule for a *certiorari* was then obtained for the purpose of quashing the convictions on the ground that M. was an interested justice. On showing cause M. made affidavit that, though he sat on the bench he took no part until the other justices had unanimously determined to convict H. when he M. proposed a mitigation of the penalties & that he did not sign the convictions:—*Held*: M. had such an interest as might give him a real bias in the matter; consequently, he ought not to have sat as a justice & it was immaterial what part he really took in the matter.—*R. v. MEYER* (1875), 1 Q. B. D. 173; 34 L. T. 247; 40 J. P. 645; *sub nom. R. v. HARRISON*, 24 W. R. 392.

*Annotations*:—*Distd. R. v. Alcock, Ex p. Chilton* (1878), 37 L. T. 829. *Consd. R. v. Handsley* (1881), 8 Q. B. D. 383. *Apld. R. v. Farrant* (1887), 20 Q. B. D. 58. *Consd. R. v. Sunderland JJ.*, [1901] 2 K. B. 357; *R. v. Lancashire JJ.* (1906), 75 L. J. K. B. 198; *R. v. Byles, Ex p. Hollidge* (1912), 108 L. T. 270. *Refd. R. v. Huntingdon JJ.* (1879), 4 Q. B. D. 522; *R. v. Deal (Mayor & JJ.)*, *Ex p. Curling* (1881), 45 L. T. 439; *R. v. Lee* (1882), 30 W. R. 750; *R. v. L. C. C., Ex p. Akkersdyk, Ex p. Fermentia*, [1892] 1 Q. B. 190; *R. v. L. C. C., Ex p. Edwardes* (1894), 15 R. 66; *R. v. Huggins, etc., Gravesend JJ., Ex p. Clancy* (1895), 72 L. T. 193; *R. v. Budden, Kent JJ.* (1896), 60 J. P. 166; *R. v. London JJ., Ex p. Kerfoot* (1896), 45 W. R. 58; *Frome United Breweries Co. v. Bath JJ.*, [1926] A. C. 586. *Mentd. L. C. C. v. Erith Overseers, L. C. C. v. West Ham Union, L. C. C. v. Woolwich Union, L. C. C. v. St. George's Union* (1893), *Ryde, Rat. App.* (1891–93), 382.

101. ——— Prosecution by urban authority for infringement of local bye-law.]—*R. v. WINCHESTER JJ.* (1882), 46 J. P. Jo. 724, D. C.

102. ——— To remove obstruction on highway.]—At a vestry meeting summoned by a district surveyor to consider (*inter alia*) the obstruction of a highway by deft., who had deposited & left a heap of earth & manure by the side of the highway, a justice of the peace moved a resolution calling upon deft. to remove the heap. Deft. having failed to remove the heap, a summons was taken out against him by the district surveyor for depositing the heap to the obstruction & annoyance of the highway, & for failing to remove it after notice. The justice who had moved the resolution, & who was a ratepayer of the parish, sat & adjudicated with another justice upon the summons, & made an order directing the heap to be removed & sold, & the proceeds of the sale to be applied to the repair of the highway:—*Held*: the justice was disqualified from adjudicating upon the summons, for the part taken by him in moving the resolution afforded ground for a reasonable suspicion of bias on his part, though there might not have been bias in fact, & upon the further ground that as a ratepayer he was pecuniarily interested in the result of the summons.—*R. v. GAISFORD*, [1892] 1 Q. B. 381; 61 L. J. M. C. 50; 66 L. T. 24; 56 J. P. 247, D. C.

103. ——— To enforce Education Act.]—*R. v. GRIFFITHS* (1900), *Times*, May 18, D. C.

104. ——— Magistrate taking part in making order under Act of Parliament—Complaint under order.]—Three justices who were members of the town council of a borough, & as such had taken an active part in the making of an order under the Dogs Act, 1871 (c. 56), sat to hear a complaint of non-observance of the order:—*Held*: they had no such interest in the subject-matter as to oust their jurisdiction.—*R. v. HUNTINGDON JJ.* (1879), 4 Q. B. D. 522; 43 J. P. 767, D. C.

*Consd. R. v. Handsley* (1881), 8 Q. B. D. 383.

*police commissioners.*]—The magistrate was not disqualified on the ground of bias because he was chairman of the police comrs.—*R. v. KAY, Ex p.*

(1908), 6 E. L. R. 257; 39 N. B. R. 124.—*CAN.*  
g. ——— Magistrates trustees of public library—Prosecution for destruc-

105. ———.]—A county borough corpn. under statutory powers for the improvement of a district bought land in the borough, including licensed premises, dismantled the premises & put caretakers therein with a view to suppressing unnecessary licensed premises on payment of compensation to the corpn. under Licensing Act, 1904 (c. 23). At the next annual licensing sessions the caretakers, in pursuance of an arrangement between the corpn. & the justices, applied for renewal licenses, some under the Alehouse Act, 1828 (c. 61), & some under the Beerhouse Act, 1840 (c. 61). The licensing justices provisionally granted renewal licences subject to a reference to quarter sessions, the compensation authority under the Licensing Act, 1904 (c. 23), s. 1. It was contended that the renewals were void because the caretakers were not persons keeping or about to keep alehouses under the Alehouse Act, 1828 (c. 61), or real resident holders & occupiers under the Beerhouse Act, 1840 (c. 61), & because some of the justices who granted the renewals were members of the corpn. & parties to the arrangement:—*Held*: the justices having honestly exercised their discretion & the transaction being *bona fide* & for the purpose of carrying out the object of the Licensing Act, 1904 (c. 13), the renewals were valid.—*LEEDS CORPN. v. RYDER*, [1907] A. C. 420; 76 L. J. K. B. 1032; 97 L. T. 261; 71 J. P. 484; 23 T. L. R. 721; *sub nom. LEEDS CORPN. v. WOODHOUSE*, 51 Sol. Jo. 716, H. L.; *reversg. S. C. sub nom. R. v. WOODHOUSE*, [1906] 2 K. B. 501, C. A.

*Annotations*:—*Consd. Frome United Breweries v. Bath JJ.*, [1926] A. C. 586. They [Justices] must use the impartiality & fairness which are characteristic of an honest judge. It is thus that I understand Lord Loreburn's language in *Leeds Corpn. v. Ryder* (LORD SUMNER). *Mentd. R. v. Jackson* (1906), 96 L. T. 77; *R. v. Shann*, [1910] 2 K. B. 418; *R. v. Walsall Licensing JJ.* (1910), 102 L. T. 737; *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (1920), Ltd., [1924] 1 K. B. 171.

106. ——— Presence at meeting called to institute proceedings.]—G. was summoned before the justices of Truro on Oct. 13, 1883, & convicted by them of an offence against the above bye-law, & fined £2 2s. & costs. It was proved that G. was a captain in the Salvation Army, & on the morning of Sunday, Oct. 7, he was in Victoria Square, Truro, playing a concertina, & surrounded by a large crowd; that he was requested by the superintendent of police to desist from playing the concertina, but he refused to do so, the superintendent at the same time telling him that he had reasonable cause for asking him to desist, as several complaints had been made by the inhabitants. It was also proved that on many previous occasions the Salvation Army had marched through the streets, playing musical instruments, tambourines & triangles; that they had been frequently cautioned & required to desist, as many complaints had been made of their proceedings. On a rule for a *certiorari* to remove the conviction into this ct.:—*Held*: the mere fact of the justices having attended a meeting, convened by the superintendent, at which a summons was applied for, but refused, did not render them interested parties so as to disqualify them from afterwards dealing with the case, even if at the meeting they had discussed the facts of the case.—*R. v. POWELL, ETC., TRURO JJ.* (1884), 51 L. T. 92; 48 J. P. 740, D. C.

*Annotations*:—*Mentd. Johnson v. Croydon Corpn.* (1886), 16 Q. B. D. 708; *Munro v. Watson* (1887), 3 T. L. R. 445.

*tion of library property.*]—*WILDRIDGE v. ANDERSON* (1897), 2 Adam, 399; 25 R. (Ct. of Sess.) 27; 35 So. L. R. 125, J.—*SCOT.*



*Sect. 2.—Disqualification to act as magistrate: Subsect. 1, B. (b) i. & ii.]*

**107. — Expression of opinion prior to hearing.]—***R. v. FERGUSON* (1890), 54 J. P. Jo. 101, D. C.

*Annotation:—*Refd. *R. v. Howard, etc., Farnham Licensing JJ.* (1902), 71 L. J. K. B. 754.

**108. — Magistrate concerned in negotiations—For disposal of licensed premises.]—**An alderman of a borough was appointed by the corpn. to be a member of a committee to negotiate the disposal of certain already licensed premises, the license of which subsequently became merged in that of other licensed premises, the alderman in question ultimately taking part in deciding upon the granting of such license. Other objections were taken:—*Held*: the rule obtained to quash the order of the justices, on the ground of interest or bias, must be dismissed.—*R. v. STOCKPORT JJ.* (1896), 60 J. P. 552, D. C.

*Annotations:—*Dbtd. *R. v. Sunderland JJ.*, [1901] 2 K. B. 357. I do not myself think that it was correctly decided (SMITH, M.R.). Refd. *R. v. Tempest* (1902), 86 L. T. 585; *R. v. Johnson* (1905), 74 L. J. K. B. 585.

**109. — Agreement between corporation & applicant for license.]—**A municipal corpn. having, for the purposes of a street improvement, purchased certain premises licensed for the sale of intoxicating liquors, an agreement was entered into between the corpn. & a brewery co. by which the co. agreed to pay to the corpn. a sum of money, in the event of a license being granted to the co. for the sale of intoxicating liquors on certain premises belonging to them & the corpn. agreed to close the before mentioned licensed premises, & not to make, or allow to be made any application for a renewal of the license in respect of them.

Certain justices for the borough, who were also members of the borough council, had taken an active part in the council in support of the proposal that the above mentioned agreement should be entered into by the corpn. These justices subsequently sat on the hearing of an application to the licensing committee on behalf of the brewery co. for a license in respect of their before mentioned premises, which was granted. On the application to the confirming authority under the Licensing Act, 1872 (c. 44), for confirmation of the grant of the license to the co. the same justices again sat to hear the application which was granted. On an application for a *certiorari* to bring up & quash the order confirming the grant of the licence:—*Held*: there being a real likelihood of bias on the part of the before mentioned justices with regard to the subject-matter of the application to the confirming authority, the writ of *certiorari* must be issued.—*R. v. SUNDERLAND JJ.*, [1901] 2 K. B. 357; 70 L. J. K. B. 946; 85 L. T. 183; 65 J. P. 598; 17 T. L. R. 551; 45 Sol. Jo. 575, C. A.

*Annotations:—*Apld. *R. v. Tempest* (1902), 86 L. T. 585. Consd. *Frome United Breweries Co. v. Bath JJ.*, [1926] A. C. 586. Refd. *R. v. Johnson*, [1905] 2 K. B. 59; *R. v. Woodhouse*, [1906] 2 K. B. 501.

**110. — Application for transfer of license—Transfer to benefit of local authority.]—**An application was made to the licensing committee of the borough of T. for the removal of a license to new premises.

Three of the justices were members of the borough council of T., & one held shares in a brewery co. that sold beer within the district.

A suggestion was made before the committee that if the transfer was granted another license would be given up & certain property would be

placed at the disposal of the corporation for town improvements. The transfer was granted.

The confirming authority, which included the four justices, confirmed the transfer, but the offer above stated was withdrawn:—*Held*: there was not any likelihood of bias on the part of the three justices who were members of the borough council, so as to render the orders made invalid, & the orders were not invalid by reason of the fact that the fourth justice adjudicated, owing to proviso (3) of Licensing Act, 1872 (c. 94), s. 60. *Secus*, where actual bias could be shown in fact to exist.—*R. v. TEMPEST* (1902), 86 L. T. 585; 66 J. P. 472; 18 T. L. R. 433; *sub nom. R. v. TAMWORTH JJ., Ex p. CLARKE*, 46 Sol. Jo. 360, D. C.

**111. — Licensing magistrate sitting on compensation committee.]—**A justice of a borough who has been appointed a member of the committee of quarter sessions under Licensing Act, 1904 (c. 23), s. 5 (5), is not disqualified from acting on the question of the refusal of the renewal of a license by the fact that he presided at the meeting of the licensing justices of the borough at which it was decided to refer the question of the renewal of that license to quarter sessions under Licensing Act, 1904 (c. 23), s. 1 (2).—*R. v. CHESHIRE LICENSING JJ., Ex p. KAY'S ATLAS BREWERY, LTD.*, [1906] 1 K. B. 362; 75 L. J. K. B. 290; 94 L. T. 412; 70 J. P. 172; 54 W. R. 482; 22 T. L. R. 238; 50 Sol. Jo. 207, D. C.

*Annotations:—*Distd. *Frome United Breweries Co. v. Bath JJ.*, [1926] A. C. 586. Mentd. *R. v. Southampton JJ., Ex p. Fuller, Smith & Turner* (1906), 94 L. T. 442.

**112. — —.]—**FROME UNITED BREWERIES CO. v. BATH JJ., No. 83, *ante*.

**113. — Membership of neighbouring local authority—Assessment committee—Rating appeal.]—***R. v. SUFFOLK JJ., Ex p. MANNERS* (1906), 2 Konst. Rat. App. 480, D. C.

*Annotations:—*Apld. *R. v. London County JJ., Ex p. South Metropolitan Gas Co.* (1907), 97 L. T. 716. Refd. *R. v. London JJ., Ex p. South Metropolitan Gas Co.* (1908), 98 L. T. 519.

—A gas co. appealed to the London quarter sessions against the assessment of their property in several parishes in the metropolis. One of the justices who heard & determined the appeals was a member of the borough council & chairman of the assessment committee of a borough in another part of the metropolis which was served by a different gas co.:—*Held*: there was no such reasonable suspicion of bias as to disqualify the justice for deciding the appeals to quarter sessions.—*R. v. LONDON JJ., Ex p. SOUTH METROPOLITAN GAS CO.* (1908), 98 L. T. 519; 72 J. P. 137; 24 T. L. R. 274; 52 Sol. Jo. 238; 6 L. G. R. 324; 2 Konst. Rat. App. 642, D. C.

*Annotation:—**R. v. Middlesex JJ., Ex p. Hendon Union* (1908), 6 L. G. R. 739.

**115. — Appeal against rate—Local authority landlords of appellants.]—**A tramway co. appealed against a poor rate to the Middlesex quarter sessions. Some of the justices who were members of the ct. of quarter sessions were also members of the Middlesex County Council, who were the owners of the tramways & had leased them to the tramway co. on the terms that the council were to receive (*inter alia*) 45 per cent. of the net revenue of the tramway co.:—*Held*: the justices who were members of the county council, being mere trustees for the ratepayers, were not disqualified from adjudicating by interest & on the facts proved the allegation that there would be in the minds of reasonable people a possibility of bias had not been made out.—*R. v. MIDDLESEX*



JJ., *Ex p.* HENDON UNION ASSESSMENT COMMITTEE (1908), 72 J. P. 251; 52 Sol. Jo. 458; 6 L. G. R. 739; 2 Konst. Rat. App. 754, D. C.

ii. *Statutory Permission to Adjudicate.*

116. What will disqualify—Appearance by counsel in proceedings—& giving evidence.]—Notwithstanding Highway Act, 1864 (c. 101), s. 46, a justice of the peace, who, on the application to subtract certain townships, appears by counsel & gives evidence to oppose the subtraction, makes himself a party to the proceedings, & is not entitled to vote. Such proceedings are judicial & not administrative. *Qu.*: whether the mere giving of evidence in such a matter by a justice would disentitle him to vote.—*R. v. CUMBERLAND JJ.* (1878), 42 J. P. 361, D. C.

117. — Instruction of solicitors.]—*FROME UNITED BREWERIES CO. v. BATH JJ.*, No. 83, *ante*.

118. — Active Interest—Party to institution of proceedings.]—Public Health Act, 1875 (c. 55), s. 258, does not extend to enable a justice, being a member of an urban sanitary authority, to adjudicate upon a prosecution, which in the latter capacity he has been a party to instituting.—*R. v. MILLEDGE* (1879), 4 Q. B. D. 332; 40 L. T. 748; 27 W. R. 659; *sub nom.* *R. v. WEYMOUTH JJ.*, 48 L. J. M. C. 139; 43 J. P. 606, D. C.

*Annotations*:—*Apld.* *R. v. Gibbon* (1880), 1 Q. B. D. 168. *Distd.* *R. v. Deal* (Mayor & JJ.), *Ex p.* *Curling* (1881), 45 L. T. 439. *Consd.* *R. v. Handsley* (1881), 8 Q. B. D. 383; *R. v. Powell* (1884), 48 J. P. 740. *Apld.* *R. v. Galsford*, [1892] 1 Q. B. 381. *Refd.* *R. v. Lee* (1882), 30 W. R. 750.

— — —.]—In the borough of Wakefield the sanitary committee of the town council, who were the local authority under the Public Health Act, 1875, passed a resolution directing the town clerk to prosecute S. for exposing for sale meat unfit for human food, contrary to the provisions of the Act, & at the hearing of an information laid in pursuance of this resolution S. was convicted before four justices of the borough, who imposed a penalty upon him. One of the justices was a member of the sanitary committee, & had been present at the meeting at which the resolution was passed:—*Held*: Public Health Act, 1875 (c. 55), s. 258, did not remove the disqualification which attached to the justice by reason of his having acted as a member of the sanitary committee in directing the prosecution, & a rule for a *certiorari* to bring up & quash the conviction must be made absolute.—*R. v. LEE* (1882), 9 Q. B. D. 394; 47 J. P. 118; 30 W. R. 750, D. C.

*Annotations*:—*Apld.* *R. v. Henley*, [1892] 1 Q. B. 504. *Refd.* *R. v. Spedding, etc.*, JJ. (1885), 2 T. L. R. 163; *R. v. Bath Compensation Authority*, [1925] 1 K. B. 685; *Frome United Breweries Co. v. Bath JJ.*, [1926] A. C. 586.

120. — — —.]—A mining co. was convicted under the Salmon Fisheries Act, 1865 (c. 121), of having polluted the river Greta, by justices, one of whom was a riparian owner of the river Derwent, of which the Greta is a tributary. The same justice, as a conservator of the river Derwent, had a year previously been appointed by the Conservancy Board a member of a committee to investigate whether the mining co. used the best practical means of filtering the effluent water from their mine & had been party to a report that the mining co. had failed to do so:—*Held*: the justice had had such an interest in the matter as to have disqualified him from adjudicating upon it.—*R. v. SPEDDING, ETC.*, JJ. (1885), 2 T. L. R. 163; 49 J. P. Jo. 804, D. C.

121. — — —.]—A justice of the peace,

who was also a member of the board of conservators of a fishery district, was present at a meeting of the board at which a resolution was unanimously passed to take legal proceedings against a person for violation of certain provisions of the Salmon Fishery Acts; he took no prominent part in the proceedings, but his name appeared as being present at the meeting when the resolution authorising the water-bailiff to institute the prosecution was passed. The justice afterwards sat with others to hear the charge, & the alleged offender was convicted:—*Held*: the disqualification otherwise attaching to the justice by reason of his having acted as a member of the board at the meeting at which the prosecution was authorised was not removed by Salmon Fishery Act, 1865 (c. 121), s. 61, & the conviction must, therefore, be quashed.—*R. v. HENLEY*, [1892] 1 Q. B. 504; 61 L. J. M. C. 135; 66 L. T. 675; 56 J. P. 391; 40 W. R. 383; 36 Sol. Jo. 233; 17 Cox, C. C. 518, D. C.

*Annotations*:—*Distd.* *R. v. Stockport JJ.* (1896), 60 J. P. 552. *Consd.* *R. v. Burton, Ex p. Young*, [1897] 2 Q. B. 468.

122. — Mere membership of authority.]—*R. v. CANT*, No. 98, *ante*.

123. — — — Authority as prosecutor.]—Under a local Improvement Act, on an information laid by order of the corp., who were the local board of health, for violating a bye-law in deviating from a plan of buildings:—*Held*: the convicting justices were not disqualified as being members of the corp.—*HARRING v. STOCKTON CORPN.* (1867), 31 J. P. 420.

124. — — —.]—By a local Act for the improvement of a borough the corp. was made the authority for the execution of the Act, with power to direct prosecutions for this purpose. An information for an offence under the Act having been preferred by an officer on behalf of the corp., a summons was issued upon it by a justice, who was also an alderman & member of the corp., but came on for hearing before justices, none of whom were connected with the corp.:—*Held*: notwithstanding such justices could not proceed with the hearing of the summons, for it had been issued by one who was virtually prosecutor.—*R. v. GIBBON* (1880), 6 Q. B. D. 168; 29 W. R. 442, D. C.

*Annotation*:—*N.F.* *R. v. Handsley* (1881), 8 Q. B. D. 383.

125. — — —.]—Where by statute a member of the town council of a borough may act as a justice of the peace in matters arising under the Act, in order to disqualify him from so acting it is not sufficient to show that, as a member of the town council, he has a pecuniary interest in the result of the information or complaint, or that the corp. of which he is a member are the prosecutors, but it must be established that he has such a substantial interest in the result of the hearing as to make it likely that he has a real bias in the matter. An officer of a corp. appointed to collect the borough rate obtained a summons against a ratepayer in arrear. In so doing he acted in the discharge of his duty, but on his own responsibility & without consulting the town council. At the hearing the justices dismissed the summons, on the ground that one of the sitting magistrates being a town councillor was thereby disqualified from adjudicating upon the summons. On motion for a *mandamus* to the justices to hear & adjudicate on the summons:—*Held*: there was no ground for supposing either substantial interest or likelihood of bias, & consequently no disqualification.—*R. v. HANDSLEY* (1881), 8 Q. B. D. 383; 30 W. R.



**Sect. 2.—Disqualification to act as magistrate:**  
**sect. 1, B. (b) ii., & (c), C. & D.]**

368; *sub nom.* *R. v. HANDSLEY, ETC., BURNLEY JJ., Ex p. KING*, 51 L. J. M. C. 137; 46 J. P. 119, D. C.

**Annotations:—***Apld.* *R. v. Farrant* (1887), 20 Q. B. D. 58. *Refd.* *R. v. St. Albans (Bp.)* (1882), 9 Q. B. D. 454; *R. v. Henley, etc., JJ. & Hutchings* (1892), 40 W. R. 383; *Allinson v. General Council of Medical Education & Registration* (1894), 70 L. T. 471; *R. v. Huggins, etc., Gravesend JJ., Ex p. Clancy* (1895), 72 L. T. 193; *R. v. Halifax JJ., Ex p. Robinson* (1912), 76 J. P. 233.

126. — **Substantial interest in result of proceedings.]—***R. v. HANDSLEY*, No. 125, *ante*.

**(c) Membership of, or Subscription to Society Interested in Proceedings.**

127. **Subscription to society by justice—Society for Prevention of Cruelty to Animals—Prosecution by Society.]—***Appct.* had been convicted & fined for cruelty to a horse upon the prosecution of an officer of the Royal Society for the Prevention of Cruelty to Animals. Some of the justices who heard the summons & took part in the conviction were subscribers to a branch of the society which received subscriptions in the country, & forwarded them to the society's office in London. All prosecutions by the society were directed by the secretary or committee in London, & no subscribers had any authority over or responsibility for such prosecutions, & the society never accepted any part of the penalties inflicted under the Cruelty to Animals Prevention Act, 1849 (c. 92), ss. 2, 18, 21:—*Held*: there was nothing in these facts to create a real bias in the minds of the justices which could amount to a disqualifying interest.—*R. v. DEAL (MAYOR & JJ.)*, *Ex p. CURLING* (1881), 45 L. T. 439; 46 J. P. 71; 30 W. R. 154, D. C.

**Annotation:—***Apld.* *R. v. Burton, Ex p. Young*, [1897] 2 Q. B. 468.

128. **Membership of society—Association for protection of fisheries—Association directing prosecution.]—**Where justices were members of an assocn. for the protection of fisheries, & one of them was present at a meeting of the assocn., which directed H. to be prosecuted under the Salmon Fishery Act, & afterwards joined in convicting H., such conviction was held bad, on the ground that the justices were interested.—*R. v. ALLAN* (1864), 4 B. & S. 915; 33 L. J. M. C. 98; 10 Jur. N. S. 796; 122 E. R. 702; *sub nom.* *R. v. HODGSON*, 3 New Rep. 503; 9 L. T. 761; 28 J. P. 484; 12 W. R. 423.

**Annotations:—***Consd.* *Leeson v. General Council of Medical Education & Registration* (1889), 43 Ch. D. 366; *R. v. Henley*, [1892] 1 Q. B. 504; *R. v. London County JJ., Ex p. South Metropolitan Gas Co.* (1907), 97 L. T. 716. *Refd.* *Allinson v. General Council of Medical Education & Registration* (1894), 70 L. T. 471; *R. v. Huggins* (1895), 43 W. R. 329; *R. v. Burton, Ex p. Young*, [1897] 2 Q. B. 468.

129. — **Temperance body—Society opposing application for renewal of license.]—**Magistrate, being a member of a temperance body which is opposing the transfer or renewal of a license is disqualified from taking part as a licensing justice

in the decision of the question.—*R. v. FRASER* (1893), 9 T. L. R. 613; 37 Sol. Jo. 685; 57 J. P. Jo. 500, D. C.

**Annotations:—***Apld.* *Frome United Breweries Co. v. Bath JJ.*, [1926] A. C. 586. *Refd.* *R. v. Howard, etc., Farnham Licensing JJ.* (1902), 71 L. J. K. B. 754.

130. — **—.]—**The renewal of a license having been refused by the compensation authority by a majority, one of the justices wrote a letter to a local paper giving the names of those who had voted for & against the granting of the renewal, & amongst the latter he gave the name of one W. Thereupon W. wrote a letter contradicting that statement & adding: "I should be nothing less than a traitor considering the position I hold if I had voted as he states in his letter." It appeared that W. had been for many years a secretary of a branch of the Order of Rechabites, & as a member of that society had signed the following declaration: "I hereby declare that I will abstain from all intoxicating liquors. . . . I will not engage in the traffic of them, but in all possible ways will discountenance the use, manufacture, & sale of them." The Div. Ct. having refused an application for an order *nisi* for a *mandamus* to the compensation authority to hear & determine the application for the renewal according to law, on the ground that there was evidence of bias on the part of W. in dealing with the application, the Ct. of Appeal granted the application & W. filed an affidavit in which he stated that having regard to the evidence against the renewal of the license he considered & meant when he wrote the letter that he would have been a traitor to his position as a magistrate if he had voted in favour of the renewal, & further that the word "position" in his letter had no reference to his office in the Order of Rechabites:—*Held*: the circumstances were such as to make bias on the part of W. so probable that he ought not to have taken part in the case, & the order for a *mandamus* should therefore be made absolute.—*R. v. HALIFAX JJ., Ex p. ROBINSON* (1912), 76 J. P. 233; 28 T. L. R. 288, C. A.

**Annotation:—***Consd.* *R. v. Bath Compensation Authority*, [1925] 1 K. B. 685.

131. — **Incorporated Law Society—Prosecution by society.]—**On the hearing of a summons for falsely pretending to be a solr., contrary to Attorneys & Solicitors Act, 1874 (c. 68), s. 12, a magistrate, who was a practising solr., & an ordinary member of the Incorporated Law Society, sat & adjudicated. The proceedings were taken by the council of the Incorporated Law Society, who alone had power to direct prosecutions, ordinary members having no control over the proceedings of the society. On the argument of an order *nisi* for a *certiorari* to quash the conviction:—*Held*: the circumstances did not show any probability of bias on the part of the magistrate, he was not disqualified by his membership of the Incorporated Law Society, either as having a pecuniary interest in the proceedings, or as being a prosecutor, & therefore he was justified in adjudicating.—*R. v. BURTON, Ex p. YOUNG*,

**PART II. SECT. 2, SUB-SECT. 1.—**  
**B. (c).**

130 i. **Membership of society—Temperance body.]—**If the justice is interested in the prosecution, as where he was a member of a Division of the Sons of Temperance, by which a prosecution for selling liquor was carried on, he is incompetent to try the cause, & a conviction before him is bad.—*R. v. SIMMONS* (1872), 14 N. B. R. (1 Pug.) 158.—*CAN.*

130 ii. — **—.]—***Ex p. GROVES*

(1883), 23 N. B. R. 38.—*CAN.*

130 iii. — **—.]—***R. v. HERRELL* (1898), 12 Man. L. R. 198.—*CAN.*

130 iv. — **—.]—***R. v. CHAREST, Ex p. DAIGLE* (1906), 37 N. B. R. 492; 2 E. L. R. 12.—*CAN.*

130 v. — **—.]—***R. (FINDLATER) v. COUNTY DUBLIN RECORDER & JJ.*, [1904] 2 I. R. 75; 37 I. L. T. 202.—*IR.*

130 vi. — **—.]—***GOODALL v. BILSLAND*, [1909] S. C. 1152.—*SCOT.*

130 vii. — **—.]—***Held*: the mere fact of belonging to a temperance society pledged to the principle of "no licence in any form under any circumstances for the sale of liquors to be used as a beverage" did not operate as a disqualification for sitting as a member of a Licensing Ct.—*M'GEEHEN v. KNOX*, [1913] S. C. 688.—*SCOT.*

b. — **Trade protection association.]—***R. (UPRICHARD) v. ARMAGH COUNTY JJ.* (1913), 47 I. L. T. 84.—*IR.*



[1897] 2 Q. B. 468; 66 L. J. Q. B. 831; 77 L. T. 364; 61 J. P. 727; 46 W. R. 127; 13 T. L. R. 587; 41 Sol. Jo. 748; 18 Cox, C. C. 647, D. C.

*C. Effect of Presence of Interested Justices.*

**132. Whether decision invalidated—Magistrate taking no part in decision.]**—The mere presence on the bench of an interested magistrate during part of the hearing of an appeal is not sufficient ground for setting aside an order of sessions made on such hearing, if it be expressly shown that he took no part in the hearing, came into ct. for a different purpose, & did not in any way influence the decision.—*R. v. LONDON JJ.* (1852), 18 Q. B. 421; 16 J. P. 297; 118 E. R. 159.

**133. ———.]**—Upon the trial of a parish appeal *F.*, one of the justices, who was a rated inhabitant of applt. parish, was on the bench during the hearing, & in the course of the proceedings referred the chairman of the quarter sessions to some of the documents put in evidence. Upon an observation being made that he was a party interested, *F.* stated that he should take no part in the decision, but he remained in ct. until the final decision, which was in favour of appls. It was sworn that he did not vote or give any opinion upon the question at issue, nor did he influence the decision of the other justices present, & that if he had not believed that the parties were satisfied with his assurance that he would take no part, he would have retired from the ct. during the trial:—*Held*: under the above circumstances, the order of Sessions was invalid by reason of the presence of the interested justice.—*R. v. SUFFOLK JJ.* (1852), 18 Q. B. 416; 21 L. J. M. C. 169; 19 L. T. O. S. 107; 16 J. P. 296; 16 Jur. 612; 118 E. R. 156.

*Annotations*:—*Reid. R. v. Middlesex JJ.* (1854), 18 J. P. Jo. 390; *R. v. Surrey JJ.* (1855), 19 J. P. Jo. 755; *R. v. Budden, etc., Kent JJ.* (1896), 60 J. P. 166. *Mentd. Hayman v. Rugby School* (1874) L. R. 18 Eq. 28.

**134. ———.]**—Upon an appeal against a refusal of justices to license an alehouse under the 9 Geo. 4, c. 61, one of the justices whose decision was appealed against was upon the bench, & remained there at the time of the decision of the ct. dismissing the appeal, which decision the chairman declared was unanimous. Upon a motion for a *certiorari* to remove the order of sessions into this ct., that the same might be quashed on the above ground, the justice deposed that he had no recollection of being present: but, if so, he took no part in the decision, which latter fact was also deposed by the chairman:—*Held*: as it was distinctly sworn that he was so present, the ct. was improperly constituted, & the rule was made absolute.—*R. v. SURREY JJ.* (1855), 26 L. T. O. S. 89; 1 Jur. N. S. 1138; 4 W. R. 86; 19 J. P. Jo. 755.

**135. ———.]**—*R. v. MEYER*, No. 100, *ante*.

**136. ———.]**—*R. v. LONDON COUNTY COUNCIL, Re EMPIRE THEATRE*, No. 85, *ante*.

**137. ———.]**—On notice of appeal from their refusal to renew or transfer a license, the licensing justices of a petty sessional division sent a circular to all the justices for the county to say that their bench attached so much importance to the case that they had instructed counsel to appear in support of their decision, & hoped it might be convenient to all justices interested in licensing matters to attend the hearing of the

appeal. In consequence of receiving this circular a larger number of magistrates than usual attended the hearing. Several justices from the division in question, some of whom had participated in the decisions appealed against, were also present in ct. at the hearing of the appeals, but did not sit on the bench during the hearing, & took no part judicially or by discussion in the hearing or determination. The appeals, after a full hearing, were dismissed by a large majority of the votes of the justices taking part in the determination:—*Held*: the mere receipt of the circular, & attending in consequence at the hearing, did not show that the minds of the justices deciding the appeals must necessarily have been biased in favour of supporting the decision of the licensing justices, & there was no reason to issue a *mandamus* to the quarter sessions to rehear the appeals.—*R. v. LONDON JJ., Ex p. KERFOOT* (1896), 60 J. P. 726; 45 W. R. 58; 13 T. L. R. 2; 41 Sol. Jo. 13, D. C.

**138. ———.]**—On the hearing of a licensing appeal at quarter sessions two of the justices, whose order was appealed against, were present on the bench during the argument, accompanied the other justices on their adjoining to consider their decision, & had resumed their places on the bench when the decision was pronounced. The chairman & several of the other justices, including the two justices in question, stated on affidavit that the latter had taken no part in the hearing of the appeal or in influencing or arriving at the decision:—*Held*: the mere presence on the bench of the two disqualified justices rendered the constitution of the ct. of quarter sessions irregular, & its order must be set aside.—*R. v. LANCASHIRE JJ.* (1906), 75 L. J. K. B. 198; 94 L. T. 481; 70 J. P. 337, D. C.

*Annotation*:—*Reid. R. v. Byles, Ex p. Hollidge* (1912), 108 L. T. 270.

**139. ———.]**—Communication with other magistrates.]—*R. v. HERTFORDSHIRE JJ.*, No. 45, *ante*.

**140. ———.]**—Upon the hearing of an information against a builder for breach of a byelaw of an urban district council, the chairman of the council being *ex officio* a county justice, sat in ct. close in front of the bench, next to the solr. for the prosecution, in a place usually occupied by witnesses, but only very slightly lower than the level of the bench & divided off by a low screen. Whilst sitting there a note was passed down to him from the bench by the adjudicating justices, on which he wrote & passed back an answer. Deft. was convicted. On a rule *nisi* for a *certiorari* to quash the conviction, it being proved that the contents of the note & answer did not have & could not have had any influence on the decision, & other charges against the justice of conduct influencing the decision having broken down on the facts:—*Held*: the rule must be discharged, but without costs.—*R. v. BUDDEN, ETC., KENT JJ.* (1896), 60 J. P. 166, D. C.

*D. Magistrate as Witness.*

**141. Whether disqualified from adjudicating—General rule.]**—Before the hearing of a summons for encroachment on a highway, informant served one of the bench of justices with a supcena to produce a charter which was supposed to show



**Sect. 2.—Disqualification to act as magistrate: Sub-sect. 1, D. & E.; sub-sect. 2.]**

that a place was a market town. The justice had previously offered the document, & had no interest whatever in the matter, & though objected to as disqualified, sat & adjudicated:—*Held*: the mere fact of a justice being a witness was not necessarily a disqualification for adjudicating, & rule for *certiorari* discharged with costs.—*R. v. TOOKE* (1884), 48 J. P. 661; 32 W. R. 753, D. C.

**142. — Application for subtraction from highway district—Highway Act, 1864 (c. 101), s. 46.]—*R. v. CUMBERLAND JJ.*, No. 116, *ante*.**

**143. — Magistrate having made affidavit in previous action.]—Appct., a commoner of Epping Forest, who objected to the proceedings of the corpn. of London, as owners of the forest, removed & destroyed their notice boards & gave them warning that he should remove their fences & other obstructions. The corpn. promptly commenced an action against him & obtained an injunction to restrain him from carrying out his threats. They also summoned him under Mutinous Damage Act, 1881 (c. 97), s. 52, for destroying their boards. At the hearing of the summons before two justices, appct. objected to one of them on the ground that he was disqualified by interest in adjudicating on the summons. This justice had made an affidavit on behalf of the corpn. in the action, in which he stated that he was a commoner, & that the corpn. had by their proceedings rendered the forest better fitted for the use of the commoners & the public:—*Held*: the justice was not disqualified from adjudicating on this summons.—*R. v. ALCOCK, Ex p. CHILTON* (1878), 37 L. T. 829; 42 J. P. 311, D. C.**

*Annotations:—Reid. R. v. Deal* (Mayor & JJ.), *Ex p. Curling* (1881), 45 L. T. 439; *R. v. L. C. C., Re Empire Theatre* (1894), 71 L. T. 638.

**144. — Magistrate subpoenaed as witness.]—*R. v. FARRANT*, No. 52, *ante*.**

**145. — Magistrate a witness at previous hearing.]—At the sitting of the compensation authority of the borough of C. as to the question of the renewal of the license of a certain public-house which had been referred to the compensation authority by the licensing committee of the borough on the ground that the said public-house was not required for the particular neighbourhood in which it was situated, a majority of the members of the compensation authority, who had also sat on the licensing committee, refused to grant a renewal of the license. At the same sitting, however, of the compensation authority, but some time later, the case was reopened, & one of the majority of the justices who had sat at the first hearing gave evidence, but took no part in the adjudication as to the question of the renewal of the license on this second hearing. The justices again refused to renew the license:—*Held*: how-**

ever regrettable it might be for a justice to give evidence in the manner above stated, there was nothing in law to render such evidence inadmissible, & as there was evidence upon which the justices could legally arrive at their decision, whether the evidence of the justice was taken into consideration or not, there was nothing in Jud. Act, 1894 (c. 16), s. 2, which permitted the High Ct. to interfere with such decision.—*MITCHELL v. CROYDON JJ.* (1914), 111 L. T. 632; 78 J. P. 385; 30 T. L. R. 526, D. C.

*Annotation:—Reid. R. v. Bath Compensation Authority*, [1925] 1 K. B. 685.

**146. Magistrate taking no part in decision—Whether order void.]—Upon the trial of a parish appeal, C., one of the justices, not a ratepayer, was summoned as a witness, & sat upon the bench, & in the course of the proceedings suggested audibly certain facts to the chairman:—*Held*: the order in sessions was good, as it did not appear that C. had acted judicially, or done more than a witness might properly do.—*R. v. MIDDLESEX JJ.* (1854), 2 W. R. 459; 18 J. P. Jo. 390, D. C.**

**E. Waiver of Objection.**

**147. What amounts to waiver—Interest known to party—Or attorney.]—The surveyor of the roads directed trestles to be put at intervals on either side of the road, on which fresh granite had been laid, to confine the traffic to a particular part of it. A. drove his carriage against the trestles to knock them down, in alleged assertion of a right, he deeming the surveyor to have no power so to put the trestles for this object. One of the trestles was injured, and on a summons against A., under the Malicious Trespass Act, the justices convicted & fined A. 1s. By a local Act the justices were made vestrymen, & so became interested in the property in the trestles & also in the fine:—*Held*: the justices had jurisdiction to convict; & in order to obtain a *certiorari* to quash the conviction on the ground of the justices being interested, the party should show on the face of his affidavits that neither he, nor his advocate before the justices, knew of the objection at the time of the hearing.—*R. v. RICHMOND, SURREY JJ.* (1860), 2 L. T. 373; 24 J. P. 422; 8 Cox, C. C. 314.**

**148. — — — Objection made & overruled.]—*R. v. GREAT YARMOUTH JJ.*, No. 81, *ante*.**

**149. — No objection made at time.]—*R. v. CAMBRIDGESHIRE JJ., Ex p. STEEPLE MORDEN OVERSEERS*, No. 57, *ante*.**

**150. — — —.]—*R. v. RISHTON (INHABITANTS)* (1813), 1 Q. B. 480; 10 L. J. M. C. 103, n.; 113 E. R. 1217; *sub nom. R. v. WINCHESTER*, cited in 5 Jur. at p. 869.**

*Annotation:—Expld. R. v. Cheltenham Comrs.* (1841), 1 Q. B. 467.

**151. — — — Objection cannot be made later.]—*R. v. CHELTENHAM COMRS.*, No. 72, *ante*.**

proceed, because he is required as a witness, & another justice is called upon to try the cause, he must continue the proceedings to the end of the suit: the first justice has no further jurisdiction.—*SUMNER v. MCMONAGLE* (1864), 11 N. B. R. (6 All.) 203.—CAN.

**141 ii. — — —.]—The calling of a magistrate sitting on a case as a witness does not of itself disqualify him from further acting in the case.—*R. v. SPROULE* (1887), 14 O. R. 375.—CAN.**

**144 i. — Magistrate subpoenaed as witness.]—Where a justice, after issuing summons in a civil suit, is subpoenaed as a witness, & another justice tries the cause, the latter justice must sign**

the judgment & issue execution.—*KNOX v. NOBLE* (1889), 28 N. B. R. 34.—CAN.

**k. — Evidence immaterial.]—*R. (DONNELLY) v. TYRONE COUNTY JJ.* (1910), 44 I. L. T. 264.—IR.**

**l. — Magistrate holding local investigation.]—Where a magistrate, in whose ct. a complaint of rioting & mischief had been filed, made a personal inspection of the *locus in quo*:—*Held*: by so doing he had made himself a witness in the case, & had thereby rendered himself incompetent to try it.—*R. v. MANIKAM* (1896), 1 L. R. 19 Mad. 263.—IND.**

**m. — — —.]—A magistrate by**

going to view a place for the purpose of understanding the evidence, does not thereby make himself a witness in the case, & render himself disqualified from trying it.—*Re LALJI'S PETITION* (1897), 1 L. R. 19 All. 302.—IND.

**PART II. SECT. 2, SUB-SECT. 1.—E.**

**149 i. What amounts to waiver—No objection made at time.]—*R. (GIANTS' CAUSEWAY, ETC. TRAMWAY CO.) v. ANTRIM COUNTY JJ.*, [1895] 2 I. R. 603.—IR.**

**149 ii. — — —.]—*R. (HARRINGTON) v. CLARE COUNTY COURT JUDGE & COUNTY JJ.*, [1918] 2 I. R. 116, 580.—IR.**



152. ———.]—*R. v. RICHMOND, SURREY JJ.*, No. 147, *ante*.

153. ———.]—An order of justices will not be removed by *certiorari* on the ground of disqualification of some of the justices on the ground of interest, unless the affidavits show distinctly that the objecting party not only did not know of the disqualifying matter at the time of the hearing, but also that he did nothing by way of acquiescing in the jurisdiction.—*Ex p. ILCHESTER PARISH* (1861), 25 J. P. 56.

154. ———.]—W. having applied to the licensing justices for a license for a new hotel, & the three justices who were sitting having refused it, afterwards applied to the ct. for a *mandamus* to have the case heard again on the ground that B., one of the justices, was interested as owner in one of the licensed houses near the proposed hotel. The affidavits showed that B.'s wife had succeeded to the licensed house, & was tenant for life, but it was a small house without hotel accommodation, & not likely to be injured by the new license being granted:—*Held*: a *mandamus* could not be granted because the decision not having been set aside or quashed on *certiorari*, the case could not be heard again; & if a *certiorari* were applied for, the affidavit ought to state that the party applying & his solr. did not know at the time that one of the justices was interested.—*R. v. KENT JJ.* (1880), 44 J. P. 298.

155. ———.]—When a case is heard before a ct. of summary jurisdiction, deft. or his solr. must take objection to the presence on the bench of any justice who is alleged to have an interest in the subject-matter of the case, if he is aware of the existence of such interest, before the merits of the same are gone into. If deft., or his solr., fails to take such objection & is afterwards convicted, he cannot then come to the Div. Ct. & obtain a writ of *certiorari* to quash the conviction on the ground that one of the justices had an interest in the matter which was before the court of summary jurisdiction. His failure to take the objection is fatal.—*R. v. BYLES, Ex p. HOLLIDGE* (1912), 108 L. T. 270; 77 J. P. 40; 23 Cox, C. C. 314, D. C.

156. ——— **Waiver as to known interest only.**]—Where a justice of the peace is shown to have taken an active part in defending an appeal against a decision of which he approves, but to which he was no party, he is disqualified on the ground of probability of bias from taking part in deciding the appeal.

A magistrate, an *ex officio* member of a board of guardians, took an active part in defending an appeal which a railway co. brought against the decision of an assessment committee in respect of the rating of their property in a particular parish, & voted that the costs of the assessment committee in defending the appeal should be defrayed by his board of guardians. When the appeal came on to be heard at quarter sessions, he mentioned that he was an *ex officio* member of the board of guardians, & offered to retire from the bench, but did not mention that he had taken an active part in the proceedings connected with the rating of the railway co., or its appeal against the decision of the assessment committee, which was adverse to the co.; & he was allowed to take part in the adjudication on the understanding

that he was merely an *ex officio* guardian, & had in no way interested himself in the subject matter of the appeal. The ct. of quarter sessions made an order affirming the decision of the assessment committee:—*Held*: the previous conduct of the magistrate showed that he was or was likely to be swayed by a real bias in the matter, & therefore the proceedings of the court of quarter sessions were irregular, & the order of the ct. ought to be quashed.—*R. v. CUMBERLAND JJ., Ex p. MIDLAND RY. Co.* (1888), 58 L. T. 491; 52 J. P. 502; 4 T. L. R. 294, D. C.

*Annotation*:—*Consd. R. v. Sunderland JJ.*, [1901] 2 K. B.

157. **Effect of waiver on power of justice.**]—*Railway Clauses Consolidation Act, 1845* (c. 20), s. 58, enacts that any question as to damage done to a road by a railway co. in making the railway, or as to the repair thereof by them, shall be referred to the determination of two justices; & such justices may direct such repairs to be made in the state of such road, in respect of the damage done by the co., & within such period as they think reasonable, & may impose on the co., for not carrying into effect such repairs, any penalty not exceeding £5 per day as to such justices shall seem just. Sect. 3 enacts that the word "justice" shall mean justice of the peace acting for the county, city, borough, etc., or place where the matter requiring the cognisance of any such justice shall arise, & who shall not be interested in the matter:—*Held*: (1) the definition in sect. 3 did not render a justice of the peace who was interested incompetent to act if the party knowing that he was interested assented to his acting. (2) *Semble*: the objection to one of the justices on the ground of interest having been waived on the hearing of the original information, he might act in enforcing an order then made.—*WAKEFIELD LOCAL BOARD OF HEALTH v. WEST RIDING & GRIMSBY RY. Co.* (1865), L. R. 1 Q. B. 84; 6 B. & S. 794; 35 L. J. M. C. 69; 13 L. T. 590; 30 J. P. 20; 12 Jur. N. S. 160; 14 W. R. 100; 10 Cox, C. C. 162; 122 E. R. 1386; *subsequent proceedings, sub nom. R. v. RAWSON* (1866), 6 B. & S. 802.

*Annotation*:—*As to* (1) *Reid. Muir v. Hore* (1877), 47 L. J. M. C. 17.

#### SUB-SECT. 2.—SPECIAL STATUTORY DISQUALIFICATION.

158. **Prosecution under Hosier Act, 1843** (c. 40)—**Disqualification not known—Certiorari granted.**]—A. was convicted for having woollen materials suspected to have been embezzled on his premises; he applied for & obtained a case for the opinion of the ct., which was in due course entered in the Crown paper; he afterwards, but before the argument of the case, ascertained that the convicting justices were connected with the woollen trade, contrary to above Act, s. 25. Under the above circumstances the ct. granted a rule *nisi* for a *certiorari*, to be heard at the same time as the special case.—*R. v. ARMITAGE, ETC., WEST RIDING OF YORKSHIRE JJ.* (1860), 2 L. T. 459.

159. **Prosecution under Coal Mines Act, 1911** (c. 50)—**Disqualification not known—Acquittal—Certiorari not granted.**]—Two miners were charged before justices sitting as a ct. of summary jurisdiction

#### PART II. SECT. 2, SUB-SECT. 2.

n. **Stipendiary magistrate—Person not practising barrister for two years.**]—A person who is appointed a stipendiary magistrate, who has not been a practis-

ing barrister for at least two years before appointment, as required by 57 Vict. c. 16 (P. E. I.), may be prevented from acting as such by writ of prohibition.—*Re ALLEN* (P. E. I.) (1914), 14 E. L. R. 271.—CAN.

o. ———.] — *MEAD v. ALLAN* (P. E. I.) (1914), 14 E. L. R. 505.—CAN.

p. **Stipendiary magistrate sitting as ordinary magistrate**—With other



2. *Sect. 3.*  
*Sub,sects. 1, 2, 3 & 4, A., B. &*

with an offence under above Act, s. 74, alleged to have been committed in a mine. The information was dismissed. One of the magistrates who formed the ct. was a person employed in a mine within the meaning of above Act, s. 103 (2), but this fact was not known to the prosecutor at the time of the hearing & he did not consent to this magistrate acting as a member of the ct.

On an application for a *certiorari* to quash the order dismissing the information:—*Held*: as defts. had been acquitted of the offence charged against them, a *certiorari* to quash the proceedings ought not to be granted.—*R. v. SIMPSON*, [1914] 1 K. B. 66; *sub nom. R. v. SIMPSON, Ex p. SMITHSON*, 83 L. J. K. B. 233; 110 L. T. 67; 78 J. P. 55; 30 T. L. R. 31; 58 Sol. Jo. 99; 23 Cox, C. C. 739, D. C.

*Annotation*:—*Refd. Haynes v. Davis*, [1915] 1 K. B. 332.

*Licensing Act, 1872 (c. 94).*—See INTOXICATING LIQUORS, Vol. XXX., p. 24, Nos. 151–156.

SECT. 3.—WHAT OFFICES MAGISTRATE MAY HOLD.

160. County treasurer.]—The ground upon which it has been held, that the acceptance of a second office, incompatible with one already held, vacates the first, is an implied surrender on the part of the appointee, & an acceptance by the person or body appointing, of such surrender. An officer, therefore, cannot avoid his office, by accepting another incompatible with it, unless his office be such as he could determine by his

or if the concurrence of another is required, unless the power to accept the surrender or remove from the old office, concur in the new appointment. Deft., an alderman & justice of the peace, by virtue of his office, of the city of Norwich & county of the same city, was appointed by the mayor & aldermen, in sessions assembled, to be treasurer of the city & county thereof; by County Rates Acts 1738 (c. 29) & 1814 (c. 51), the treasurer is to give security to the justices at sessions, who are to fix his salary, to admit, to allow, & to pass his accounts; & the offices were admitted to be incompatible:—*Held*: (1) as the mayor & aldermen, when they appointed him treasurer were acting as justices, & not in their corporate capacity deft. did not, by accepting the office of treasurer, vacate that of alderman; although, *qu.*: if he fill the former office in conjunction with the latter, if it would not be ground of amotion; (2) was incapable of being appointed; & no Justice of Peace was capable within his district.—*R. v. PATTESON* (1832), 4 B. & Ad. 9; 1 Nev. & M. K. B. 612; 1 Nev. & M. M. C. 488; 2 L. J. K. B. 33; 110 E. R. 358.

*Annotations*:—As to (1) *Expld. R. v. Cheshire JJ.* (1840), 4 J. P. 122. *Consd. Worth v. Newton* (1854), 10 Exch. 247. *Refd. Arkwright v. Cantrell* (1837), 7 Ad. & El. 565; *Davis v. Pembrokeshire JJ.* (1881), 7 Q. B. D. 513; *R. v. Douglas* (1897), 46 W. R. 377.

161. Vestryman.]—An inhabitant may be a member of a select vestry, although he be a magistrate acting within the parish.—*R. v. KENT JJ., Ex p. TENTERDEN SELECT VESTRY* (1834), 4 Nev. & M. K. B. 299; 2 Nev. & M. M. C. 506; 4 L. J. M. C. 7.

162. Clerk to justices.]—*R. v. DOUGLAS*, No. 42, *ante*.

## Part III.—Liability of Magistrates.

### SECT. 1.—ACTION.

See PUBLIC AUTHORITIES.

### SECT. 2.—CRIMINAL INFORMATION.

#### SUB-SECT. 1.—BY WHAT COURT GRANTED.

163. Court of King's Bench.]—*Ex p. Rook* (1736), 2 Atk. 2; 26 E. R. 398, L. C.

#### SUB-SECT. 2.—WHO MAY FILE.

See C. O. R., 1906, r. 35.

Attorney-General.]—See CRIMINAL LAW, Vol. XIV., p. 349, No. 3657.

Solicitor-General.—During vacancy of Attorney-General's office.]—See CRIMINAL LAW, Vol. XIV., p. 349, No. 3657.

Attorney-General for Duchy of Lancaster.]—See CRIMINAL LAW, Vol. XIV., p. 349, No. 3658.

164. Private person.—Only in cases of public importance.]—The ct. will grant a rule for a criminal information, on the sole testimony of a *particeps criminis*, uncontradicted, where the offence is against the public interests, as bribery in the election of an alderman, who will, by virtue of the office, be a justice of peace.—*R. v. STEWARD* (1831), 2 B. & Ad. 12; 109 E. R. 1048; *sub nom. R. v. TURNER*, 9 L. J. O. S. K. B. 143.

165. —.—.]—*R. v. WINCHELSEA (LORD)* (1865), cited in Halsbury's Laws of England, Vol. XIX., p. 558.

*Annotation*:—*Refd. R. v. Labouchere* (1884), 12 Q. B. D.

166. —.— With leave of court.—On application in open court.]—*R. v. WINCHELSEA (LORD)* (1865), cited in Halsbury's Laws of England, Vol. XIX., p. 558.

*Annotation*:—*Refd. R. v. Labouchere* (1884), 12 Q. B. D.

*Justices.*]—*R. v. GRAHAM* (1885), 6 R. & G. 455; 6 C. L. T. 537.—CAN.

q. Statutory stipulation for trial by mayor & alderman.]—Under 26 Vict. c. 33, which requires all offences committed in F., & punishable by summary conviction, to be tried before the mayor & an alderman, a justice of the peace for the county, who is not an alderman has no jurisdiction to sit

with the mayor & try an assault.—*Ex p. HUGHEY* (1864), 11 N. B. R. (6 All.) 59.—CAN.

r. Property qualification.]—*WEIR v. SMYTH* (1892), 19 A. R. 433.—CAN.

### PART II. SECT. 3.

t. Clerk of peace & clerk of county court.]—A justice of the peace who

accepts the office of clerk of the peace & clerk of the county ct. is not disqualified from trying an offence charged under the Liquor License Act, on the ground that the offices are incompatible.—*R. v. PLANT, Ex p. MORNEAULT, Ex p. TARDIFF* (1906), 2 E. L. R. 17; 37 N. B. R. 500.—CAN.

a. Town clerk.]—*R. v. MURRAY* (1906), 2 E. L. R. 80.—CAN.

SUB-SECT. 3.—NATURE OF COMPLAINT.

See C. O. R., 1906, r. 36.

167. Must relate to conduct of magistrate as such.]—Where an assault is committed by a magistrate on an attorney several days after he had conducted certain proceedings against such magistrate, this ct. will not grant a rule for a criminal information, inasmuch as the breach of the peace has not been *quod magistrate*, but will leave the party to the remedies by indictment or action.—*R. v. ARROWSMITH* (1843), 2 Dowl. N. S. 704; *sub nom. Ex p. LEE*, 7 Jur. 441.

SUB-SECT. 4.—GROUNDS FOR GRANTING.

A. In General.

168. Mere irregularity.]—*R. v. NICHOLLS* (1724), 8 Mod. Rep. 337; 88 E. R. 241.

169. —.]—*ANON.* (1728), 1 Barn. K. B. 116; 94 E. R. 81.

170. —.]—*R. v. AUSTIN* (1732), 2 Barn. K. B. 203; 94 E. R. 450.

171. —.]—A justice of the peace cannot be criminally proceeded against for a mere irregularity.—*R. v. FIELDING* (1759), as reported in 2 Burr. 719; 97 E. R. 531.

172. —.]—The ct. refused a criminal information against a magistrate for returning to a writ of *certiorari* a conviction of a party in another & more formal shape than that in which it was first drawn up, & of which a copy had been delivered to the party convicted by the magistrate's clerk; the conviction returned being warranted by the facts.—*R. v. BARKER* (1801), 1 East, 186; 102 E. R. 73.

*Annotations*:—*Reid. Chaney v. Payne* (1841), 1 Q. B. 712. *Mentd. R. v. Cheshire JJ.* (1833), 2 L. J. M. C. 95.

173. —.]—*R. v. LIPSCOMBE, Ex p. BIGGINS*, No. 207, *post*.

174. Mere mistake.]—*R. v. TAYLOR* (1730), 1 Barn. K. B. 346; 94 E. R. 233.

175. —.]—*R. v. EYRES* (1733), 2 Barn. K. B. 250; 94 E. R. 481.

176. —.]—*R. v. YOUNG* (1758), 1 Burr. 556; 97 E. R. 447.

*Annotations*:—*Consd. Sharpe v. Wakefield* (1888), 21 Q. B. D. 66. *Mentd. R. v. Peters, Cavil v. Burnaford* (1758), 1 Burr. 568; *Kennedy v. Hilliard* (1859), 1 L. T. 78.

177. —.]—This ct. will never grant an information against a justice of peace for a mere error of judgment (*DENISON, J.*).—*R. v. COX* (1759), 2 Burr. 785; 97 E. R. 562.

*Annotations*:—*Mentd. R. v. Younger* (1793), 5 Term Rep. 449; *Bullen v. Ward* (1905), 74 L. J. K. B. 916.

178. —.]—Wherever magistrates act up-rightly though they mistake the law, no information will be granted against them.—*R. v. JACKSON* (1787), 1 Term Rep. 653; 99 E. R. 1302.

*Annotation*:—*Mentd. Re Leak* (1829), 3 Y. & J. 46.

179. —.]—(1) An attorney has no right to be present on the hearing of an information on the game laws, & therefore where an attorney for deft. was excluded by the magistrates from the justice room, the ct. refused a criminal information against the magistrate on that ground. (2) An error in the proceedings before magistrates is no ground for a criminal information; & the ct. will not interfere against them, unless they have acted corruptly.—*R. v. STAFFORDSHIRE JJ.* (1819), 1 Chit. 217.

*Annotation*:—*As to (1) Reid. Cox v. Coleridge* (1822), 2 Dow. & Ry. K. B. 86.

180.

*R. v. BORRON*, No. 198, *post*.

181.

*R. v. BADGER*, No. 203, *post*.

—.]—(1) Misconduct in his office may magistrate amenable to a criminal information, though he be not actuated by motives of pecuniary interest or personal malice, as, if he gives way to passion so as clearly to interfere with the due administration of justice; (2) but a mere display of ill humour, or an error of judgment, such as the omission to administer an oath, or to give a caution to a dying man before taking his examination, will not induce the ct. to interfere.—*R. v. BARTON* (1822), 10 T. R. 202.

183. Mere display of ill humour.]—*R. v. BARTON*, No. 182, *ante*.

B. Flagrant Misconduct.

184. Justices acting in sessions.]—No information against justices acting in sessions unless in very flagrant cases.—*R. v. SEAFORD JJ.* (1763), 1 Wm. Bl. 432; 96 E. R. 246.

C. Illegal or Corrupt Motive.

185. Information granted.]—The ct. will not grant an information against a mayor for neglecting to hold a sessions, unless the neglect was wilful & corrupt.—*R. v. HALFORD* (1733), 7 Mod. Rep. 193; *Ridg. temp. H.* 31; 87 E. R. 1184.

186. —.]—Although the conduct of a magistrate be not strictly legal, yet an information will not be granted, unless oppression was intended.—*R. v. BIGAMAN* (1736), *Ridg. temp. H.* 157; 7 Mod. Rep. 321; 27 E. R. 789.

187. —.]—An information is not to be granted against a justice of the peace, unless he has acted from a corrupt or partial motive.—*R. v. RYE CORPN. JJ.* (1752), *Say.* 25; 96 E. R. 791.

188. —.]—*R. v. YOUNG* (1758), 1 Burr. 556; 97 E. R. 447.

*Annotations*:—*Consd. Sharpe v. Wakefield* (1888), 21 Q. B. D. 66. *Reid. R. v. Peters, Cavil v. Burnaford* (1758), 1 Burr. 568; *Kennedy v. Hilliard* (1859), 1 L. T. 78.

189. —.]—(1) Where justices of the peace are complained of without reason, they shall have costs.

(2) Even where a justice of the peace acts illegally yet if he has acted honestly & candidly, without oppression, malice, revenge, or any bad view or ill intention whatsoever, the ct. will never punish him in this extraordinary course of an information; but leave the party complaining to the ordinary legal remedy or method of prosecution, by action or indictment (*per CUR.*).—*R. v. PALMER* (1761), 2 Burr. 1162; 97 E. R. 767.

190. —.]—Unless justices act corruptly & oppressively an information will not be granted.—*R. v. BAYLIS* (1762), 3 Burr. 1318; 97 E. R. 851.

191. —.]—*R. v. SKINNER* (1772), *Lofft*, 54; 98 E. R. 529.

*Annotations*:—*Reid. Kennedy v. Hilliard* (1859), 1 L. T. 78. *Mentd. Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255; *Seaman v. Netherclift* (1876), 1 C. P. D. 540; *Munster v. Lamb* (1883), 11 Q. B. D. 588; *Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405.

192. —.]—The ct. will not punish in an extraordinary way, where the act complained of was occasioned by fault of the complainant, & he is obliged to do that justice he ought to have done himself, if the matter does not appear *malo animo*, but will leave him to his ordinary remedy.—*R. v. JACKSON* (1773), *Lofft*, 147; 98 E. R. 580.

PART III. SECT. 2, SUB-SECT. 4.—A.

b. Unjustifiable conduct.]—If the conduct of prosecutor has been blam-

able the ct. will not grant a criminal information against a magistrate at his instance; but if the conduct of the magistrate is not justifiable, the rule

will be discharged without costs.—*R. v. MUNRO* (1831), N. B. Dig. 226.—CAN.



*Sect. 2.—Criminal information: Sub-sect. 4, C., D., E., F., G., H., I. & J.]*

193. —.]—When a justice of the peace acts from indirect or corrupt motives, the ct. will punish him by information.

No justice of the peace ought to suffer for ignorance, when the heart is right (LORD MANSFIELD, C.J.).—*R. v. COZENS* (1780), 2 Doug. K. B. 426; 99 E. R. 273.

194. —.]—The ct. will not grant an information against the magistrates of a borough for having disfranchised persons entitled to their freedom, although sworn to have been done to serve election purposes, if defts. deny that motive, & swear that they thought there was a legal ground for the disfranchisement, & the ground on which the disfranchisement went has not been decided.—*R. v. DAVIE* (1781), 2 Doug. K. B. 588; 99 E. R. 371.

195. —.]—*R. v. JACKSON*, No. 178, *ante*.

196. —.]—If any fraud or misconduct had been imputed to the magistrates in proceeding notwithstanding the issuing of the *certiorari*, that might have been a ground for a criminal proceeding against them; & I believe there are instances in which a criminal information has been granted against magistrates acting in sessions (LORD KENYON, C.J.).—*R. v. SETON (INHABITANTS)* (1797), 7 Term Rep. 373; 101 E. R. 1027.

*Annotation:—Refd. R. v. Wilson* (1844), 6 Q. B. 620.

197. —.]—*R. v. STAFFORDSHIRE JJ.*, No. 179, *ante*.

198. —.]—Where a criminal information is applied for against a magistrate, the question for the ct. is not whether the act done be found on investigation to be strictly right or not, but whether it proceeded from an unjust, oppressive, or corrupt motive, amongst which fear & favour are generally included, or from mistake or error only. In the latter case, the ct. will not grant the rule.—*R. v. BORRON* (1820), 3 B. & Ald. 432; 106 E. R. 721.

*Annotations:—Refd. Ex p. Fentiman* (1834), 2 Ad. & El. 127. *Mentd. Cox v. Coleridge* (1822), 1 B. & C. 37.

199. —.]—Where only circumstances of strong suspicion are stated in affidavits, on which a rule for a criminal information is moved, it is not sufficient unless deponents also add their belief that the party against whom the application is made acted from corrupt motives.—*R. v. WILLIAMSON* (1820), 3 B. & Ald. 582; 106 E. R. 774.

*Annotation:—Mentd. Ex p. Munster* (1869), 20 L. T. 612.

200. —.]—The ct. will not grant a *certiorari* in the first instance to remove the order for the appointment of overseers for the purpose of having it quashed, on a suggestion, that the justices made the appointment from corrupt & improper motives, the propriety of the appointment being matter of appeal to sessions; but they will grant a criminal information against the justices, if the corrupt & improper motive for making the appointment be satisfactorily established.—*R. v. SOMERSETSHIRE JJ.* (1822), 1 Dow. & Ry. K. B. 443; 1 Dow. & Ry. M. C. 116.

*Annotation:—Refd. R. v. Cambridgeshire JJ.* (1835), 4 Ad. & El. 111.

201. —.]—(1) The ct. will not grant a rule *nisi* for a criminal information against magistrates, unless it appears they have acted from an oppressive, dishonest, or corrupt motive, under which fear or favour are included.

(2) A magistrate is entitled in all cases to six days' notice of an intention to apply for a rule *nisi* for a criminal information, & it is not sufficient that in point of fact six days have expired between the notice & the motion, if the notice contemplates

an earlier application.—*Ex p. FENTIMAN* (1834), 2 Ad. & El. 127; 111 E. R. 49; *sub nom. R. v. BLANCHARD*, 4 L. J. M. C. 24; *sub nom. Re FENTIMAN*, 4 Nev. & M. K. B. 126; 2 Nev. & M. M. C. 427.

*Annotation:—As to (2) Folld. Re Pyrke* (1843), 1 L. T. O. S. 253.

202. —.]—A person had been charged with perjury before two magistrates; the prosecutor did not appear, & the offence had been committed without the jurisdiction of the justices; under these circumstances they refused to hold the prosecutor to bail. It further appeared that the promoter of the information was actuated by resentful feelings against two defts. A rule for a criminal information having been granted the ct. discharged it with costs.—*R. v. THOMAS* (1837), 7 Ad. & El. 608; 1 J. P. 386; 1 Jur. 984; 112 E. R. 599.

*Annotation:—Refd. R. v. Dodson* (1841), 5 J. P. 404.

203. —.]—(1) Where a criminal information is applied for against magistrates, the question for the ct. is, not whether their acts be found upon investigation to be strictly correct or not, but whether they were influenced by corrupt, oppressive, or partial motives, or acted in error, & from mistake only. In the latter case, the ct. will not grant the rule.

(2) A rule for a criminal information will not be granted against justices who wrongly or improperly reject bail, unless it manifestly appear to the ct., by conclusive & satisfactory evidence, that they were also influenced by partial & corrupt motives.—*R. v. BADGER* (1843), 4 Q. B. 468; 1 Dav. & Mer. 375; 12 L. J. M. C. 66; 7 J. P. 128; 7 Jur. 216; 114 E. R. 975.

*Annotations:—Refd. Linford v. Fitzroy* (1849), 13 Q. B. 240; *R. v. Broome* (1851), 18 L. T. O. S. 19.

204. —.]—(1) A criminal information for misconduct in office may be moved for against a magistrate in the second term after the alleged misconduct though an assize has intervened; the motion being made early enough to allow of cause being shown in the same term.

(2) On a motion for a criminal information against a magistrate for misconduct in the exercise of his office, the affidavits must state the *bonâ fide* belief of the prosecutor that deft. had acted from corrupt motives, or show facts from which the ct. must necessarily infer such corrupt motives.—*R. v. SAUNDERS* (1847), 10 Q. B. 484; 9 L. T. O. S. 246; 2 Cox, C. C. 249; 116 E. R. 185.

205. —.]—If the justices have misconducted themselves & acted *malâ fide*, they may be liable to a criminal information (LORD CAMPBELL, C.J.).—*Ex p. HOPWOOD* (1850), 15 Q. B. 121; 4 New Sess. Cas. 174; 19 L. J. M. C. 197; 18 Jur. 812; 117 E. R. 404; *sub nom. Re HOPWOOD*, 15 L. T. O. S. 134; 14 J. P. 590.

*Annotations:—Refd. Ex p. Williams* (1851), 2 L. M. & P. 580; *R. v. Whitfield* (1885), 15 Q. B. D. 122; *R. v. Glamorganshire JJ.* (1889), 5 T. L. R. 636; *R. v. Nat Bell Liquors*, [1922] 2 A. C. 128. *Mentd. Osgood v. Nelson* (1869), 10 B. & S. 119.

206. —.]—The ct. will not presume that magistrates will not do their duty; if they corruptly neglect to do so, they will be open to punishment (LORD CAMPBELL, C.J.).—*Ex p. BRIGHTHELMSTONE DIRECTORS* (1850), as reported in 4 New Sess. Cas. 298.

207. —.]—Seven artificers who left their master's employment without notice one morning, were the same afternoon apprehended under a warrant, handcuffed & imprisoned until next morning at seven o'clock, when they were taken before a justice, who refused their request to postpone the hearing till they procured legal

assistance, & who heard all the cases in the lump, without taking each separately, & awarded to each the punishment of forfeiture of one day's wages:—*Held*: though the justice's conduct was irregular & injudicious, still there was no sufficient evidence of corruption to induce the ct. to grant a rule for a criminal information against him.—*R. v. LIPSCOMBE, Ex p. BIGGINS* (1861), 25 J. P. 726.

208. —.]—*COLAM v. MANFIELD*, No. 1124, *post*.

#### D. Oppression.

209. **Information granted.**]—An information lies against a justice for sending a servant to the house of correction for being saucy to his master.—*R. v. OKEY* (1722), 8 Mod. Rep. 45; 88 E. R. 36.

210. —.]—*ANON.* (1727), 1 Barn. K. B. 22; 94 E. R. 15.

211. —.]—*R. v. MATHER* (1733), 2 Barn. K. B. 249; Sess. Cas. K. B. 66; 94 E. R. 480.

212. —.]—*R. v. ANGELL*, No. 399, *post*.

213. —.]—Three days before a borough election, a voter, who had become liable to pay a sum of money under an order of affiliation, was apprehended by virtue of a warrant, & brought before a magistrate. He was then told, that unless he paid the money, he should be committed to prison, but the magistrate added, that time for payment should be given, if he would consent to remain locked up in the station house for a short time. The ct. made absolute a rule for a criminal information against the magistrate. *Qu.*: whether a magistrate can be rendered amenable to punishment who is induced, by improper motives, to act in strict accordance with law.—*R. v. EAGLE* (1837), 2 Jur. 63.

214. —.]—Information granted against a justice of peace for acting oppressively.—*R. v. SOANE* (1738), Andr. 272; 95 E. R. 395.

#### E. Extortion.

215. **Information granted.**]—An information for extortion granted against justices of the peace, for refusing to grant licenses to publicans unless on the payment of ten shillings, although this had been the practice of the borough for twenty-five years before.—*R. v. SEYMOUR* (1740), 7 Mod. Rep. 382; 87 E. R. 1305.

216. —.]—Information shall go against a justice for committing a man for not paying 1s. for discharging his warrant.—*R. v. JONES* (1742), 1 Wils. 7; 95 E. R. 462.

217. —.]—*R. v. BALLENY* (1857), 30 L. T. O. S. 133.

#### F. Matters Concerning Bail.

218. **Improperly refusing bail.**]—*R. v. BADGER*, No. 203, *ante*.

219. **Taking improper bail.**]—A justice of Surrey committed a man on suspicion of stealing a mare, & bound over the owner to prosecute. Afterwards upon examining two other persons, he admitted the party to bail. The prosecutor appeared at the assizes, & found a bill, but the party accused did not appear. The ct. granted an information against the justice, declaring they should not have bailed the man themselves.—*R. v. CLARKE* (1744), 2 Stra. 1216; 93 E. R. 1140.

220. —.]—*R. v. LEDIARD* (1755), Say. 242; 96 E. R. 867.

#### G. Convicting Without Summons.

221. **Information granted.**]—If a justice is empowered to make an order for suppressing alehouses, & on disobedience to make an order for the commitment of the offender, the latter order is not a bare execution of the first. The justice is punishable if he makes the latter order without summoning the offender.—*R. v. VENABLES* (1725), Fortes. Rep. 325; 2 Ld. Raym. 1405; 8 Mod. Rep. 377; 1 Stra. 630; Sess. Cas. K. B. 77; 92 E. R. 415; *subsequent proceedings, sub nom. R. v. ALLINGTON* (1726), 2 Stra. 678.

*Annotations*:—*Mentd.* *R. v. Cleg* (1721), 1 Stra. 475; *R. v. Lloyd* (1734), 2 Barn. K. B. 466.

222. —.]—*R. v. HEBER* (1731), 2 Barn. K. B. 101; 2 Stra. 915; 94 E. R. 382.

*Annotations*:—*Refd.* *R. v. Hughes* (1879), 4 Q. B. D. 614. *Mentd.* *Creppe v. Durden* (1777), 2 Cowp. 640.

223. —.]—*R. v. HARWOOD* (1738), 2 Stra. 1088; Andr. 152; 93 E. R. 1050.

#### H. Acting from Interest or Resentment.

224. **Information granted.**]—Information against justices of the peace for acting from motives of resentment.—*R. v. HANN* (1765), 3 Burr. 1716; 97 E. R. 1062.

*Annotation*:—*Refd.* *R. v. Davie* (1781), 2 Doug. K. B. 588.

225. —.]—*R. v. DAVIS* (1772), Lofft, 62; 98 E. R. 534.

226. —.]—Where a magistrate, upon whose property a malicious trespass had been committed, issued a summons requiring the offender to appear before himself, or some other magistrate, & purporting that information had been given to him, the magistrate, on oath; whereas no oath had been taken, & the information had been communicated by the magistrate to the informer, the ct., in discharging a rule for a criminal information against the magistrate, refused to give him his costs.—*R. v. WHATELY* (1829), 4 Man. & Ry. K. B. 431; 2 Man. & Ry. M. C. 313.

227. —.]—*R. v. BARTON*, No. 182, *ante*.

#### I. Wrongfully Granting or Refusing Licences.

228. **Information granted.**]—On a motion for an information against a justice of the peace for refusing an ale license, on grounds set forth; the party must allege that he was innocent.—*R. v. ATHAY* (1758), 2 Burr. 653; 97 E. R. 494.

*Annotations*:—*Refd.* *Brocklebank v. R.*, [1924] 1 K. B. 647. *Mentd.* *R. v. Sylvester* (1862), 26 J. P. 151; *R. v. Bowman*, [1898] 1 Q. B. 668; *R. v. Shann*, [1910] 2 K. B. 418.

229. —.]—*R. v. WILLIAMS, R. v. DAVIS* (1762), 3 Burr. 1317; 97 E. R. 851.

*See, further, INTOXICATING LIQUORS, Vol. XXX., p. 30, Nos. 209–218.*

#### J. Matters Concerning Mandamus.

230. **False return to mandamus.**]—Where no one in particular is interested to bring an action for a false return to a *mandamus*, & the affidavits are contradictory, the ct. will direct an information to try the facts between the parties.—*R. v. SPOTLAND OVERSEERS* (1735), Lee temp. Hard. 184; 95 E. R. 119.

*Annotations*:—*Refd.* *R. v. Lancashire JJ.* (1822), 1 Dow. & Ry. K. B. 485; *R. v. Fall* (1841), 1 Q. B. 636.

231. —.]—*R. v. PETTIWARD* (1769), 4 Burr. 2452; 98 E. R. 286.

232. —.]—*Qu.*: whether a criminal information will lie against justices for making a false



*Sect. 2.—Criminal information: Sub-sect. 4, J., K. & L.; sub-sect. 5, A., B., C., D. & E. Sects. 3 & 4. Part IV. Sect. 1.]*

return to a *mandamus*, unless the return is corruptly & wilfully false.

Where justices had made a false return to a *mandamus* to appoint overseers for a township, & the ct. had thereupon granted a rule *nisi* for a criminal information; & on showing cause against that rule, contradictory facts were disclosed, which were directed to be tried by an issue, & after an issue had been prepared & delivered, the justices had abandoned the issue, & obtained a judge's order for staying proceedings without prejudice to the question of costs, the ct. ordered the justices to pay the prosecutor the costs of preparing & delivering the issue.—*R. v. LANCASHIRE JJ.* (1822), 1 Dow. & Ry. K. B. 485; 1 Dow. & Ry. M. C. 127.

**233. Disobedience to *mandamus*.]**—An information may be filed against justices of the peace for disobedience to a *mandamus*.—*R. v. CORBETT & COULSON* (1756), Say. 267; 96 E. R. 875.

#### *K. Failure to Suppress Riot.*

**234. Information granted.]**—Magistrates are not criminally answerable for not having called out special constables, & compelled them to act pursuant to Special Constables Act, 1831 (c. 41), unless it be proved that information was laid before them on oath, of a riot, etc., having occurred or being expected.

There is no doubt in point of law, that a public officer guilty of a criminal neglect in the discharge of his duty is liable to an indictment or information (*LITTLEDALE, J.*).—*R. v. PINNEY* (1832), 3 B. & Ad. 947; 5 C. & P. 254; 3 State Tr. N. S. 11; 1 Nev. & M. M. C. 307; 110 E. R. 349.

*Annotations:—*Refd. *R. v. Glamorgan County Council*, [1899] 2 Q. B. 536. *Mentd. R. v. Holden* (1833), 5 B. & Ad. 347; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1.

**235. —.]**—A magistrate, being responsible for order in the district over which he has control, & the Comr. of Police for the Metropolis being the officer mainly responsible for the preservation of peace & order in the metropolis, if a magistrate or such commissioner lazily, stupidly, or negligently fails to take the precautions necessary to preserve order, he can be proceeded against in a criminal ct., & be called upon to answer for his neglect of duty.—*R. v. GRAHAM & BURNS* (1888), 4 T. L. R. 212; 16 Cox, C. C. 420.

*Annotations:—**Mentd. Ex p. Lewis* (1888), 21 Q. B. D. 191; *Field v. Metropolitan Police Receiver*, [1907] 2 K. B. 853; *Burden v. Rigler* (1910), 27 T. L. R. 140.

#### *L. Other Cases.*

**236. Wilful absence from sessions.]**—Information against a justice for absenting from the sessions.—*R. v. FOX* (1717), 1 Stra. 21; 93 E. R. 359.

**237. Refusal to tender oath.]**—*R. v. NEWTON* (1721), 1 Stra. 413; 93 E. R. 604.

**238. Tendering illegal oath.]**—*R. v. ROBE* (1729), 1 Barn. K. B. 263; 94 E. R. 179.

**239. Making improper return of conviction.]**—*ANON.* (1731), 2 Barn. K. B. 8; 94 E. R. 322.

**240. Making improper order of removal.]**—Information granted against a justice of peace because he alone took an examination in order to make an order of removal, & upon a complaint not stating that the person to be removed was likely to become chargeable; also against two other justices for signing the order without examination, & without summoning the party & demanding security.—*R. v. WYKES* (1738), Andr. 238; 2 Stra. 1092; 95 E. R. 379.

**241. —.]**—An information granted against a justice of the peace for adding another justice's name to an order of removal.—*R. v. HOWARD* (1739), 7 Mod. Rep. 307; 87 E. R. 1258.

**242. Acting from political motives.]**—An information granted against justices, etc., refusing to relieve burgesses appealing against a poor's rate.—*R. v. PHELPS* (1757), 2 Keny. 570; 96 E. R. 1282.

**243. —.]**—*R. v. COZENS* (1780), 2 Doug. K. B. 426; 99 E. R. 273.

**244. Interfering with order of another magistrate.]**—A commitment by a justice of peace for a time certain, as for fourteen days, under Justices Commitment Act, 1744 (c. 5), is a commitment in execution, & the party is not entitled to be bailed. If another magistrate, on illegal & corrupt motives, discharge a person so committed, the ct. will grant an information against him. The ct., on granting an information, will not require the prosecutor to give security for the costs, in case deft. should be acquitted beyond the extent of the recognisance in £20 required by 4 Will. & Mar. c. 18, s. 2.—*R. v. BROOKE* (1788), 2 Term Rep. 190; 100 E. R. 103.

*Annotations:—**Mentd. R. v. Rhodes* (1791), 4 Term Rep. 220; *Kendall v. Wilkinson* (1855), 4 E. & B. 680; *R. v. Wilmot* (1861), 4 L. T. 208.

**245. Improperly making appointment.]**—*R. v. SOMERSETSHIRE JJ.*, No. 200, *ante*.

**246. Bribery in election.]**—*R. v. STEWARD*, No. 164, *ante*.

**247. Refusal to hear evidence.]**—If justices wilfully refuse to receive legal evidence, that is misconduct for which they can be brought here by criminal information (*LORD DENMAN, C.J.*).—*R. v. HIGGINS* (1843), 17 L. J. Q. B. 63, n.; 2 L. T. O. S. 167; 8 J. P. 486; *sub nom. Ex p. HIGGINS*, 10 Jur. 838.

**248. —.]**—*Ex p. SMERDON* (1850), 15 L. T. O. S. 141; *sub nom. R. v. HOLE*, 14 J. P. Jo. 352.

#### SUB-SECT. 5.—PROCEDURE.

##### *A. In General.*

**249. Exculpatory affidavit from applicant.]**—The ct. will not grant an information against a magistrate for having improperly convicted a person, unless the party complaining makes an exculpatory affidavit denying the fact.—*R. v. WEBSTER* (1789), 3 Term Rep. 388; 100 E. R. 636.

**250. Refused where action pending.]**—An information against a justice of peace refused till an action for the same offence is discontinued.—*R. v. FIELDING* (1759), 2 Keny. 386; 2 Burr. 719; 96 E. R. 1219.

*Annotation:—**Mentd. Caddy v. Barlow* (1827), 1 Man. & Ry. K. B. 275.

##### *B. Time for Application.*

*See, generally, CRIMINAL LAW, Vol. XIV., p. 352, No. 3710.*

**251. During term when offence committed.]**—The ct. will grant a rule *nisi* for a criminal information at the end of a term against a magistrate for malpractices during the term; but not for any misconduct before the term.—*R. v. SMITH* (1796), 7 Term Rep. 80; 101 E. R. 865.

**252. In second term after commission of offence—No intervening assize.]**—A criminal information may be moved for against magistrates for misconduct in the execution of their offices in the second term after the offence committed, there being no intervening assizes.—*R. v. HARRIES* (1811), 13 East, 270; 104 E. R. 374.

253. — In time for hearing during term.]—The ct. will not grant a rule *nisi* for a criminal information against a magistrate so late in the second term after the imputed offence, as to preclude him from the opportunity of showing cause against it in the same term.—*R. v. MARSHALL* (1811), 13 East, 322; 104 E. R. 394.

254. — — —.]—*R. v. SAUNDERS*, No. 204, *ante*.

255. More than a year after commission of offence—Circumstances not known to prosecutor till just before application.]—Where the facts tending to criminate a magistrate took place twelve months before the application to the ct., they refused to grant a criminal information, although the prosecutor, in order to excuse the delay, stated that the facts had not come to his knowledge till very shortly previous to the application.—*R. v. BISHOP* (1822), 5 B. & Ald. 612; 2 Dow. & Ry. M. C. 65; 106 E. R. 1314.

Annotation:—*Refd. R. v. Jollie* (1833), 2 L. J. K. B. 144.

#### C. Notice of Application.

256. Necessity for.]—A party who applies to the ct. for a criminal information against deft. for breach of duty as a magistrate as well as an individual, must, before motion give notice to deft. of his intended application.—*R. v. HEMING* (1833), 5 B. & Ad. 666; 2 Nev. & M. K. B. 477; 1 Nev. & M. M. C. 445; 3 L. J. M. C. 3; 110 E. R. 936.

257. Sufficiency of notice.]—*R. v. SHREWSBURY JJ.* (1733), 2 Barn. K. B. 272; 94 E. R. 195.

258. Length of notice required to be given—Six days.]—*Ex p. FENTIMAN*, No. 201, *ante*.

259. — — —.]—Notice of an application for a criminal information against a magistrate was served on Apr. 13, two days before Easter Term, & stated that the application would be made in Easter Term. A second notice was served on Apr. 27, which stated that the application would be made on May 2. Counsel for deft. objected that six days' previous notice of the intended motion had not been given, but offered to waive the objection:—*Held*: (1) the notice of an intended motion for Easter Term, dated Apr. 13, was bad because within two days of the term, & the second

notice could not be engrafted on it; (2) the ct. would not permit such an objection to be waived.—*Re PYRKE* (1843), 1 L. T. O. S. 253; *sub nom. R. v. PYRKE*, 7 J. P. 515.

260. Objection to insufficiency—Waiver.]—*Re PYRKE*, No. 259, *ante*.

#### D. Contents of Affidavits.

See CRIMINAL LAW, Vol. XIV., pp. 355–357, Nos. 3757–3771.

261. Whole case.]—*R. v. WALLIS* (1772), Lofft, 37; 98 E. R. 520.

262. Circumstances of strong suspicion.]—*R. v. WILLIAMSON*, No. 199, *ante*.

263. Belief in corrupt motive.]—*R. v. WILLIAMSON*, No. 199, *ante*.

264. — On facts necessarily inferring such motive.]—*R. v. SAUNDERS*, No. 204, *ante*.

#### E. Costs.

265. Liability of unsuccessful complainant—F frivolous complaint.]—The attorney & complainant shall pay costs upon the discharging of a rule obtained against a justice of the peace upon grounds appearing to be frivolous.—*R. v. FIELDING* (1758), 2 Burr. 654; 97 E. R. 495.

Annotation:—*Refd. R. v. Johnson* (1794), Ridg. temp. H. 158, n.

266. — — —.]—*R. v. PALMER*, No. 189, *ante*.

### SECT. 3.—INDICTMENTS.

267. Defamation of grand jury.]—*R. v. SKINNER* (1772), Lofft, 54; 98 E. R. 529.

Annotations:—*Mentd. Kennedy v. Hillard* (1859), 1 L. T. 78; *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255; *Seaman v. Netherclift* (1876), 1 C. P. D. 540; *Munster v. Lamb* (1883), 11 Q. B. D. 588; *Copartnership Farms v. Harvey-Smith*, [1918] 2 K. B. 405.

See, further, PUBLIC AUTHORITIES.

### SECT. 4.—PROTECTION OF MAGISTRATES.

See CRIMINAL LAW, Vol. XV., pp. 702, 703, Nos. 7586–7590, 7595–7601; LIBEL & SLANDER, Vol. XXXII., pp. 104, 105, Nos. 1354–1356; PUBLIC AUTHORITIES.

## Part IV.—Local Limit of Justices' Jurisdiction.

### SECT. 1.—IN GENERAL.

268. Jurisdiction given by Act of Parliament—Narrower construction adopted.]—The ct. will not grant a *mandamus* to the justices of a borough, commanding them to hear an application for an order of filiation, under 2 & 3 Vict. c. 85, s. 1, where the bastard is chargeable to a parish which is not within the borough, but is within the same union, & is under the jurisdiction of the county justices, it being doubtful whether the borough justices have any jurisdiction to make the order.

#### III. SECT. 2, SUB-SECT. 5.—C.

256 i. Necessity for.]—*BUSTARD v. SHOFIELD* (1834), 4 O. S. 11.—CAN.

258 i. Length of notice required to be given—Six days.]—A magistrate is entitled to six days' notice of a motion for a criminal information against him for a violation of his duty. The motion must be made in sufficient time to

enable him to answer the same term.—*R. v. HEUSTIS* (1853), James, 101.—CAN.

258 ii. — — —.]—*R. v. RAE* (1874), 1. R. 8 C. L. 524.—IR.

#### PART IV. SECT. 1.

a. Proceedings taken in foreign country.]—A magistrate has no juris-

Where words of an Act of Parliament are general, & if construed strictly, & literally they would extend the limits of the jurisdictions of justices, the ct. will only give them a narrower construction (COLERIDGE, J.).—*Ex p. WALLINGFORD UNION GUARDIANS* (1841), 9 Dowl. 987; 5 Jur. 1085.

Limits of criminal jurisdiction.]—See CRIMINAL LAW, Vol. XIV., pp. 132–141, Nos. 1042–1147.

Venue.]—See CRIMINAL LAW, Vol. XIV., pp. 142–151, Nos. 1148–1258.

diction to administer an oath & take examination within the limits of a foreign country, & a commitment founded on such proceedings is void, & affords no jurisdiction in an action of trespass against the magistrate.—*NARY v. OWEN* (1838), 2 Ber. 569.—CAN.

c. Stipendiary magistrate.]—*R. v.*



**Sect. 1.—In general. Sects. 2, 3, 4, 5 & 6.]**

**Offences in regard to animals.]—See ANIMALS** Vol. II., pp. 248, 288, 298, 300, Nos. 316, 588, 590, 676–682, 691.

**Fraudulent removal of distress.]—See DISTRESS**, Vol. XVIII., p. 365, No. 1033.

**Offences in regard to food & drugs.]—See FOOD & DRUGS**, Vol. XXV., pp. 100, 101, Nos. 238–240.

**Desertion of wife.]—See HUSBAND & WIFE**, Vol. XXVII., pp. 554, 555, Nos. 6081–6087.

**Offences against revenue laws.]—See REVENUE.**

**Offences in regard to seamen.]—See SHIPPING.**

**Offences in regard to street vehicles.]—See STREET AND AERIAL TRAFFIC.**

**SECT. 2.—COUNTY JUSTICES.**

*See Criminal Law Act, 1826 (c. 64), s. 12; Metropolitan Police Courts Act, 1839 (c. 71), s. 18; Counties (Detached Parts) Act, 1839 (c. 82), s. 1; Counties (Detached Parts) Act, 1844 (c. 61), s. 3; Indictable Offences Act, 1848 (c. 42), ss. 6, 7; Summary Jurisdiction Act, 1848 (c. 43), ss. 5, 6; Municipal Corporations Act, 1882 (c. 50), s. 154; Justice of the Peace Act, 1906 (c. 16), s. 5; Criminal Justice Act, 1925 (c. 86), s. 31.*

**269. Limited to locality named in commission.]**

—(1) The examination upon oath required by 27 Eliz. c. 18, in the case of hue & cry, may be taken by a justice of the county, though he is not in the county at the time of taking it, for it is a ministerial act.

(2) A justice of the peace cannot exercise any jurisdiction or do any judicial act out of the borough or county for which he is appointed. But a justice of the peace may take a mere examination out of his borough or county relating to an act done in it, for it is not an act of jurisdiction.—**HELIER v. BENHURST HUNDRED** (1631), Cro. Car. 211; 79 E. R. 785.

*Annotations:—As to (1) Refd. Griffith v. Walker (1752), 1 Wils. 336. As to (2) Distd. Talbot v. Hubble (1740), 7 Mod. Rep. 326. Refd. R. v. Stainforth (1847), 11 Q. B. 66.*

**270. — Act giving jurisdiction to “any justice of the peace of the United Kingdom.”]—Re PEERLESS**, No. 289, post.

**271. — Justices for adjoining counties.]—R. v. TIFFIELD (INHABITANTS)** (1858), 22 J. P. Jo. 784, D. C.

**272. — Distinction between judicial & ministerial acts.]—HELIER v. BENHURST HUNDRED**, No. 269, ante.

**273. — —.]—An allowance of an indenture of apprenticeship is a ministerial & not a judicial act, so as to make it essential that it should show that it was made within the jurisdiction of the justices. Therefore an allowance by two justices “of & for the county,” is sufficient.—R. v. STAINFORTH (INHABITANTS)** (1847), 11 Q. B. 66; 3 New Sess. Cas. 53; 17 L. J. M. C. 25; 10 L. T. O. S. 412; 12 J. P. 105; 12 Jur. 95; 116

*Annotations:—Distd. R. v. Totness (1849), 11 Q. B. 80. Refd. R. v. Preston (1848), 12 Q. B. 816; Staverton Overseers v. Ashburton Overseers (1855), 4 E. & B. 526; R. v. Broadhempston (1858), 5 Jur. N. S. 267.*

**BROWN** (1898), 31 N. S. R. (19 R. & G.) 401.—CAN.

**1. Claim for possession of whale—Whale found more than three miles from shore.]—A magistrate had jurisdiction to hear & determine a claim for possession of a whale, although found more than three miles from shore,**

**where it has been brought to land.—BALDICK v. JACKSON** (1910), 30 N. Z. L. R. 343.—N.Z.

**PART IV. SECT. 2.**

**269 i. Limited to locality named in commission.]—R. v. ABBOTT** (1888), 15 O. R. 640.—CAN.

**274. — —.]—All judicial acts by persons whose authority is limited as to locality must, on the face of them, purport to be done within the locality. The act of justices in determining on the propriety of making an order to bind a parish apprentice, under 56 Geo. 3, c. 139, is judicial; but, on execution of the indenture, their allowance, under sect. 1, in pursuance of the order previously made, is not a judicial act, & consequently need not purport to be executed within the jurisdiction of the justices signing it. Where the justices act, under sect. 2, for the place in which the child is to serve, they determine on the propriety at the time of allowance; & consequently an allowance under sect. 2 is a judicial act, & must, on the face of it, purport to be executed within the jurisdiction of the justices signing.—R. v. TOTNESS (INHABITANTS)** (1849), 11 Q. B. 80; 3 New Sess. Cas. 356; 18 L. J. M. C. 46; 12 L. T. O. S. 373; 13 J. P. 283; 13 Jur. 168; 116 E. R. 406.

*Annotations:—Consd. Staverton Overseers v. Ashburton Overseers* (1855), 4 E. & B. 526. *Refd. R. v. Crowan* (1849), 14 Q. B. 221. *Mentd. Parkes v. Parkes* (1852), 2 Rob. Eccl. 518.

**275. Whether jurisdiction extends to all petty sessional divisions in county—Indictable offences.]—Defts. were indicted at the Cambridgeshire quarter sessions for conspiracy. The offence with which defts. were charged was committed in the petty sessional division of Bottisham, in the above county, but they were arrested outside the county upon a warrant, issued by a justice for the petty sessional division of Cambridge, commanding the constables to apprehend defts. & take them before the justice who signed the warrant, or other justices at Bottisham. Defts. were apprehended in pursuance of the warrant, brought before a justice for the Cambridge petty sessional division, & remanded to Chesterton, where the petty sessions for that division were usually held. At the hearing before the justices at Chesterton it was objected that they had no jurisdiction to hear a case arising in another petty sessional division. The justices overruled the objection, & committed defts. for trial. The sessions having refused to quash the indictment under Vexatious Indictments Act, 1859 (c. 17), upon the same objection, the trial was proceeded with & defts. convicted:—*Held*: the conviction was right, inasmuch as it was competent for the Justices sitting at the Cambridge petty sessional division to hear & send for trial a case arising within another petty sessional division of the same county, & therefore Vexatious Indictments Act, 1859 (c. 17), had no application.—R. v. BECKLEY** (1887), 20 Q. B. D. 187; 57 L. J. M. C. 22; 57 L. T. 716; 52 J. P. 120; 36 W. R. 160; 4 T. L. R. 151; 16 Cox, C. C. 331, C. C. R.

*Annotations:—Folld. Calstor R. D. C. v. Taylor* (1907), 97 L. T. 281; *R. v. Beacontree JJ., R. v. Wright*, [1915] 3 K. B. 388.

**276. — Under Public Health Acts.]—A person cannot be summarily convicted under above Act, for an offence against that Act, except by the justices acting in & for the petty sessional division in which the offence was committed.—R. v. BROADHURST** (1863), 1 New Rep. 477; 32 L. J. M. C. 168; 27 J. P. 580; 11 W. R. 425.

**277. — —.]—Where a rural district extends into several petty sessional divisions in a county,**

**269 ii. —.]—R. v. DOWLING** (1889), 17 O. R. 698.—CAN.

**269 iii. —.]—TOBIQUE SALMON CLUB v. McDONALD** (1904), 36 N. B. R. 589.—CAN.

**269 iv. —.]—R. v. JOHNSON** (1904), 24 C. L. T. 266; 7 O. L. R. 525; 3 O. W. R. 221.—CAN.

justices of the peace acting in & for any one of these petty sessional divisions have jurisdiction to hear & determine a complaint by the council of the rural district against overseers of a parish in one of these divisions for making default in paying over to the council a sum of money which they had been ordered by the council to pay as the contribution of the parish to the special expenses incurred by the council under above Act; & in such cases the council may make their complaint in any one of the petty sessional divisions into which their district extends, & are not limited to that petty sessional division in which the matter of complaint arose.—**CAISTOR RURAL DISTRICT COUNCIL v. TAYLOR** (1907), 97 L. T. 281; 71 J. P. 310; 5 L. G. R. 767, D. C.

*Annotation*:—**Folld. R. v. Beacontree JJ., R. v. Wright**, [1915] 3 K. B. 388.

— **Under Sale of Food & Drugs Act, 1875 (c. 63).**—*See* **FOOD & DRUGS**, Vol. XXV., p. 104, Nos. 268, 269.

— **Bastardy proceedings.**—*See* **BASTARDY**, Vol. III., pp. 389, 390, Nos. 275–280.

278. Where county partly within metropolitan police division—Justices sitting outside division—Offence committed within division.]—Resp. was charged before justices of the county of Kent, sitting at Dartford, out of the metropolitan police district, with committing an offence under Metropolitan Police Act, 1839 (c. 47), s. 54, at Bexley, which is a place within the metropolitan police district, not assigned to any of the police cts. of the metropolis:—*Held*: affirming the opinion of the justices, they had no jurisdiction to try the offence.—**DANN v. MANBY** (1872), 26 L. T. 730; 37 J. P. 117; *sub nom.* **R. v. KENT JJ., DANN v. MANBY**, 20 W. R. 627.

**Jurisdiction within boroughs & liberties.**—*See* Part I., Sect. 4, sub-sect. 2, *ante*.

### SECT. 3.—BOROUGH JUSTICES.

*See* **Municipal Corporations Act, 1882 (c. 50)**, s. 158.

279. Limited to borough.]—**HELIER v. BENHURST HUNDRED**, No. 269, *ante*.

280. — Will not be extended.]—*Ex p.* **WALLINGFORD UNION GUARDIANS**, No. 268, *ante*.

**Exclusion of jurisdiction of county justices.**—*See* Part I., Sect. 4, *ante*.

### SECT. 4.—LONDON JUSTICES.

*See* **Metropolitan Police Courts Act, 1839 (c. 71)**, s. 42; **Metropolitan Police Courts Act, 1840 (c. 84)**, s. 6; **Local Government Act, 1888 (c. 41)**, s. 115.

**To hear information for offence—Under Weights & Measures Act, 1878.**—*See* **WEIGHTS & MEASURES**.

**Entitled to benefit of statutes giving limitation of time—As in actions against metropolitan police magistrate.**—*See* **PUBLIC AUTHORITIES**.

**To whom penalties payable.**—*See* No. 1725, *post*.

**Concurrent jurisdiction of metropolitan police magistrate.**—*See* Sect. 5, *post*.

### SECT. 5.—METROPOLITAN POLICE MAGISTRATES.

*See, generally*, **Metropolitan Police Courts Act, 1839 (c. 71)**; **Metropolitan Police Courts Act, 1840 (c. 84)**; **Summary Jurisdiction Act, 1848 (c. 43)**, s. 33; **Summary Jurisdiction Act, 1879 (c. 49)**, s. 20 (10); **Interpretation Act, 1889 (c. 63)**, s. 13 (12), (13).

281. Extends to whole metropolitan area—Not limited to division in which sitting.]—The jurisdiction of a metropolitan police magistrate extends to the whole area covered by his commission, viz., the metropolitan police district, & is not limited to the division of the metropolis in the ct. of which he happens to be sitting.—**FROUD v. FROUD** (1920), 123 L. T. 176; 36 T. L. R. 505; 26 Cox, C. C. 605, D. C.

282. — — —.]—A metropolitan police magistrate may exercise at any police ct. the powers of two justices of the peace over any offence committed within the county, even though not within the district assigned to the particular police ct.—**R. v. RICHARDS** (1851), 16 L. T. O. S. 386; 15 J. P. Jo. 64.

283. Exercise of powers of two justices of the peace.]—A police magistrate sitting alone has jurisdiction under Metropolitan Police Courts Act, 1839 (c. 71), s. 14, to do any act which would otherwise require two justices.

**T.**, a pauper, was bound apprentice by the parish of A., which is within the city & liberty of Westminster, into the parish of St. George, Bloomsbury, in the county of Middlesex. Justices of the peace for the county of Middlesex have concurrent jurisdiction, & usually act within the city & liberty of Westminster. By Parish Apprentices Act, 1816 (c. 139), s. 2, where the binding of an apprentice is into a different county or jurisdiction from that in which the binding parish is situate, the indenture is to be allowed by two justices of each jurisdiction; & by 3 & 4 Will. 4, c. 63, s. 3, indentures for binding parish apprentices within any city, etc., are to be allowed by two justices, one acting for & on behalf of the city, etc., within the limits of which the apprentice is bound. By Metropolitan Police Courts Act, 1838 (c. 71), s. 14, any one police magistrate may do at any police ct. any act which by any law then in force, or by any law not containing an express enactment to the contrary thereafter to be made, was or should be directed to be done by more than one justice:—*Held*: the indenture of apprenticeship had been properly allowed by a single police magistrate sitting at his ct. within the metropolitan police district, he being a justice of the peace for the city & liberty of Westminster & county of Middlesex.—**R. v. ST. GEORGE'S, BLOOMSBURY (INHABITANTS)** (1851), 16 Q. B. 1005; 4 New Sess. Cas. 669; 20 L. J. M. C. 200; 17 L. T. O. S. 92; 15 J. P. 466; 15 Jur. 799; 117 E. R. 1166.

284. — — —.]—**R. v. RICHARDS**, No. 282, *ante*.

### SECT. 6.—ORDERS MUST SHOW JURISDICTION ON THEIR FACE.

285. General rule.]—**R. v. DOBBYN** (1696), 2 Salk. 474; 91 E. R. 408.

#### PART IV. SECT. 3.

g. Stipendiary magistrate for municipal district—Jurisdiction in incorporated town within district.]—**JONES v. THOMPSON** (1917), 51 N. S. R. 192. CAN.

h. Offence outside borough but within province—Discretion of stipendiary magistrate.]—*Re* **SEELEY** (1908), 41 S. C. R. 5.—CAN.

k. Police magistrate of city or incorporated town—Jurisdiction throughout province.]—**R. v. McEWEN** (1908), 17 Man. L. R. 477.—CAN.

l. Exercise of jurisdiction in other boroughs—Police magistrate—When requested.]—**R. v. FARRELL** (1907), 10 O. W. R. 790; 15 O. L. R. 100.—CAN.

m. Whether residence within city essential.]—**R. v. MORRIS** (1920), 53

N. S. R. 525.—CAN.

#### PART IV. SECT. 6.

285 i. General rule.]—**CORBET v. MCCracken** (1878), 2 P. & B. 157.—CAN.

n. Jurisdiction not stated in conviction—Territorial jurisdiction—Location of offence appearing in deposition.]—**R. v. PERRIN** (1888), 16 O. R. 446.—CAN.



*Sect. 6.—Orders must show jurisdiction on their face. Part V. Sects. 1 & 2: Sub-sect. 1.]*

286. —.]—An order of two justices must show the county in which it was made.—ANON. (1710), 11 Mod. Rep. 266; 88 E. R. 1030.

287. —.]—If, by 57 Geo. 3, c. 87, justices of one local jurisdiction have authority to convict for an offence committed within another, such authority must appear upon the face of the conviction.

Where justices of the port of D. convicted for an offence committed in the port of F. which had an exclusive jurisdiction, without showing on the face of the conviction that they had authority to do so, the conviction was quashed.—*Ex p. KITE* (1822), 2 Dow. & Ry. K. B. 212; 1 Dow. & Ry. M. C. 222.

*Annotation:—Refd. R. v. Nunn* (1828), 3 Man. & Ry. K. B. 75.

288. —.]—An indenture of apprenticeship was allowed by two justices describing themselves as “justices of the peace of the said county, dwelling in or near the said parish.” The county last mentioned was a county in respect of which they would not have jurisdiction over the subject-matter; but the parish last mentioned had been described as in a county in respect of which they would have jurisdiction:—*Held*: the expression, taken entire sufficiently referred to the county which gave them jurisdiction; although, according to strict grammatical construction, the word “said” referred to the county last antecedent.—*R. v. COUNTSTHORPE (INHABITANTS)* (1831), 2 B. & Ad. 487; 9 L. J. O. S. M. C. 77; 109 E. R. 1224.

*Annotations:—Refd. R. v. Ashburton* (1846), 2 New Sess. Cas. 316. *Mentd. R. v. Hunt* (1847), 9 L. T. O. S. 495.

289. —.]—A warrant of commitment stated, that G. P. had been duly convicted before W. G. & T. B., two of Her Majesty’s justices of the peace for the county of Kent, for that he, G. P. being a subject, etc., was found on the high seas, within one hundred leagues of the coast of the United Kingdom, to wit, the coast of the county of Kent, on board a vessel there, from which part of the cargo had been thrown overboard, to prevent seizure:—*Held*: (1) as *prima facie* the magistrates had no jurisdiction upon the high seas, the warrant did not show jurisdiction, as it did not sufficiently disclose the circumstances from which alone jurisdiction was given to the magistrates; (2) the offences under 3 & 4 Will. 4, c. 53, s. 77, not being repealed by 4 & 5 Will. 4, c. 13, s. 2, the words “any two justices” in that sect. did not give jurisdiction to all justices in the United Kingdom, without reference to the limits of their commission, & it was not always enough to follow the form of warrant given in the Act.—*Re PEERLESS* (1841), 1 Q. B. 143; 4 Per. & Dav. 528; 10 L. J. M. C. 67; 5 Jur. 748; 113 E. R. 1084; *sub nom. R. v. PEERLESS*, Arn. & H. 133; 5 J. P. 239.

*Annotation:—As to (2) Refd. Ex p. Wallingford Union Grdns.* (1841), 9 Dowl. 987.

290. —.]—The allowance [in an indenture of apprenticeship] purported to be made by two of

His Majesty’s justices of the peace in & for the West Riding of the county of Y., etc.:—*Held*: it sufficiently appeared to have been made within their jurisdiction.—*R. v. ALDBROUGH (INHABITANTS)* (1849), 13 Q. B. 190; 3 New Sess. Cas. 486; 18 L. J. M. C. 81; 13 L. T. O. S. 46; 13 J. P. 331; 13 Jur. 322; 116 E. R. 1236.

*Annotation:—Refd. R. v. St. George, Bloomsbury* (1855), 4 E. & B. 520.

291. —.]—Justices, by a regular order, having the county as *venue*, removed a pauper to his settlement; & they, at the same time, by indorsement on the order of removal, suspended the execution on account of his illness. Afterwards one of the same justices & another justice, by order indorsed on the first order, directed a removal; &, by a contemporaneous order, similarly indorsed, they directed payment of expenses. The last two orders did not, either by *venue* in the margin or statement in the body, show that they were made in the county:—*Held*: they were bad for this fault; & they were quashed on *certiorari*.—*R. v. CROWAN (INHABITANTS)* (1849), 14 Q. B. 221; 4 New Mag. Cas. 13; 3 New Sess. Cas. 663; 19 L. J. M. C. 20; 14 L. T. O. S. 172; 14 J. P. 207; 13 Jur. 1099; 117 E. R. 88.

292. —.]—An order of justices for the binding of a parish apprentice, made under Parish Apprentices Act, 1816 (c. 139), must show on the face of the order itself that the justices acted at the time within their jurisdiction.

Where, in the order two justices of the county of Middlesex, by whom it was made, were described as justices of the peace “of the said county,” & in the margin were the words “Middlesex, to wit,” & the order purported to be signed “at the boardroom of the Holborn Union Workhouse”:—*Held*: the ct. could not take judicial notice that the boardroom was in the county of Middlesex; & the order did not show on the face of it that the justices were acting within their jurisdiction, & being therefore bad, no settlement by service under the apprenticeship was gained.—*R. v. ST. GEORGE’S, BLOOMSBURY (INHABITANTS)* (1855), 4 E. & B. 520; 3 C. L. R. 550; 24 L. J. M. C. 49; 24 L. T. O. S. 213; 19 J. P. 166; 1 Jur. N. S. 231; 3 W. R. 170; 119 E. R. 190.

*Annotations:—Distd. R. v. Holborn Union Grdns.* (1856), 8 E. & B. 715. *Refd. R. v. Staverton* (1855), 3 W. R. 173.

293. —.]—The allowance of justices to an indenture for binding a parish apprentice under Poor Relief Act, 1601 (c. 2), is a judicial act, & it must appear on the face of the allowance that the justices were at the time of granting it acting within their jurisdiction.—*STAVERTON (CHURCHWARDENS, ETC.) v. ASHBURTON (CHURCHWARDENS, ETC.)* (1855), 4 E. & B. 526; 24 L. J. M. C. 53; 1 Jur. N. S. 233; 119 E. R. 193; *sub nom. R. v. STAVERTON*, 3 C. L. R. 562; 24 L. T. O. S. 214; 19 J. P. 229; 3 W. R. 173.

*See, also*, Part VIII., Sect. 5, sub-sect. 1, B. (a), *post*; *BASTARDY*, Vol. III., pp. 401, 402, No. 349.

*Judicial notice by court of places mentioned in order.*—*See EVIDENCE*, Vol. XXII., pp. 151, 152, Nos. 1281–1296.

## Part V.—Petty Sessions and Special Sessions.

### SECT. 1.—PETTY SESSIONS.

**294. Creation of division.]—**37 Geo. 3, c. 143, s. 1, by which the justices at their respective petty sessions within the divisions, districts, & other places of the several counties of England, are authorised to appoint examiners of weights & balances, extends only to such divisions, etc., as were known & recognised at the time when the Act passed; &, therefore, such appointment made at a petty sessions, by two justices for a district which they had, without the consent of the other magistrates, created within the last five or six years, was held to be illegal.—*R. v. DEVON JJ.* (1818), 1 B. & Ald. 588; 106 E. R. 216.

*Annotation:—*Consd. *R. v. Whittles* (1849), 13 Q. B. 248.

*See* Division of Counties Act, 1828 (c. 43); Petty Sessional Divisions Act, 1836 (c. 12); Petty Sessions Act, 1849 (c. 18); Petty Sessions & Lock-up House Act, 1868 (c. 22); Public Works Loans Act, 1875 (c. 89), s. 40; Summary Jurisdiction Act 1879 (c. 49), ss. 20, 30; Summary Jurisdiction Act, 1884 (c. 43), s. 8; Municipal Corporations Act, 1882 (c. 50), ss. 105, 160; Local Government Act, 1888 (c. 41), s. 3; Interpretation Act, 1889 (c. 63), s. 13.

**295. — Holding of sessions at various places within division—Will not create new division.]—**The fact of petty sessions for a division of a county having been usually held at several places within the limits of that division does not constitute such places separate petty sessional divisions under Bastardy Act, 1845 (c. 10), s. 10.—*R. v. WHITTLES* (1849), 13 Q. B. 248; 3 New Mag. Cas. 102; 3 New Sess. Cas. 397; 18 L. J. M. C. 96; 12 L. T. O. S. 447; 13 J. P. 365; 13 Jur. 403; 116 E. R. 1258.

*Annotation:—*Refd. *Lawson v. Reynolds*, [1904] 1 Ch. 718.

**296. Petty sessional court house—What is.]—**In a borough which had no separate commission of the peace the mayor & a county justice used to sit at the town hall, where they held petty & special sessions. Since Summary Jurisdiction Act, 1879 (c. 49), s. 20, petty sessions had been held at the county hall only, but latterly, since Summary Jurisdiction Act, 1884 (c. 43), the justices again sat in the town hall:—*Held*: the town hall was a petty sessional court house within Summary Jurisdiction Act, 1879 (c. 49), s. 20, being a place where justices were accustomed to assemble.—*JONES v. JONES* (1886), 51 J. P. 198.

**297. — Cost of providing.]—**A local Act passed in 1843 provided for the appointment of a stipendiary justice for a certain district & empowered quarter sessions of the county to provide "a suitable office or offices for transacting the magisterial business of the district included within the limits of this Act." The salary of the justice & the expenses of providing the office or offices were to be paid out of rates levied under the Act upon the district. In 1845 an office was provided which was used as a petty sessional court house. By subsequent local Acts of 1868 & 1894 the district was extended, & the justice was required to sit in different parts of the added areas, the powers of the Act of 1843 being applied to the whole district:—*Held*: the words "office or offices" in the Act of 1843 included cts. for the justice to act in, & the enactment for the provision of such cts. was not impliedly repealed by Petty Sessions Act, 1849 (c. 18); &, therefore, the cost of providing additional petty sessional court houses required

for the district was chargeable upon the district within the limits of the local Acts & not upon the county generally.—*R. v. HUNTON, Ex p. GLAMORGANSHIRE COUNTY COUNCIL* (1904), 68 J. P. 453; 2 L. G. R. 917, C. A.

### SECT. 2.—SPECIAL SESSIONS.

#### SUB-SECT. 1.—IN GENERAL.

*See* Division of Counties Act, 1828 (c. 43); Petty Sessional Divisions Act, 1836 (c. 12); Licensing (Consolidation) Act, 1910 (c. 24), s. 83.

**298. General nature of special sessions.]—**Justices sitting in special petty sessions under Juries Act, 1825 (c. 50), s. 10, for revising the lists of jurors, are not a ct. of summary jurisdiction within Interpretation Act, 1889 (c. 63), s. 13 (11), & have no power under Summary Jurisdiction Act, 1879 (c. 49), s. 33, or otherwise to state a special case for the opinion of the High Ct. upon the application of a person aggrieved by their decision.

It more nearly resembles the proceedings of a public authority, who are allowed to act on their own knowledge without being bound & fettered by the ordinary rules of evidence; &, in my opinion the provisions of Summary Jurisdiction Act, 1879 (c. 49), are not sufficient to justify us in holding that justices, when acting under Juries Act, 1825 (c. 22), are a ct. of summary jurisdiction with power to state a special case (*LORD ALVERSTONE, C.J.*).—*HAGMAIER v. WILLESSEN OVERSEERS*, [1904] 2 K. B. 316; 73 L. J. K. B. 638; 90 L. T. 683; 68 J. P. 343; 20 T. L. R. 494; 2 L. G. R. 965; *sub nom.* *HOGMAIER v. WILLESSEN OVERSEERS*, 52 W. R. 654; 48 Sol. Jo. 494, D. C.

*Annotations:—*Fold. *Newman v. Foster* (1916), 86 L. J. K. B. 360. Refd. *R. v. Johnson, Ex p. Thornely* (1905), 92 L. T. 654; *R. v. Southampton Licensing JJ., Ex p. Cardy*, [1906] 1 K. B. 446; *R. v. Allen* (1911), 81 L. J. K. B. 258; *Huish v. Liverpool JJ.*, [1914] 1 K. B. 109.

**299. Order for division of county—Whether appeal lies.]—**Where an order for altering the arrangement of the parishes, etc., of any county for the purpose of holding special sessions has been made under Division of Counties Act, 1828 (c. 43), ss. 2, 4, there is no appeal against it, sects. 8 & 9 of that Act applying to orders made under the authority of sect. 7 only.—*R. v. DERBYSHIRE JJ.* (1832), 1 Dowl. 386.

**300. Order of special sessions—Need not show jurisdiction on its face.]—**Where an order made by three justices of a petty sessional division of a county, on the county treasurer, for the payment of the expenses of special constables, who had been called out & had served in such division, under Special Constables Act, 1831 (c. 41), has been obeyed by the treasurer, & the expenses have been incurred, the money paid, & the item allowed in his accounts, the ct. will not issue the writ of *certiorari* for the purpose of quashing the order, upon grounds affecting the regularity of the proceedings in respect of the appointment of the constables, or the making of the order. *Semble*: such an order is in the nature of a direction to the officer of the justices, & need not show on the face of it that the justices signing it had jurisdiction to make it.—*R. v. NEWBOROUGH (LORD)* (1869), L. R. 4 Q. B. 585; 10 B. & S. 586; 38 L. J. M. C.



**Sect. 2.—Special sessions: Sub-sects. 1 & 2. Sect. 3. Part VI. Sects. 1, 2, 3 & 4.]**

129; 17 W. R. 861; *sub nom.* R. v. CARNARVON-SHIRE JJ., 20 L. T. 818.

*Annotations:—Mentd.* R. v. Surrey JJ. (1870), L. R. 5 Q. B. 466; R. v. Johnson (1905), 74 L. J. K. B. 585.

**Notice of sessions—Under Highway Acts.]—**See HIGHWAYS, Vol. XXVI., pp. 480, 481, Nos. 1919–1927.

#### SUB-SECT. 2.—PARTICULAR SESSIONS.

**Brewster sessions.]—**See INTOXICATING LIQUORS, Vol. XXX., p. 12, Nos. 43 *et seq.*

**Billiard licences.]—**See THEATRES.

**Licensed houses for lunatics.]—**See Lunacy Act, 1890 (c. 5), s. 177; LUNATICS.

**Reformation of jury list.]—**See JURIES Act, 1922 (c. 11); JURIES, Vol. XXX., p. 213, Nos. 12 *et seq.*

**Music & dancing licences.]—**See THEATRES.

**Rating appeals.]—**See RATES & RATING.

**Regulations as to explosives.]—**See PUBLIC HEALTH.

**Theatre licences.]—**See THEATRES.

#### SECT. 3.—POWERS EXERCISABLE AT PETTY OR SPECIAL SESSIONS.

**Powers under Highways Acts.]—**See HIGHWAYS, Vol. XXVI., p. 476, Nos. 1890 *et seq.*

**Appointment of overseers.]—**See LOCAL GOVERNMENT, pp. 30, 31 Nos. 146, 156; POOR LAW.

**Appointment of special constables.]—**See POLICE.

## Part VI.—Jurisdiction of Courts of Summary Jurisdiction and Single Justices.

### SECT. 1.—WHEN JUSTICES FORM COURT OF SUMMARY JURISDICTION.

See Summary Jurisdiction Act, 1879 (c. 49), s. 20; Interpretation Act, 1889 (c. 63), s. 13; & generally, COURTS, Vol. XVI., p. 99, Nos. 6–14.

**Justices acting under Costs in Criminal Cases Act, 1908 (c. 15).]**—See CRIMINAL LAW, Vol. XV., p. 615, No. 6434.

**Distress for rates.]—**See DISTRESS, Vol. XVIII., pp. 398, 399, 415, 422, Nos. 1389–1397, 1546–1550, 1603–1605.

**Licensing justices.]—**See INTOXICATING LIQUORS, Vol. XXX., pp. 69, 70, Nos. 546–548.

**In lunacy matters.]—**See LUNATICS, pp. 249 *et seq.*, *ante*.

**In public health & vaccination matters.]—**See PUBLIC HEALTH.

**In rating matters.]—**See RATES & RATING.

**Theatre & cinema licences.]—**See THEATRES.

### SECT. 2.—OFFENCES SUMMARILY PUNISHABLE.

See Summary Jurisdiction Act, 1879 (c. 49), s. 20, Interpretation Act, 1889 (c. 63), s. 13.

**301. Creature of statute.]—**All summary jurisdiction is the creature of statute (BLACKBURN, J.).—WHITE v. FEAST (1872), as reported in L. R. 7 Q. B. 353; 26 L. T. 611; 36 J. P. 436; *sub nom.* R. v. NORFOLK JJ., WHITE v. FEAST, 20 W. R. 382.

*Annotations:—Refd.* R. v. Muscott (1872), 26 L. T. 429; R. v. Marshall (1876), 35 L. T. 373; R. v. Fane JJ. Jo. 329. *Mentd.* R. v. French (1873), 37 J. P. 429; R. v. Thwaites (1876), 2 Ex. D. 21; Cole

(1899), 79 L. T. 734; Heaven v. Crutchley (1903), 68 J. P. 53.

**302. — Offence must be strictly within statute.]—**4 Geo. 4, c. 34, s. 1, does not apply

where the offence charged amounts to a felony. Therefore where deft. under that statute was convicted by two justices, “for that he the said W. did contract with T., as a servant in husbandry, & hath, in his said service & employment, been guilty of divers misdemeanours, in that he, the said W. did, on etc., purloin a quantity of barley to give to the horses under his care, contrary to the express commands of the said T.:—*Held*: the offence charged here was a felony irrespective of the contract of service, & therefore a conviction under the statute was invalid.

Justices should never convict summarily without all the necessary statutable preliminaries being complied with. In a case of this sort a summary conviction cannot be allowed merely because deft. has been guilty of a misdemeanour whilst he remained in the service, but it should appear that the misdemeanour consisted of some misconduct which was a violation of his contract of service; it is therefore important that the terms of the contract should be stated (COLERIDGE, J.).—*Re* JACKLIN (1844), 1 New Sess. Cas. 280; *sub nom.* *Ex p.* JACKLIN, 2 Dowl. & L. 103; 13 L. J. M. C. 139; 3 L. T. O. S. 207; 8 J. P. 539.

**303. — May be given by implication.]—**By Contagious Diseases (Animals) Act, 1870 (c. 70), s. 57, if any person exposes, in a public place where animals are commonly exposed for sale, any animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against this Act, unless he shows, to the satisfaction of the justices before whom he is charged, that he did not know of the same being so affected; & by sect. 103 a penalty not exceeding £20 is imposed on any person guilty of an offence against the Act:—*Held*: jurisdiction was impliedly given to justices summarily to convict in a penalty

#### PART VI. SECT. 2.

**a. Assault.]—**R. v. ADONCHUK (Alta.), [1919] 1 W. W. R. 987.—CAN.

293; [1923] 1 W. W. R. 1155.—CAN.

**q. Obstructing peace officer.]—**R. v. FOLKINS, *Ex p.* MCADAM (1915), 43 N. B. R. 538.—CAN.

**r. Trespassing on railway tracks.]—**R. v. HUGHES (1895), 26 O. R. 486.—CAN.

**t. Wife beating.]—**R. v. ZYLA (1910), 17 W. L. R. 258.—CAN.

**a. Theft of goods valued less than**

**ten dollars.]—**R. v. BABIUK (Alta.) [1925] 1 D. L. R. 243; [1924] 1 W. W. R. 858.—CAN.

**b. Solemnisation of infant's marriage.]—**R. v. GALLANT (1861), 10 N. B. R. (5 All.) 115.—CAN.

**c. Title to land involved.]—**If, in a prosecution before a justice of the peace, under Highway Act, the title to land comes in question, it must be gone into by the justice if he entertains

**LANEGRAFF, [1923] 2 D. L. R. 39 Can. Crim. Cas. 318; 1(**

a person guilty of an offence under Contagious Diseases (Animals) Act, 1870 (c. 70), s. 57.—*CULLEN v. TRIMBLE* (1872), L. R. 7 Q. B. 416; 41 L. J. M. C. 132; 26 L. T. 691; *sub nom.* *R. v. LANCASHIRE JJ.*, *CULLEN v. TRIMBLE*, 20 W. R. 701; *sub nom.* *CULLEN v. LANCASHIRE JJ.*, 37 J. P. 115.

*Annotation* :—*Apld.* *Johnson v. Colam* (1875), L. R. 10 Q. B. 544.

**304.** ———.] — By Contagious Diseases (Animals) Act, 1869 (c. 70), s. 64, food & water are to be provided at railways to the satisfaction of the Privy Council, & such food & water is to be supplied, on the request in writing of the consignor or person in charge, to animals carried on the railway, & if in the case of any animal such a request as aforesaid is not made, so that the animal remains without a supply of water for thirty consecutive hours, or other period of not less than twelve hours as the Privy Council shall from time to time by order prescribe, the consignor & the person in charge of the animal shall each be deemed guilty of an offence against the Act :—*Held* : by implication jurisdiction was given to justices summarily to convict & impose a penalty upon any person guilty of an offence against Contagious Diseases (Animals) Act, 1869 (c. 70), s. 64.—*JOHNSON v. COLAM* (1875), L. R. 10 Q. B. 544; 44 L. J. M. C. 185; 32 L. T. 725; 40 J. P. 135; 23 W. R. 697, D. C.

*Annotation* :—*Consd.* *Swan v. Saunders* (1881), 44 L. T. 424.

**305. Matters not cognisable by justices under summary jurisdiction—Breach of statutory direction where no penalty provided.**—3 Geo. 4, c. cvi., s. 8, & therefore Bread Act, 1836 (c. 37), s. 6, which is in the same terms, though directing that every baker, etc., shall fix in his shop proper weights & scales, etc., does not provide a penalty for the breach of this duty, which therefore does not constitute an offence cognisable by a ct. of summary jurisdiction.—*R. v. SMITH* (METROPOLITAN MAGISTRATE) & AERATED BREAD CO. (1894), 63 L. J. M. C. 67; 70 L. T. 373; 58 J. P. 445; 17 Cox, C. C. 735; *sub nom.* *Re AERATED BREAD CO.*, *R. v. SMITH* (METROPOLITAN POLICE MAGISTRATE), 10 T. L. R. 227, D. C.

**306.** ——— **Blasphemy.**—Justices of the peace have no jurisdiction over scandalous words defamatory of religion.—*ATWOOD'S CASE* (1617), Cro. Jac. 421; 79 E. R. 359.

**307.** ——— **Obstructing highway—Town Police Clauses Act, 1847 (c. 89), s. 28.**—Three men walked abreast on the pavement of a street back & forward, causing passengers to go aside on the highway. On a summons under above sect. :—*Held* : they could not be convicted, as they had not used any cart, carriage, or animal, & the only remedy seemed to be by indictment.—*R. v. LONG, ETC.*, JJ. (1888), 59 L. T. 33; 52 J. P. 630; 4 T. L. R. 584; 16 Cox, C. C. 442, D. C.

*Annotations* :—*Folld.* *R. v. Williams* (1891), 55 J. P. 406. *Expld.* *Gill v. Carson & Nield*, [1917] 2 K. B. 674.

**308.** ———.] — Four men walked abreast on the pavement, causing passengers to go into the carriageway in order to pass, & were

the suit.—*R. v. BUCHANAN* (1848), 3 Kerr, 674.—CAN.

**d.** ———.] — *DOOHAN v. LAFOREST* (1885), 24 N. B. R. 553.—CAN.

**e. Offences triable by two justices—Without accused's consent.**—*R. v. SHING* (1910), 20 Man. L. R. 214.—CAN.

**f.** ———.] — Deft. was convicted by two justices of an assault causing actual bodily harm, & being imprisoned pursuant to the conviction, applied for a *habeas corpus* :—*Held* :

the justices had jurisdiction to try the accused without his consent.—*R. v. PROKOPATZ* (1914), 29 W. L. R. 88; 18 D. L. R. 696; 7 Sask. L. R. 95; 6 W. W. R. 405; 23 Can. Crim. Cas. 189.—CAN.

**g.** ———.] — *Re WORRELL* (1915), 30 W. L. R. 915; 8 W. W. R. 230, 478; 21 D. L. R. 519, 522; 24 Can. Crim. Cas. 88.—CAN.

**h.** ———.] — *R. v. LAW* (1916), 33 W. L. R. 569; 9 W. W. R. 1075.—CAN.

charged under above sect. with obstructing the highway :—*Held* : this was not an offence punishable summarily, but might be indictable.—*R. v. WILLIAMS* (1891), 55 J. P. 406.

— **Indictable offences.**—See CRIMINAL LAW, Vol. XIV., pp. 202–208, Nos. 1814–1900.

### SECT. 3.—JURISDICTION IN CIVIL MATTERS.

**309. Cannot be conferred by consent.**—13 Geo. 3, c. 78, s. 48, which requires the accounts of the surveyors of highways to be laid before one justice, & on his refusal to allow them, before the justices at petty sessions, gives no original jurisdiction over the accounts to the justices at petty sessions, even if by consent of all parties they be laid before them.

The Act of Parliament gives no original jurisdiction whatever to the justices at petty sessions. How can we decide that mere consent of parties shall give a jurisdiction which is withheld by Act of Parliament? The safe course will certainly be to hold that consent cannot have any such effect (LORD DENMAN, C.J.).—*R. v. GOODENOUGH* (1835), 2 Ad. & El. 463; 111 E. R. 179; *sub nom.* *R. v. CUMBERLAND JJ.*, 1 Har. & W. 497; 5 Nev. & M. K. B. 578; 3 Nev. & M. M. C. 451; 4 L. J. M. C. 104.

—See COURTS, Vol. XVI., pp. 117–119, Nos. 153–174.

See, generally, Titles *passim*.

### SECT. 4.—POWERS OF SINGLE JUSTICE.

See Criminal Law Act, 1826 (c. 64); Indictable Offences Act, 1848 (c. 42); Summary Jurisdiction Act, 1848 (c. 43), ss. 12, 29; Summary Jurisdiction Act, 1879 (c. 49), s. 20; Interpretation Act, 1889 (c. 63), s. 13.

**310. To receive information or complaint.**—*R. v. WESTWOODHAY* (INHABITANTS) (1717), as reported in Cas. Sett. 82.

**311.** ———.] — An information for an offence against any Act relating to the customs may, notwithstanding 8 & 9 Vict. c. 87, s. 82, be laid before a single justice of the peace, although not less than two justices must be present at the hearing of a summons issued upon such information.—*R. v. RUSSELL* (1849), 13 Q. B. 237; 3 New Sess. Cas. 368; 12 L. T. O. S. 448; 13 J. P. 70; 116 E. R. 1254; *sub nom.* *Re RUSSELL*, *R. v. HARWICH JJ.*, 18 L. J. M. C. 106; 13 Jur. 259.

**312.** ———.] — An information for using a place for betting contrary to Betting Act, 1853 (c. 119), s. 3, does not require to be laid before two justices; one will suffice.—*LEE v. GOLD* (1880), 44 J. P. 395, D. C.

**313.** ——— **Unless precluded by statute.**—The provision in 3 Geo. 4, c. 23, s. 2, that, in all cases where two or more justices, deputy lieutenants or others, are authorised to hear & determine any complaint, one justice, etc., shall be competent

### PART VI. SECT. 3.

**k. Debt exceeding £5.**—A justice of the peace has no jurisdiction, under 4 Wm. IV. c. 45, in cases of debt where the amount exceeds £5, unless reduced to that sum by actual payments.—*WHITE v. MACKLIN* (1840), 1 Kerr, 94.—CAN.

**l.** ———.] — *DRAPER v. MUNROE* (1847), 3 Kerr, 438.—CAN.

**m. Trespass—Action in small debts court.**—*FARQUHARSON v. CORTESI* (B. C.), [1918] 3 W. W. R. 193.—CAN.



**Sect. 4.—Powers of single justice. Sect. 5.]**

to receive the original information, does not repeal provisions of former statutes, expressly requiring more than one justice, etc., to receive an information. Therefore, a conviction on an information laid before a single comr. of assessed taxes (not being a justice), under 52 Geo. 3, c. 93, sched. (L), r. 13, is bad.—*R. v. GRIFFIN* (1846), 9 Q. B. 155; 2 New Sess. Cas. 368; 15 L. J. M. C. 120; 7 L. T. O. S. 225; 10 J. P. 483; 10 Jur. 493; 115 E. R. 1234.

— **In bastardy proceedings.]—See BASTARDY**, Vol. III., p. 389, Nos. 275, 276.

**314. To hand over absentee to military custody.]**—On a charge of being an absentee from His Majesty's forces under Army Act, 1881 (c. 58), s. 154 (1), & Reserve Forces Act, 1882 (c. 48), s. 16 (1):—*Held*: where the accused is charged with a view, if the charge is proved, of his being handed over to military custody, he can be dealt with by a single justice.—*WALDER v. TURNER*, [1917] 1 K. B. 39; 85 L. J. K. B. 1570; 115 L. T. 550; 80 J. P. 405; 33 T. L. R. 1; 14 L. G. R. 1094.

**315. Order for payment of wages.]—SHERGOLD v. HOLLOWAY** (1734), Sess. Cas. K. B. 154; 2 Stra. 1002; 93 E. R. 156.

*Annotations*:—*Reid. Entick v. Carrington* (1765), 2 Wils. 275; *Morrell v. Martin* (1841), 3 Man. & G. 581.

**SECT. 5.—SPECIAL POWERS OF METROPOLITAN POLICE MAGISTRATES.**

*See Metropolitan Police Courts Act, 1839* (c. 71); *Indictable Offences Act, 1848* (c. 42), s. 29; *Summary Jurisdiction Act, 1848* (c. 43), s. 33; *Summary Jurisdiction Act, 1879* (c. 20), s. 20; *Interpretation Act, 1889* (c. 63), s. 13; *Police Property Act, 1897* (c. 30); *Telegraph Act, 1878* (c. 76), ss. 4, 5; *Merchant Shipping Act, 1894* (c. 6), s. 610; *London County Council (General Powers) Act, 1915* (c. ciii).

**316. To exercise powers of two justices—Jurisdiction must appear on face of order.]—An order**

of removal stated, "whereas complaint has been made unto me, one of Her Majesty's justices of the peace in & for the county of Middlesex, one of the police magistrates of the metropolis, sitting at the plice ct., Great Marlborough street, in the parish of St. James, Westminster, within the metropolitan police district, by the churchwardens & overseers of, etc., that J. & E. are lately come into the said parish, endeavouring to settle there contrary to law; & it appeareth unto me, etc., & I do adjudge that they are become chargeable to the said parish" etc.:—*Held*: the jurisdiction of the single justice, as a police magistrate, sufficiently appeared on the face of the order.—*R. v. ST. GILES-IN-THE-FIELDS (INHABITANTS)* (1846), 7 Q. B. 529; 1 New Mag. Cas. 578; 2 New Sess. Cas. 389; 15 L. J. M. C. 122; 7 L. T. O. S. 206; 10 J. P. 553; 10 Jur. 754; 115 E. R. 588.

*Annotation*:—*Reid. R. v. St. Paul, Covent Garden* (1846), 11 J. P. 70.

**317. — Payment by parish officers of disallowance by auditor.]—A metropolitan police magistrate sitting alone, has jurisdiction to hear & determine an information by the auditor of a metropolitan poor law district, for non-payment of disbursements regularly disallowed, & surcharged by such auditor, & certified to the Poor Law Comrs. under Poor Law Amendment Act, 1844 (c. 101), s. 32, where such information is laid within nine calendar months from the time of the disallowance, as required by Poor Law Amendment Act, 1849 (c. 103), s. 9, although not until after the limitation of six calendar months mentioned in Metropolitan Police Courts Act, 1839 (c. 71), s. 44, has expired.—*R. v. TYRWHITT* (1850), 15 Q. B. 249; 4 New Mag. Cas. 110; 4 New Sess. Cas. 266; 19 L. J. M. C. 249; 15 L. T. O. S. 299; 14 J. P. 482; 14 Jur. 1024; 117 E. R. 452.**

*Annotation*:—*Apld. R. v. St. George, Bloomsbury* (1851), 16 Q. B. 1005.

**318. — Recovery of cost of road repairs—Metropolis Management Act, 1890** (c. 66), s. 3—**Court of competent jurisdiction.]—A metropolitan police magistrate is a "ct. of competent jurisdiction" within above sect. & has jurisdiction to entertain proceedings for the recovery from the**

**PART VI. SECT. 4.**

**314i. To hand over absentee to military custody.]—Qu.**: whether an order committing to military custody can be made by a single magistrate.—*R. v. JONES*, [1917] 2 J. R. 7.—**IR.**

**n. To examine witnesses—Proceedings on search warrant.]—Where a prisoner is brought before a single justice, not upon warrant or summons but in the execution of a search warrant the justice has power to examine witnesses on oath.—*R. v. HAMMOND* (1878), 1 N. S. W. S. C. R. N. S. 42.—**AUS.****

**o. To adjourn proceedings.]—One justice of the peace has power at the return day of the summons to adjourn the proceedings till a future day.—*Ex p. HOLDER* (1866), 6 All. 338.—**CAN.****

**p. —.]—If, after the entry of a summary conviction a magistrate reserves the question of the penalty to be imposed, & adjourns the case sine die for the purpose of considering "his jurisdiction is lost.—*R. TURNER*, [1924] 4 D. L. R. 916; [1925] 1 W. R. 512; 43 Can. Crim. Cas. 78; 20 Alta. L. R. 545.—**CAN.****

**q. No power to override associate justices.]—*R. v. MILNE* (1875), 25 C. P. **CAN.****

**r. In absence of police magistrate.]—*R. v. GORDON* (1888), 16 O. R. 64, **CAN.****

**t. To take view of locus—By con-**

**sent only.]—A police magistrate, upon a summary trial, under Part XVI. of the Criminal Code, has no right, unless by consent, to take a view of the locus of the offence.—*R. v. CRAWFORD* (1913), 22 W. L. R. 969; 10 D. L. R. 96.—**CAN.****

**a. Power of police magistrate—Power conferred by statute—But no rules & orders made.]—*MARCOIL v. CANADIAN KLONDIKE MINING CO.* (Y. T.) (1913), 25 W. L. R. 339; 13 D. L. R. 805.—**CAN.****

**b. No power to allow charge to be withdrawn.]—*R. v. CHEW DEB* (1913), 23 W. L. R. 308; 18 B. C. R. 23; 9 D. L. R. 266.—**CAN.****

**c. Powers of police magistrate—When conferred by ultra vires Act.]—*R. v. TOLAND* (1892), 22 O. R. 505.—**CAN.****

**d. — To hear information—On request from magistrate having jurisdiction.]—*R. v. CRUIKSHANKS* (1914), 27 W. L. R. 759; 6 W. W. R. 524; 16 D. L. R. 536; 7 Alta. L. R. 92.—**CAN.****

**e. Over offence committed outside jurisdiction—Accused found within jurisdiction.]—Criminal Code, s. 577, permits a police magistrate for a certain territorial jurisdiction to try a prisoner for an offence committed without that jurisdiction if the accused is found within it.—*R. v. THORNTON* (1916), 33 W. L. R. 178, 398; 9 W. W. R. 825.—**CAN.****

**f. To request another justice to act in his absence.]—A police magistrate having jurisdiction & being about to be absent may request a justice of the peace to act in his place in all police court work during his absence.—*DWYER v. BULBECK* (Sask.), [1923] 1 D. L. R. 597; [1922] 3 W. W. R. 391.—**CAN.****

**g. To suspend sentence.]—*R. v. HIEBERT* (Man.), [1923] 3 W. W. R. 243.—**CAN.****

**h. After issuing valid warrant.—Once a magistrate has issued a valid & proper warrant of commitment he has exhausted his jurisdiction & becomes *functus officio*.—*R. v. GRAY*, [1925] 1 W. W. R. 831; 43 Can. Crim. Cas. 395.—**CAN.****

**k. To order production of documents.]—Where the comr. appointed to hold an inquiry under Commissions of Inquiry Act, 1908, is a magistrate, he has the same power to order the production & inspection of documents as a magistrates' ct. under Magistrates & Courts Act, 1908, s. 83.—*Re ST. HELENS HOSPITAL* (1913), 32 N. Z. L. R. 682.—**N.Z.****

**l. To take affidavits—Anywhere in Great Britain.]—A Scottish justice of the peace can competently exercise acts of voluntary jurisdiction, e.g. taking affidavits in proceedings, when in England.—*KERR v. AILSA (MARQUIS)* (1854), 17 Dunl. (H. L.) 11; 1 Macq. 736; 26 Sc. Jur. 525.—**SCOT.****



frontagers of the expenses of repairs done by a borough council under the provisions of that sect. to a carriage road which is not repairable by the inhabitants at large.—*R. v. GARRETT*, [1907] 1 K. B. 881; 76 L. J. K. B. 358; 96 L. T. 407; 71 J. P. 171; 23 T. L. R. 308; 51 Sol. Jo. 265; 5 L. G. R. 358, C. A.

**319. Order for restitution of stolen goods—Metropolitan Police Courts Act, 1839 (c. 71), s. 40—Refusal of court convicting thief to make order—Jurisdiction of magistrate.]**—The refusal of the ct., before which a thief has been convicted, to make an order for restitution of pawned stolen goods under Pawnbrokers Act, 1872 (c. 93), s. 30, is no bar to the exercise in the metropolis of the summary jurisdiction under Metropolitan Police Courts Act, 1839 (c. 71), s. 40.—*Ex p. DAVISON* (1896), 60 J. P. 808; 13 T. L. R. 93, D. C.

*Annotation*:—*Refd. Leicester v. Cherryman* (1907), 96 L. T. 784.

**320. ——— Dog is “goods” within Act.]**—A dog is “goods” within above sect., & therefore a metropolitan police magistrate has jurisdiction under that sect. to order a dog to be delivered to its owner.—*R. v. SLADE* (1888), 21 Q. B. D. 433; 52 J. P. 599; 37 W. R. 141; 4 T. L. R. 777; *sub nom. R. v. SLADE, Ex p. YEOWARD*, 57 L. J. M. C. 120; 59 L. T. 640; 16 Cox, C. C. 496, D. C.

*Annotation*:—*Mentd. Evans v. Davies*, [1893] 2 Ch. 216.

**321. ——— Goods not subject matter of charge.]**—An accused person, having been arrested by a police constable, was taken to a police station, where she was searched, & a sum of £108 was found upon her & taken possession of by the police. In the charge sheet kept at the police station the following charge against her was entered: “Fraudulently obtaining on the 10th instant the sum of 5s. from Miss M., & also the sum of 5s. from Miss B., by representing that she, the prisoner, was collecting subscriptions for the children’s treat of St. Peter’s, Eaton Square, & further with endeavouring to procure charitable contributions by false pretences.” On the following day she was brought before a metropolitan police magistrate who had the charge sheet before him, & convicted her summarily in respect of the two first offences specified therein, & sentenced her to two consecutive terms of imprisonment. At the hearing, in addition to Miss M. & Miss B., three other ladies were called who proved that she had obtained from them various small sums amounting to about £2 5s. by making similar fraudulent representations:—*Held*: upon those facts, the money found upon the prisoner was not money “charged” before the magistrate to be stolen or fraudulently obtained within Metropolitan Police Courts Act, 1839 (c. 71), s. 29, & therefore he had, after the conviction, no jurisdiction to make an order under that sect. for the delivery to her of the whole of the £108 by the constable in whose custody it had remained.—*R. v. D'EYNCOURT* (1888), 21 Q. B. D. 109; 57 L. J. M. C. 64; 52 J. P. 628; 37 W. R. 59; 4 T. L. R. 455, D. C.

*Annotations*:—*Mentd. Inkpin v. Roll* (1922), 126 L. T. 517; *Conn v. Turnbull* (1925), 89 J. P. Jo. 300.

**322. Charge of unlawful possession of goods—Metropolitan Police Courts Act, 1839 (c. 71), s. 24—Does not apply to possession in house or shop.]**—(1) Under above sect. a person may be brought before a metropolitan police magistrate, charged with having in his possession or conveying anything suspected of being stolen or unlawfully obtained; & by Metropolitan Police Act, 1839, c. 47, s. 66, a constable may stop, search, & detain any person reasonably suspected of having or con-

veying anything stolen or unlawfully obtained:—*Held*: the power of a magistrate under these enactments extended only to persons who were at the time conveying the property, i.e., to street offences, & not to persons who might have such property in a house or shop; in order to give the magistrate jurisdiction, it is not necessary that the party be brought before him in custody of a constable.

(2) Evidence & documents, set out at length in an appendix to a special case, should be numbered in paragraphs, pursuant to *Regulæ Generales*, Hilary Term, 1862, or the costs will not be allowed.—*HADLEY v. PERKS* (1866), L. R. 1 Q. B. 444; 7 B. & S. 375; 35 L. J. M. C. 177; 14 L. T. 325; 30 J. P. 485; 12 Jur. N. S. 662; 14 W. R. 730.

*Annotation*:—*As to* (1) *Folld. R. v. Whitley* (1867), 31 J. P. 565.

**323. ——— ——— ———.]**—Metropolitan Police Courts Act, 1839 (c. 71), s. 24, does not apply to the case of goods found on the premises of marine store dealers suspected of having been stolen, but only to goods found on persons in the streets.—*R. v. WHITLEY* (1867), 31 J. P. 565.

**324. Excise offences committed in London area—15 & 16 Vict. c. 61, s. 1.]**—By above sect. an information “for the recovery of any penalty imposed by any Act or Acts relating to the revenue of excise, & incurred for or by reason of any offence committed against any such Act or Acts” may be heard & determined, if the offence has been committed within the limits of the chief offices of Inland Revenue in London, before a metropolitan police magistrate:—*Held*: the provisions of above sect. applied to informations for penalties imposed by statute in respect of excise offences created after the passing of the Act, & therefore a metropolitan police magistrate had jurisdiction to hear & determine an information for the recovery of the penalty imposed by Customs & Inland Revenue Act, 1887 (c. 15), s. 4, in respect of the new excise offence created by that sect.—*R. v. INGHAM* (1888), 21 Q. B. D. 47; 57 L. J. M. C. 87; 59 L. T. 62; 52 J. P. 550; 36 W. R. 811; 16 Cox, C. C. 505, D. C.

**325. Appeals under London County Council (General Powers) Acts—Control of massage establishments.]**—On the hearing of an appeal under London County Council (General Powers) Act, 1915 (c. ciii), s. 23, the magistrate is not justified in confirming the order merely because he is of opinion that the council had reason to believe that applt. was of bad character or that the house was being used for immoral purposes; he must state that he entertained the same belief himself.—*DALE v. LONDON COUNTY COUNCIL*, [1917] 1 K. B. 808; 86 L. J. K. B. 844; 116 L. T. 216; 81 J. P. 66; 15 L. G. R. 271, D. C.

**326. ——— Time for appeal—Summary Jurisdiction Rules, 1915, r. 58.]**—The effect of above rule is to repeal by implication so much of London County Council (General Powers) Act, 1910 (c. cxxix), s. 22 (5), as requires four days’ notice of an appeal under that sect.—*EDELSTEN v. LONDON COUNTY COUNCIL*, [1918] 1 K. B. 81; 87 L. J. K. B. 139; 117 L. T. 668; 81 J. P. 294; 15 L. G. R. 899, D. C.

**327. Power to deprive informer of share in penalty—Metropolitan Police Courts Act, 1839 (c. 71), s. 34.]**—Under above sect. a metropolitan police magistrate has a discretion to deprive an informer of any share in a penalty inflicted under Betting Act, 1853 (c. 119), although sect. 9 of the latter Act expressly directs that one-half of the penalty is to be paid to the informer.—*HAWKE v.*



. 5.—*Special powers of metropolitan police magistrates.* Sects. 6, 7, 8 & 9. *Part VII. Sects.*

MACKENZIE (No. 3), [1902] 2 K. B. 234; 71 L. J. K. B. 570; 87 L. T. 131; 66 J. P. 712; 51 W. R. 239; 20 Cox, C. C. 324; *sub nom.* MACKENZIE v. HAWKE, HAWKE v. MACKENZIE, 18 T. L. R. 550; 46 Sol. Jo. 501, D. C.

#### SECT. 6.—SPECIAL POWERS OF STIPENDIARY MAGISTRATES.

See Indictable Offences Act, 1848 (c. 42), s. 29; Summary Jurisdiction Act, 1848 (c. 43), s. 33; Summary Jurisdiction Act, 1879 (c. 49), s. 20; Interpretation Act, 1889 (c. 63), s. 13; Petty Sessions Act, 1849 (c. 18), s. 1; Stipendiary Magistrates Act, 1858 (c. 73), s. 1; Merchant Shipping Act, 1894 (c. 60), s. 610; Telegraph Act, 1878 (c. 76), ss. 4, 5.

328. *Where sitting with a justice of the peace—Adjudication on difference of opinion.*—Appct. was summoned before a ct. of summary jurisdiction for a contravention of the Pawnbrokers Act, 1872 (c. 93). The ct. consisted of the stipendiary magistrate for the district & another justice of the peace. At the conclusion of the evidence the second justice, in a private discussion of the case with the stipendiary magistrate, said that the evidence was not in his view such as would justify a conviction. The stipendiary magistrate, being satisfied that the case was fully made out against appct., stated his view to the second justice & added the following words: "I must then take upon myself the burden of adjudicating in this case alone." The second justice said "Very well," whereupon the stipendiary magistrate ordered appct. to pay a fine & costs, adding that he alone was responsible for the decision & that the second justice was not in any way a party

thereto:—*Held:* as the stipendiary magistrate had jurisdiction to decide the case by himself, & as what took place amounted to a withdrawal by the second justice from taking any part in the decision, the conviction of appct. by the stipendiary magistrate alone was valid.—*R. v. THOMAS, Ex p. O'HARE*, [1914] 1 K. B. 32; 83 L. J. K. B. 351; 109 L. T. 929; 78 J. P. 55; 23 Cox, C. C. 687.

329. *Appeal from pilotage authority—Extension of time for notice.*—By rule I. of the Pilotage Appeal Rules (Stipendiary & Metropolitan Police Magistrates) 1890, notice of appeal to a magistrate from the decision of a pilotage authority is to be given in writing to the magistrate & to the pilotage authority by the person aggrieved within seven days after he shall have received a notification of such decision "or within such further times as may be allowed by the magistrate":—*Held:* a magistrate has power under the rule to extend the time for appealing, although the prescribed time has expired before the date of the application for the extension.—*R. v. LEWIS*, [1906] 2 K. B. 307; 75 L. J. K. B. 508; 95 L. T. 476; 10 Asp. M. L. C. 270.

See, generally, SHIPPING.

#### SECT. 7.—JUVENILE COURTS.

See Children's Act, 1908 (c. 67), s. 111; Juvenile Courts (Metropolis) Act, 1920 (c. 68).

#### SECT. 8.—EXTRADITION PROCEEDINGS.

See EXTRADITION, Vol. XXIV., pp. 878 *et seq.*

#### SECT. 9.—CONTEMPT OF COURT.

See CONTEMPT OF COURT, Vol. XVI., pp. 13, 14, Nos. 68, 73.

#### PART VI. SECT. 6.

m. *Where sitting with a justice of the peace.*—A stipendiary magistrate when sitting with another justice or other justices of the peace under Licensing Act, 1881, can only act as a single justice of the peace, with no greater power or authority than the other or others.—*NUTT v. BISHOP* (1895), 13 N. Z. L. R. 656.—N.Z.

n. *In respect of violation of licensing laws.*—*Re FRASER* (1880), 1 R. & G. 354.—CAN.

o. —.—*GARDNER v. PARR* (1881), 2 R. & G. 225; 1 C. L. T. 710.—CAN.

p. —.—*R. v. IACI*, [1924] 3 D. L. R. 321; [1924] 2 W. W. R. 958; 33 B. C. R. 501.—CAN.

q. *In unorganised district.*—*Re ONTARIO BANK v. HARSTON* (1881), 9 P. R. 47.—CAN.

r. *Power to state a case.*—*R. v. HAWES* (1900), 33 N. S. R. 389.—CAN.

t. *Stipendiary magistrate of town*

—*No jurisdiction in city.*—*R. v. BENNER* (1902), 35 N. B. R. 632.—CAN.

a. *General jurisdiction through whole colony.*—Although under New Zealand Resident Magistrates Act, 1867, the jurisdiction of magistrates was purely local, yet under Magistrates Courts Act, 1893, stipendiary magistrates appointed thereunder do not hold office for particular districts, but possess a general jurisdiction throughout the whole Colony, controlled in practice by departmental arrangements.—*BASTINGS v. CALLAGHAN*, [1905] A. C. 351.—N.Z.

b. *Stipendiary magistrate appointed for county—County altered to municipality by statute.*—*R. v. TOWNSEND* (No. 1) (1906), 39 N. S. R. 172.—CAN.

c. *Where cause of action exceeds eighty dollars.*—*HALL v. VEINOT* (1907), 4 E. L. R. 374.—CAN.

d. *Powers of deputy.*—*Re NEILLY* (1911), 1 E. L. R. 345.—CAN.

e. *Exercising powers of justices.*—A stipendiary magistrate appointed by the Lieutenant-Governor in Council has the jurisdiction of two justices of the peace to try offences against the criminal law under the Summary Convictions Act passed by the Parliament of Canada.—*R. v. BASKER* (1912), 10 E. L. R. 320; 1 D. L. R. 295.—CAN.

f. *No civil jurisdiction—Where parties not resident in same parish as magistrate.*—*R. v. CARLETON, Ex p. DELONG* (1917), 44 N. B. R. 678.—CAN.

g. *No power to try adultery—Under Criminal Code Act, 1909.*—*Ex p. BELYEA* (1918), 45 N. B. R. 308.—CAN.

h. *No security for costs given—Effect on magistrate's jurisdiction.*—*MURPHY v. McMILLAN* (1919), 46 N. B. R. 88; 43 D. L. R. 25.—CAN.

k. *Additional stipendiary magistrate.*—*KNIGHT v. MANSON*, [1925] 3 D. L. R. 101; 58 N. S. R. 96.—CAN.

## Part VII.—Indictable and Summary Offences.

### SECT. 1.—WHAT OFFENCES ARE INDICTABLE.

See CRIMINAL LAW, Vol. XIV., pp. 202-208, Nos. 1814-1900.

### SECT. 2.—INDICTABLE OFFENCES TRIABLE SUMMARILY.

See, now, Criminal Justice Act, 1925 (c. 86), s. 24, sched. II.

**330. Election of accused to be tried summarily—Whether available on charge under Larceny Act, 1916 (c. 50), s. 17 (2) (a)—Accused charged as clerk.]—**An information laid against a clerk employed by the Ministry of Labour alleged that "you . . . being a clerk employed in the public service of His Majesty . . . did feloniously steal the sum of £5 16s. . . . received into possession by you by virtue of your employment contrary to the Larceny Act, 1916 (c. 50), s. 17 (2) (a) " :—

*Held*: the information charged deft. with an offence under above sub-sect., & did not by reason merely of its describing him as a "clerk" charge him with an offence under sub-sect. 1 (a); & consequently, the offence charged not being that merely of larceny as a clerk or servant, that a ct. of summary jurisdiction had no jurisdiction under Summary Jurisdiction Act, 1879 (c. 49), s. 12, & sched. I., to deal with the offence summarily, but must deal with it as an indictable offence.—*R. v. SUTER, Ex p. A.-G., R. v. CUMBERLAND JJ. & SUTER, Ex p. A.-G., [1920] 2 K. B. 630; 89 L. J. K. B. 810; sub nom. R. v. THOMP-*

*SON, [1920] 2 K. B. 630; 89 L. J. K. B. 810, 20 T. L. R. 546; 26 Cox, C. C. 626, D. C.*

— **Discretion to commit for trial.]—**See CRIMINAL LAW, Vol. XIV., p. 201, No. 1799.

— **Right of appeal.]—**See Part XIII., Sect. 1, sub-sect. 2, A., *post*.

**331. Reduction of charge by justices—Is offence triable summarily—Jurisdiction of justices.]—**CONN *v. TURNBULL* (1925), 89 J. P. Jo. 300, D. C.

#### PART VII. SECT. 2.

1. *Election of accused to be tried summarily.]—R. v. O'LEARY* (1876), 16 N. B. R. (3 Pug.) 264.—CAN.

m. —.]—*R. v. HOGARTH* (1893), 24 O. R. 60.—CAN.

n. —.]—*R. v. LAWRENCE* (1896), 5 B. C. R. 160.—CAN.

o. —.]—*R. v. WEBSTER* (1896), 2 Terr. L. R. 236.—CAN.

p. —.]—*R. v. BROWN* (1898), 31 N. S. R. (19 R. & G.) 401.—CAN.

q. —.]—*R. v. CROSSEN* (1899), 19 C. L. T. 347; 12 Man. L. R. 571.—CAN.

r. —.]—*CLARKE v. RUTHERFORD* (1901), 2 O. L. R. 206.—CAN.

t. —.]—A person accused of perjury may, with his own consent, be summarily tried before a police magistrate.—*Re R. v. BURNS* (1901), 21 C. L. T. 236; 1 O. L. R. 341.—CAN.

a. —.]—*R. v. KEEPING*, 21 C. L. T. 508.—CAN.

b. —.]—*R. v. RIDEHAUGH* (1903), 23 C. L. T. 236; 14 Man. L. R. 434.—CAN.

c. —.]—*R. v. WALSH & LAMONT* (1904), 24 C. L. T. 82; 7 O. L. R. 149; 2 O. W. R. 222; 3 O. W. R. 31.—CAN.

d. —.]—*Re VANCINI* (1904), 34 S. C. R. 621.—CAN.

e. —.]—*R. v. JODREY*, 25 C. L. T. 109.—CAN.

f. —.]—*R. v. WILLIAMS* (1905), 11 B. C. R. 351; 2 W. L. R. 410.—CAN.

g. —.]—*R. v. LEE GUEY* (1907), 10 O. W. R. 1060; 15 O. L. R. 235; 13 Can. Crim. Cas. 80.—CAN.

h. —.]—*R. v. DORCHESTER PENITENTIARY WARDEN, Ex p. SEELEY* (1908), 38 N. B. R. 517; 5 W. L. R. 259.—CAN.

k. —.]—*R. v. HOWELL* (1910), 13 W. L. R. 594.—CAN.

aa. —.]—*R. v. BARNES* (1911), 18 W. L. R. 630; 21 Man. L. R. 357.—CAN.

bb. —.]—There is no provision which entitles a justice, who has undertaken to try an accused person summarily, to refuse to do so.—*R. v. HICKS* (1912), 22 W. L. R. 236; 5 Alta. L. R. 371; 20 Can. Crim. Cas. 192; 7 D. L. R. 171.—CAN.

cc. —.]—*R. v. SOVEREEN* (1912),

21 O. W. R. 618; 3 O. W. N. 779; 26 O. L. R. 16; 4 D. L. R. 356.—CAN.

dd. —.]—A person who has been brought up for election as to the mode of his trial under the speedy trials sections of the Criminal Code, & has elected to take a speedy trial, cannot afterwards re-elect to be tried before a jury in the ordinary way.—*R. v. HOWE* (1913), 42 N. B. R. 378.—CAN.

ee. —.]—*R. v. JUNG LEE* (1913), 25 O. W. R. 63; 5 O. W. N. 80; 13 D. L. R. 896.—CAN.

ff. —.]—*R. v. PRICE & BURNETT* (1914), 30 W. L. R. 1; 25 Man. L. R. 26; 7 W. W. R. 621; 19 D. L. R. 229.—CAN.

gg. —.]—*R. v. JAMES* (Sask.), [1918] 2 W. W. R. 994.—CAN.

hh. —.]—*R. v. ARMSTRONG* (Ont.) (1922), 38 Can. Crim. Cas. 98.—CAN.

kk. —.]—*R. v. STANYER*, [1924] 1 W. W. R. 570; 41 Can. Crim. Cas. 206; 33 B. C. R. 223.—CAN.

ll. — *Where more serious charge to be preferred.]—*Where the depositions disclose an offence which could not have been disposed of by speedy trial, prisoner will not be allowed to elect for speedy trial if the Crown intends to lay the more serious charge, even though he is committed for an offence which may be disposed of by speedy trial.—*R. v. PRESTON* (1905), 11 B. C. R. 159; 1 W. L. R. 17.—CAN.

mm. — *Amendment—Further election.]—R. v. LACELLE* (1905), 11 O. L. R. 74; 6 O. W. R. 911.—CAN.

nn. — *Before whom.]—*Where accused has consented to a charge being summarily tried & determined by the magistrate & the charge has been read to accused who has pleaded not guilty, the accused has a right to be tried by the magistrate who has proposed to try him summarily, & before whom he has consented to be tried.—*Re BAIN* (Man.), [1919] 2 W. W. R. 709.—CAN.

oo. *Reduction of charge by justices—To offence triable summarily—Jurisdiction of justices.]—R. v. COOLEN* (1904), 36 N. S. R. 510.—CAN.

pp. —.]—*R. v. CARVERY* (1920), 34 Can. Crim. Cas. 117.—CAN.

qq. *Keeping house of ill-fame.]—R. v. ROBERTS*, 21 C. L. T. 314.—CAN.

rr. *Obstruction of police officer.]—*

A person charged with obstructing a peace officer in the execution of his duty may, without his own consent, be tried summarily by the magistrate.—*R. v. JACK* (1902), 9 B. C. R. 19.—CAN.

tt. —.]—*R. v. TANNER* (1911), 10 E. L. R. 264; 18 Can. Crim. Cas. 73.—CAN.

aaa. —.]—*R. v. WEST* (1915), 9 O. W. N. 37; 34 O. L. R. 368; *affd.* 35 O. L. R. 95.—CAN.

bbb. —.]—*Ex p. CARROLL* (N.B.) (1918), 41 D. L. R. 196.—CAN.

ccc. —.]—*R. v. SOLOMON* (1921), 58 D. L. R. 235; 34 Can. Crim. Cas. 171.—CAN.

ddd. *Theft.]—R. v. MCLENNAN* (1905), 7 Terr. L. R. 309; 2 W. L. R. 227.—CAN.

eee. —.]—*R. v. STAYK* (Alta.), [1920] 3 W. W. R. 622.—CAN.

fff. —.]—*R. v. POWER*, [1922] 1 W. W. R. 595; 62 D. L. R. 470; 36 Can. Crim. Cas. 389; 17 Alta. L. R. 247.—CAN.

ggg. —.]—*R. v. HARYCHKA* (1924), 42 Can. Crim. Cas. 155; 20 Alta. L. R. 526; [1924] 2 W. W. R. 723.—CAN.

hhh. *Magistrate must have jurisdiction.]—R. v. SHARPE* (1911), 18 W. L. R. 55; 20 Man. L. R. 555.—CAN.

kkk. —.]—*R. v. CROOKS* (1911), 17 W. L. R. 560; 4 Sask. L. R. 335.—CAN.

lll. —.]—*R. v. FUERST* (Y.T.) (1913), 26 W. L. R. 445; 15 D. L. R. 214; 22 Can. Crim. Cas. 183.—CAN.

mmm. —.]—*R. v. PASSMORE* (Ont.), [1923] 3 D. L. R. 1181.—CAN.

nnn. *Magistrate's discretion.]—*Under Secret Commissions Act, 1909 (c. 33), s. 3, on a charge of any of the offences there specified, the magistrate has jurisdiction to proceed to try the accused by way of summary conviction without asking for the consent of the accused or against his wish. The magistrate has discretion & as guardian of the interests of the public he must decide whether to proceed by way of summary conviction or by way of indictment.—*R. v. McNABB* (Alta.), [1919] 3 W. W. R. 1031; 49 D. L. R. 495; 32 Can. Crim. Cas. 166; 15 Alta. L. R. 107.—CAN.

ooo. —.]—*R. v. NELSON* (Alta.), [1920] 1 W. W. R. 150; 32 Can. Crim. Cas. 75.—CAN.



**SECT. 3.—SUMMARY OFFENCES TRIABLE ON INDICTMENT—RIGHT TO TRIAL BY JURY.**

*See, now, Criminal Justice Act, 1925 (c. 86), s. 24 (2).*

**332. Objection by accused to summary trial—Conspiracy & Protection of Property Act, 1875 (c. 86), s. 9.]**—By above sect., where a person is accused before a ct. of summary jurisdiction of an offence made punishable by the Act for which a penalty amounting to £20 or imprisonment, is imposed, the accused may, on appearing before the ct. of summary jurisdiction, declare that he objects to being tried for such offence by a ct. of summary jurisdiction, & thereupon the ct. of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence & not an offence punishable on summary conviction, & the offence may be prosecuted on indictment accordingly:—*Held*: the effect of above sect. is that a person accused of an offence under sect. 7 before a ct. of summary jurisdiction, who, on appearing before that ct., declares that he objects to being tried by that ct., has a right to have the case dealt with as if he were charged with an indictable offence & not an offence punishable on summary conviction, & to have the offence prosecuted on indictment accordingly; & in the phrases “thereupon the ct. of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence” & “the offence may be prosecuted on indictment” the word “may” is an enabling word empowering the ct. of summary jurisdiction to give effect to the right of the accused, which accordingly that ct. is bound to do; & upon a declaration of objection being duly made under above sect. the ct. of summary jurisdiction has no jurisdiction to try the case.—*R. v. MITCHELL, ETC., CLITHEROE JJ., Ex p. LIVESSEY*, [1913] 1 K. B. 561; 82 L. J. K. B. 153; 108 L. T. 76; 77 J. P. 148; 29 T. L. R. 157; 23 Cox, C. C. 273, D. C.

**333. Right to trial by jury—Summary Jurisdiction Act, 1879 (c. 49), s. 17 (1)—Accused must be informed of right.]**—*R. v. COCKSHOT*, No. 345, *post*.

**334. ———.]**—Deft., if charged with an offence within above sect., must be informed by the ct. of summary jurisdiction of his right to be tried by a jury. It is not sufficient that he has heard deft. in a previous case, charged with a similar offence arising out of the same subject-matter, informed of his right to be so tried, & he cannot, under these circumstances, be held to have waived his right to be informed by the ct., when his case came on, of his right to be tried by a jury.—*HARKER v. HOPKINS* (1903), 67 J. P. 428.

**335. ——— Accused need not be informed of loss of right to appeal.]**—On an information against applt., who was eighteen years of age, for indecently assaulting a girl under the age of thirteen years, he was asked by the justices, before the case was gone into, whether he desired to be tried by a jury, but he was not informed that if he consented to be dealt with summarily he would thereby lose his right of appeal. No public notice had been given of days appointed by the justices under above Act, s. 20 (8), for the trial of indictable offences. The justices convicted applt.:—*Held*: the conviction must be quashed as the

hearing did not take place on a day of which public notice had been given as having been appointed for the trial of indictable offences.

It is not necessary for the justices, when they ask deft. whether he consents to be dealt with summarily, to inform him that he thereby loses his right of appeal (*AVORY, J.*).—*WALKER v. MORGAN* (1912), 76 J. P. 325, D. C.

**336. ——— “Term of imprisonment exceeding three months”—Imprisonment in default of sureties.]**—*R. v. LAKE* (1882), 46 J. P. 88.

*Annotations*:—*Folld. Williams v. Wynne* (1888), 57 L. J. M. C. 30. *Reid. R. v. Evans, R. v. Connor* (1914), 83 L. J. K. B. 905.

**337. ———.]**—By above sect., a person when charged before a ct. of summary jurisdiction with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, may claim to be tried by a jury:—*Held*: the offence of night poaching, whereby the person charged is liable under Night Poaching Act, 1828 (c. 69), to imprisonment for a period not exceeding three months, & at the expiration of that period to a further imprisonment of six months in case he fail to find sureties for his not so offending again, is not within above Act so as to enable the person charged to be tried by a jury.—*WILLIAMS v. WYNNE* (1888), 57 L. J. M. C. 30; 58 L. T. 283; 52 J. P. 343; 4 T. L. R. 254, D. C. *Annotation*:—*Distd. R. v. Goldberg* (1904), 91 L. T. 490.

**338. ——— Imprisonment in default of payment of fine.]**—A person who is summoned under Inland Revenue Act, 1880 (c. 20), s. 20, before a ct. of summary jurisdiction, for making in his book an untrue entry, has not the right, under above sect., to demand to be tried by a jury, but such person may be tried by the justices without a jury.—*CARLE v. ELKINGTON* (1892), 67 L. T. 374; 56 J. P. 359; 40 W. R. 510; 36 Sol. Jo. 490; 17 Cox, C. C. 557, D. C.

*Annotations*:—*Distd. R. v. Goldberg* (1904), 91 L. T. 490. *Reid. R. v. Evans, R. v. Connor* (1914), 83 L. J. K. B. 905.

**339. ——— Prosecution under Merchant Shipping Act, 1894 (c. 60), s. 680.]**—A person prosecuted under Merchant Shipping Act, 1894 (c. 60), s. 680, is entitled to demand trial by jury under Summary Jurisdiction Act, 1879 (c. 49), s. 17.—*R. v. GOLDBERG*, [1904] 2 K. B. 866; 73 L. J. K. B. 970; 91 L. T. 490; 68 J. P. 554; 20 T. L. R. 683; 20 Cox, C. C. 699, D. C.

**340. ——— Not open to incorrigible rogue—Vagrancy Act, 1824 (c. 83), s. 5.]**—Summary Jurisdiction Act, 1879 (c. 49), s. 17 (1) does not apply to incorrigible rogues committed under Vagrancy Act, 1824 (c. 83), s. 5; it only applies to persons “liable on summary conviction to be imprisoned for a term exceeding three months.” Persons liable to be committed as incorrigible rogues cannot claim to be tried by a jury.—*R. v. EVANS, R. v. CONNOR* (1914), 83 L. J. K. B. 905; 110 L. T. 780; 30 T. L. R. 326; 24 Cox, C. C. 138; 10 Cr. App. Rep. 53, C. C. A.

**341. ——— Not open to rogue or vagabond—Criminal Law Amendment Act, 1912 (c. 20), s. 7 (2).]**—A person charged before a ct. of summary jurisdiction as a rogue & vagabond under Vagrancy Act, 1898 (c. 39), s. 1, has no right to claim to be tried by a jury under Summary Jurisdiction Act, 1879 (c. 49), s. 17, notwithstanding that the term of imprisonment which may be

**PART VII. SECT. 3.**

**1. Right to trial by jury—Accused must be informed of right.]**—If a ct. of summary jurisdiction omits to inform an accused who is liable to more than

three months' imprisonment of his right to be tried by a jury the conviction will be quashed.—*R. v. REID* (1902), 20 N. Z. L. R. 604.—N.Z. g. ———.] — *AH KAN v. COX*,

*AH WING v. COX, TONG v. COX* (1902), 21 N. Z. L. R. 645.—N.Z.

h. ———.] — *LEE SUN v. HERBERT* (1906), 26 N. Z. L. R. 370.—N.Z.

imposed has been increased from three to six months by Criminal Law Amendment Act, 1912 (c. 20), s. 7 (2).—*R. v. DICKINSON, Ex p. GRANDOLINI*, [1917] 2 K. B. 393; 86 L. J. K. B. 1040; 117 L. T. 189; 81 J. P. 209; 33 T. L. R. 347; 25 Cox, C. C. 765, D. C.

**342. — Trial as for first offence—Effect of previous conviction.]**—Deft. was charged before a ct. of summary jurisdiction with keeping a brothel, under Criminal Law Amendment Act, 1885 (c. 69), s. 13 for which offence she was convicted, & became thereby liable to a term of imprisonment not exceeding three months. Before sentence a constable reported to the bench a previous conviction for the like offence. Upon a second conviction she would have been liable to imprisonment not exceeding four months. Under above Act, s. 17, a person charged with any offence for which imprisonment exceeding three months may be imposed is entitled to the option of committal for trial by a jury. Deft. was given no opportunity of exercising any such option. The justices sentenced her to a fine of £20 or, in default, to imprisonment for two months:—*Held*: deft. had never been charged with any offence for which imprisonment exceeding three months could be imposed, the justices had in effect treated the charge as for a first offence, & therefore, she was never entitled to claim a trial by jury, nor was there any ground for quashing the conviction.—*R. v. FOWLER, Ex p. WALTERS* (1894), 64 L. J. M. C. 9; 15 R. 265, D. C.

*Annotation*:—*Dttd. R. v. Beesby*, [1909] 1 K. B. 849.

**343. — A woman was charged before justices with an offence, in respect of which, if it was a first offence, she was liable on summary conviction to be imprisoned for a term not exceeding three months. In the course of the hearing evidence was given by the prosecution that deft. had been previously convicted of a like offence, & thereupon she became liable on conviction to be imprisoned for a term exceeding three months. The justices, without giving her the option prescribed by above sect., convicted deft. & sentenced her to three months' imprisonment:—*Held*: the justices had no jurisdiction to treat the case as one of a first offence; the words "before the charge is gone into" mean in such a case "before the charge in its altered character is proceeded with;" & as the justices had not, upon the evidence of the previous conviction being given, asked deft. if she wished to be tried by a jury, the conviction was bad.—*R. v. BEESBY*, [1909] 1 K. B. 849; *sub nom. R. v. BEESLY, Ex GRIMMETT, R. v. BEESLY, Ex p. GREY*, 78 L. K. B. 482; 100 L. T. 486; 73 J. P. 234; 22 Cox, C. C. 47; *sub nom. R. v. BEESBY, ETC., JJ. & DUGDALE, BIRMINGHAM RECORDER*, 25 T. L. R. 337; 53 Sol. Jo. 289, C. C. A.**

*Annotation*:—*Refd. R. v. Evans, R. v. Connor* (1914), 83 L. J. K. B. 905.

**344. — Election of accused—Offence punishable only on summary conviction.]**—

Appls. were convicted on indictment under Perjury Act, 1911 (c. 6), s. 5 (b), of knowingly & wilfully making statements false in material particulars in returns of income tax. By the proviso to Perjury Act, 1911 (c. 6), s. 16 (3), where the making a false statement is by any Act passed before the commencement of the Perjury Act, 1911 (c. 6), made punishable only on summary conviction, it shall remain so punishable. By Finance (1909–1910) Act, 1910 (c. 8), s. 94, such offence is made punishable on summary conviction & subject to imprisonment not exceeding six months:—*Held*: as the penalty under Finance (1909–1910) Act, 1910 (c. 8), s. 94, exceeded three months' imprisonment an offender, under Summary Jurisdiction Act, 1879 (c. 49), s. 17 (1), might elect to be tried on indictment, & consequently the offence was not punishable "only" on summary conviction, & the conviction of appls. was valid.—*R. v. BRADBURY, R. v. EDLIN*, [1921] 1 K. B. 562; 90 L. J. K. B. 133; 125 L. T. 31; 85 J. P. 128; 37 T. L. R. 88; 26 Cox, C. C. 732; 15 Cr. App. Rep. 76, C. C. A.

**Summons for summary offence—Offence also indictable—Right to commit for trial.]**—*See CRIMINAL LAW, Vol. XIV., p. 201, No. 1798.*

**345. Caution to be given to accused—Need not be stated in conviction.]**—(1) Where a person appears before a ct. of summary jurisdiction, charged with an offence to which Summary Jurisdiction Act, 1879 (c. 49), s. 17, applies, the ct. ought, in pursuance of sub-sect. 2, to inform him of his right to be tried by a jury before he pleads to the charge. If he be not informed of that right & after the charge has been gone into, pleads guilty, the conviction is bad. *Semble*: it is immaterial whether or not he knew of his right to be tried by a jury, & immaterial whether or not the ct. knew, before the proceedings commenced, that he meant to plead guilty in the course of the case.

(2) The conviction need not state the fact of the caution being given.—*R. v. COCKSHOTT*, [1898] 1 Q. B. 582; *sub nom. R. v. COCKSHOTT, ETC., SOUTHPORT JJ., Ex p. RICKERBY*, 67 L. J. Q. B. 467; 78 L. T. 168; 62 J. P. 325; 14 T. L. R. 264; 42 Sol. Jo. 346; 19 Cox, C. C. 3, D. C.

*Annotations*:—*As to* (1) *Consd. R. v. Beesby*, [1909] 1 K. B. 849. *Reid. R. v. Goldberg* (1904), 73 L. J. K. B. 970.

**Need not be stated in indictment.]**—*See CRIMINAL LAW, Vol. XIV., p. 234, No. 2196.*

**As grounds for plea of autrefois acquit or autrefois convict.]**—*See CRIMINAL LAW, Vol. XIV., p. 348, Nos. 3650, 3651.*

#### SECT. 4.—OFFENCES ONLY TRIABLE

*See Part VI., Sect.*



## Part VIII.—Procedure Under Summary Jurisdiction.

### SECT. 1.—INFORMATION AND COMPLAINT.

#### SUB-SECT. 1.—IN GENERAL.

See Summary Jurisdiction Act, 1848 (c. 43), s. 1.

Criminal information generally, see CRIMINAL LAW, Vol. XIV., pp. 349 *et seq.*

346. Information defined.]—*R. v. HUGHES*, No. 476, *post*.

347. Must be supported by prior evidence of fact.]—*R. v. FULLER*, No. 348, *post*.

Information distinguished from complaint.]—See Summary Jurisdiction Act, 1848 (c. 48), s. 1.

Information commencement of prosecution.]—See CRIMINAL LAW, Vol. XIV., pp. 154, 155, Nos. 1285–1300.

#### SUB-SECT. 2.—NECESSITY FOR.

##### A. Information.

348. General rule.]—Under an authority to hear & determine an offence a man cannot be convicted except an information has been laid against him for such offence. Such information must be set forth in the conviction. An information cannot be supported but by evidence of fact prior to the information.—*R. v. FULLER* (1699), 1 *Ld. Raym.* 509; 12 *Mod. Rep.* 309; 91 *E. R.* 1240.

*Annotations*:—*Reid. Blake v. Beech* (1876), 1 *Ex. D.* 320; *R. v. Hughes* (1879), 4 *Q. B. D.* 614. *Mentd. R. v. Beare* (1698), 1 *Ld. Raym.* 414.

349. —.]—After a summons issued, information was given before the magistrate that the party against whom the summons had been granted was going out of the magistrate's juris-

diction, who thereupon issued his warrant, & the person was taken into custody, & afterwards brought his action against the magistrate for false imprisonment. At the trial the summons was put in evidence, & the warrant, but not the information:—*Held*: the evidence was not sufficient, & the magistrate must put in the information to justify his warrant for apprehension, as, without a proper information, the magistrate would not be justified in issuing his warrant.—*STEVENS v. CLARK* (1842), *Car. & M.* 509; 2 *Mood. & R.*

statute requires it, an information need not be on oath, or even in writing. . . . A magistrate cannot proceed without an information (*PARKE, B.*).—*R. v. MILLARD* (1853), *Dears. C. C.* 166; 1 *C. L. R.* 70; 22 *L. J. M. C.* 108; 21 *L. T. O. S.* 108; 17 *J. P.* 279; 17 *Jur.* 400; 1 *W. R.* 314; 6 *Cox, C. C.* 150; 169 *E. R.* 681, *C. C. R.*

*Annotations*:—*Reid. Blake v. Beech* (1876), 1 *Ex. D.* 320; *R. v. Hughes* (1879), 4 *Q. B. D.* 614.

351. Where immediate arrest—Information not necessary.]—*M.* was apprehended by an excise officer & two constables, for working an illicit still. He was taken to the police office & left in custody there while the excise officer endeavoured to find a police magistrate to take the charge. Several magistrates declined to hear it, & *M.* was detained in custody two days, when a magistrate was at length found to hear the case. *M.* was convicted of the offence & fined £30. There was no information or conviction, but a warrant of commitment was made out, *M.* having failed to pay the fine. On motion by *M.* to be discharged,

### PART VIII. SECT. 1, SUB-SECT. 1.

346 i. Information defined.]—"Information" means the initiatory step in proceedings of a criminal nature which are to be disposed of summarily; "complaint" designates the initiatory step in summary proceedings of a civil nature.—*Re DILLON* (1859), 11 *I. C. L. R.* 232.—*IR.*

k. Facts necessary to give jurisdiction.]—The facts necessary to give jurisdiction did not appear either in the information or warrant:—*Held*: the conviction was bad.—*GALLIHEW v. PETERSON* (1887), 20 *N. S. R.* (8 *R. & G.*) 222; 8 *C. L. T.* 397.—*CAN.*

l. Whether magistrate bound to consider information laid before him.]—*HITCHIN v. PHIPPS* (1903), 29 *V. L. R.* 422.—*AUS.*

m. —.]—A justice is under a duty to receive & consider what is alleged on information & what process, if any, should be issued on it.—*R. v. SCOTT, Ex p. CHURCH*, [1924] *S. A. S. R.* 220.—*AUS.*

n. Right of accused to be informed of contents of information.]—A person summoned to show why liquors seized should be forfeited has a right before going into his proof to be informed who complainant is, & what he has sworn to in the information.—*Ex p. STEVENSON* (1856), 8 *N. B. R.* (3 *All.*) 391.—*CAN.*

o. Variation between information & conviction—Amendment of information.]—*Held*: there was no variance between the information & the conviction because the former used the word "disposal," & the latter "sale," & if there had been, an amendment of the information would have been made.

—*R. v. HODGINS* (1886), 12 *O. R.* 367.—*CAN.*

p. Prosecution before two justices—Whether information must be laid before both.]—Where a prosecution is brought before two justices the information must be laid before both justices.—*Ex p. SPRAGUE* (1892), 31 *N. B. R.* 236.—*CAN.*

q. —.]—*R. v. ETINGER* (1899), 32 *N. S. R.* 176.—*CAN.*

r. Withdrawal of information—Whether permissible.]—*Ex p. WYMAN* (1899), 34 *N. B. R.* 608.—*CAN.*

t. Information taken & conviction made by different magistrates.]—It is not necessary for the magistrate trying the case to be the magistrate who took the information.—*R. v. DUGGAN*, 21 *C. L. T.* 35.—*CAN.*

a. Effect of laying information before magistrate.]—Where information is laid before a magistrate, he acquires jurisdiction over the offence charged, & his jurisdiction is not ousted by a subsequent information before & determined by another magistrate of the same offence.—*R. v. KAY, Ex p. GALLAGHER* (1907), 38 *N. B. R.* 325; 4 *E. L. R.* 216.—*CAN.*

b. Taking of evidence by stipendiary when information laid—Whether necessary.]—*R. v. NELSON* (1910), 9 *E. L. R.* 210.—*CAN.*

c. Conviction on defective information—Whether conviction will be quashed.]—*R. v. McMILLAN* (1873), 15 *B. R.* (2)

Where a magistrate has jurisdiction over the person & offence & the accused is present, although he is brought there upon a defective information upon arrest

without warrant, he acquires jurisdiction & a conviction made will not be quashed on *certiorari*.—*R. v. McDUGALL, Ex p. GOGUEN* (1917), 44 *N. B. R.* 369.—*CAN.*

e. Magistrates' authority to receive information—Whether affected by entry of assize judge into county.]—The authority of the magistrates of a county to receive informations, is not suspended or affected by the entry of the judge of assize into such county.—*R. v. HOUSTON* (1840), 2 *Craw. & D.* 10.—*IR.*

f. Amendment of information—Power of justices.]—*R. v. FOX* (1850), 3 *Nfld. L. R.* 230.—*NFLD.*

### PART VIII. SECT. 1, SUB-SECT. 2.—A.

g. Whether necessary.]—*SHEEHAN v. GALLAGHER* (1902), *S. R. Q.* 319.—*AUS.*

h. —.]—*Deft.*, a justice, issued his warrant against *pltf.* on an alleged charge of stealing a lease, without any information being laid, upon which warrant *pltf.* was arrested & brought before him:—*Held*: *deft.* was liable in trespass, as without information on oath he had no jurisdiction over the person of *pltf.*—*APPLETON v. LEPPER* (1869), 20 *C. P.* 138.—*CAN.*

aa. —.]—*Re THOMPSON* (1909), 14 *B. C. R.* 314.—*CAN.*

bb. —.]—*MCCATHERIN v. JAMER, ROLSTON v. JAMER* (1912), 11 *E. L. R.* 527; 41 *N. B. R.* 367; 9 *D. L. R.* 874.—*CAN.*

cc. —.]—*R. v. MELLISH, Re GOODYER*, 2 *J. R.* 122.—*N.Z.*

dd. —.]—*Voluntary appearance of defendant.*—*Held*: an information was not required, *deft.* having come

the Ct. of Session held the conviction to be bad, on the ground that the justice had no jurisdiction as it was only in cases of summary or immediate arrest that the excise officer could proceed as he had done:—*Held*: the justice had jurisdiction & there was no necessity for an information, as the arrest was an immediate arrest.—*EVANS v. McLOUGHLAN* (1861), 4 L. T. 31; 25 J. P. 211; 7 Jur. N. S. 1253; 4 Macq. 89, H. L.  
Effect of absence of information.]—See Part VIII., Sect. 4, sub-sect. 3, B. (b) ii., *post*.

*B. Complaint.*

352. Before detention.]—A magistrate has no right to detain a known person to answer a charge of misdemeanour verbally intimated to him, but without a regular information. Before they detain a known person, they should have a charge actually made.—*R. v. BIRNIE* (1832), 5 C. & P. 206; 1 Mood. & R. 160; 1 Nev. & M. M. C. 301, N. P.

To make order for removal of pauper.]—See POOR LAW.

353. Power to commit without complaint—Where reason to apprehend breach of peace.]—*BROOKSHAW v. HOPKINS*, No. 362, *post*.

SUB-SECT. 3.—NECESSITY FOR OATH.

See Summary Jurisdiction Act, 1848 (c. 43), s. 10.

354. General rule—Oath not necessary.]—*R. v. STANDISH-WITH-LANGTREE (INHABITANTS)* (1740), Burr. S. C. 150; 2 Batt. 6th ed. 671.

355. ———.]—It is not necessary that any information or complaint should be made on oath, in order to justify the interference of magistrates under Distress for Rent Act, 1737 (c. 19), s. 16. In trespass against two magistrates for giving pltf.'s landlord possession of a farm as a deserted farm, they produced in evidence a record of their proceedings under that Act, which set forth all such circumstances as were necessary to give them jurisdiction, & by which it appeared that they had pursued the directors of the statute:—*Held*: this was conclusive as an answer to the action.—

*BASTEN v. CAREW* (1825), 3 B. & C. 649; 5 Dow. & Ry. K. B. 558; 2 Dow. & Ry. M. C. 563; 3 L. J. O. S. K. B. 111; 107 E. R. 874.

*Annotations*:—*Consd. R. v. Millard* (1853), 6 Cox, C. C. 150; *Kemp v. Neville* (1861), 10 C. B. N. S. 523. *Reid. Ex p. Kinning* (1847), 4 C. B. 507. *Mentd. Hutchinson v. Lowndes* (1832), 1 Nev. & M. K. B. 674; *Baylis v. Strickland* (1840), 1 Man. & G. 591; *Chaney v. Payne* (1841), 1 Q. B. 712; *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610; *Price v. Manning* (1889), 42 Ch. D. 372.

356. ———.]—*R. v. MILLARD*, No. 350, *ante*.

357. ———.]—*R. v. NEWTON*, No. 451, *post*.

358. To justify issue of warrant.]—*R. v. SOANE* (1738), Andr. 272; 95 E. R. 395.

359. ———.]—*CAUDLE v. SEYMOUR*, No. 450 *post*.

360. ——— Non-objection of party arrested.]—*R. v. HUGHES*, No. 476, *post*.

361. Oath required by statute.]—An information under Game Act, 1831 (c. 32), s. 30 & under 6 & 7 Will. 4, c. 65, s. 9, was stated to be by M. a credible witness, & contained the following allegation in the body of it: “& the said information having also been verified on the oath of A. another credible witness.” The *jurat* was, “exhibited by M. & sworn before me,” etc. It was signed by M. & A. It was proved by parol evidence, that A. swore to the charge at the time the information was laid, but there was no separate deposition by A. as to the charge. The charge was afterwards heard before two magistrates, when deft. gave evidence on which he was indicted for perjury:—*Held*: there did not appear to have been any sufficient deposition to the charge at the time the information was laid, therefore deft. was entitled to be acquitted, on the ground that the magistrates who heard the charge acted without jurisdiction.

All informations should show that the subject matter of complaint came within the jurisdiction of the magistrates. The statute requires that the truth of the charge shall be deposed to on the oath of some credible witness. There appears in this information nothing deposed to on oath. There are the words “verified on oath,” which would be satisfied by the fact, that M. said something (*WILLIAMS, J.*).—*R. v. SCOTTON* (1844), 5 Q. B. 493; 1 Dav. & Mer. 501; 1 New Sess. Cas.

before the ct. without summons or warrant.—*R. v. CRAWFORD* (1912), 22 W. L. R. 107; 6 D. L. R. 380; 5 Alta. L. R. 204; 2 W. W. R. 952.—CAN.

PART VIII. SECT. 1, SUB-SECT. 2.—B.

*a. Complaint necessary.*]—Where a magistrate proceeds under Masters & Servants Act, 1920 (c. 205), in the absence of a complaint of misconduct under the oath of the informant, he acts without jurisdiction.—*OKREY v. SPANGLER*, [1925] 1 D. L. R. 859; [1925] 1 W. W. R. 518; 19 Sask. L. R. 256.—CAN.

PART VIII. SECT. 1, SUB-SECT. 3.

354 i. General rule—Oath not necessary.]—In a case relating to an offence punishable upon summary conviction it is not necessary that the summons should be granted upon a sworn information.—*R. v. McDONALD* (1896), 29 N. S. R. 35.—CAN.

354 ii. ———.]—*R. v. THOMPSON* (1909), 11 W. L. R. 517.—CAN.

354 iii. ———.]—*R. v. MORRIS* (No. 2) (1920), 69 D. L. R. 117; 37 Can. Crim. Cas. 256; 53 N. S. R. 525.—CAN.

354 iv. ———.]—The information for a violation of a municipal bye-law is not required to be under oath.

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—*R. (STRANDQUIST) v. THORNBERT* (1925), 19 Sask. L. R. 429; [1925] 2 W. W. R. 175.—CAN.

354 v. ———.]—*R. v. FARRELL* (1839), 1 Jebb & S. 681.—IR.

354 vi. ———.]—*IRISH INSURANCE COMRS. v. TRENCH*, [1914] 2 I. R. 172.—IR.

358 i. To justify issue of warrant.]—*FRIEL v. FERGUSON* (1865), 15 C. P. 584.—CAN.

358 ii. ———.]—*Ex p. BOYCE* (1885), 24 N. B. R. 347.—CAN.

358 iii. ———.]—*Ex p. BALSER* (1888), 27 N. B. R. 40.—CAN.

358 iv. ———.]—*Held*: the information being sufficient to authorise the issue of a summons, was sufficient, when substantiated under oath, to authorise the issue of a warrant in the first instance.—*R. v. McDONALD* (1891), 24 N. S. R. 44.—CAN.

358 v. ———.]—*R. v. MILLS, Ex p. COFFON* (1905), 37 N. B. R. 122.—CAN.

358 vi. ———.]—A magistrate has no jurisdiction to issue a warrant on an information without examining upon oath complainant or his witnesses as to the facts upon which the information is based.—*R. v. LIZOTTE* (1906), 1 E. L. R. 355.—CAN.

358 vii. ———.]—*R. v. CARLETON, Ex p. GUNDY* (1906), 37 N. B. R. 389.—CAN.

358 viii. ———.]—*MATTHEWS v. JENKINS* (1907), 3 E. L. R. 577.—CAN.

358 ix. ———.]—*R. v. HORN BROOK, Ex p. MADDEN* (1908), 38 N. B. R. 358; 4 E. L. R. 509.—CAN.

358 x. ———.]—*Re SURENDRA NATH ROY, R. v. SURENDRA NATH ROY* (1870), 5 B. L. R. 274; 13 W. R. Cr. 27.—IND.

*p. Re-swearing information after amendment—Whether necessary.*]—*Re CONKLIN* (1871), 31 U. C. R. 160.—CAN.

*q. ———.]—R. v. McNUTT* (1896), 28 N. S. R. 377.—CAN.

*r. ———.]—Where a sworn information in writing is a prerequisite to the jurisdiction of the magistrate, an information which has been amended must, to retain its validity, be re-sworn.*—*R. v. DAVIS* (1912), 22 W. L. R. 837; 5 Alta. L. R. 443; 7 D. L. R. 608; 3 W. W. R. 1.—CAN.

*t. ———.]—It is not necessary to re-swear an information after an amendment, if the amendment only gives greater particularity or certainty to the charge & does not create a new charge.*—*R. v. TALLY*



**Sect. 1.—Information and complaint: Sub-sects. 3, 4 & 5, A. (a) & (b).]**

27; 13 L. J. M. C. 58; 2 L. T. O. S. 327; 8 J. P. 409; 8 Jur. 400; 114 E. R. 1335.

**Annotations:—**Consd. R. v. Hughes (1879), 4 Q. B. D. 614. **Refd.** R. v. Berry (1859), 8 Cox, C. C. 121.

#### SUB-SECT. 4.—FORM OF.

*See, now, Summary Jurisdiction Act, 1848 (c. 43), ss. 8, 9.*

**362. Necessity for writing.]—**The Act [Constables Protection Act, 1750 (c. 44)] does not protect justices for an act done by pretence of office: but where an act is done informally, where, in another manner, it might have been legally done, there, in consideration that country gentlemen are generally in the office that have no emolument, at least the best of them, therefore, if they do what by law they are empowered to do, & might have done another way, the Act protects them from suffering for the mere informality. On complaint, a justice may commit; but in strict form, the complaint should be in writing: on his own view, he may commit without complaint, if he has reason to apprehend the peace will be broken, though not actually broken (LORD MANSFIELD, C.J.).—**BROOKSHAW v. HOPKINS** (1773), Lofft, 240; 98 E. R. 630.

**363. —.]—**By Beerhouse Act, 1830 (c. 64), s. 15, penalties are recoverable upon the information of any person before the justices acting in petty session in & for the division or place in which the house is situate where the offence was committed. *Semble:* it is not necessary in such a case that there should have been a written information.—**R. v. RAWLINS** (1838), 8 C. & P. 439.

**364. —.]—****R. v. MILLARD**, No. 350, *ante*.

**365. —.]—***Re PERHAM*, No. 598, *post*.

**366. —.]—****R. v. HUGHES**, No. 476, *post*.

#### SUB-SECT. 5.—CONTENTS OF.

##### A. As to Offences or Grounds of Complaint.

###### (a) In General.

*See Summary Jurisdiction Act, 1848 (c. 43), ss. 1, 10, 17.*

**367. Whether alternative offences may be charged.]—**Information for selling live cattle or causing them to be sold is good.—**WINGFIELD v. JEFFERYS** (1697), 1 Ld. Raym. 284; 91 E. R. 1087, Ex. Ch.

**Annotation:—**Consd. R. v. Morley (1827), 1 Y. & J. 221.

**368. —.]—**On objection to a count in an information under 8 Ann c. 7, s. 17, charging that deft. was assisting, or otherwise concerned in the

unshipping of prohibited & uncustomed goods, that it was a charge of two distinct offences by the same count, & therefore bad, either for duplicity or uncertainty:—*Held:* the words did not involve two separate & distinct offences, & it was the established & ancient practice *cursu soaccarii* so to charge the offence in such information.—**A.-G. v. FARR** (1817), 4 Price, 122; 146 E. R. 414.

**Annotation:—**Consd. R. v. Morley (1827), 1 Y. & J. 221.

**369. —.]—**Information on 48 Geo. 3, c. 143, for selling "beer or ale" without an excise license, is bad, & a conviction thereon, showing that deft. had sold ale only, quashed.—**R. v. NORTH** (1825), 6 Dow. & Ry. K. B. 143; 3 Dow. & Ry. M. C. 38.

**Annotations:—**Apld. **Cotterill v. Lempriere** (1890), 59 L. J. M. C. 133. **Refd.** *Ex p. Pardy* (1850), 1 L. M. & P. 118.

**370. —.]—**An information stating that deft. imported or caused to be imported foreign silks, is bad for uncertainty.—**R. v. MORLEY** (1827), 1 Y. & J. 221; 4 Dow. & Ry. M. C. 109; 148 E. R. 653.

**Annotation:—**Mentd. **A.-G. v. Barroll** (1827), 1 Y. & J. 495.

**371. —.]—****COTTERILL v. LEMPRIERE**, No. 593, *post*.

**Acts charged disjunctively in indictment.]—***See CRIMINAL LAW*, Vol. XIV., pp. 223, 224, Nos. 2065–2076.

**372. Whether more than one offence may be charged.]—**A conviction for the said offence, where there are two distinct offences charged in the information, is bad. *Qu.*: whether a person can be convicted of two distinct penalties in the same information.—**R. v. SALOMONS** (1786), 1 Term Rep. 249; 99 E. R. 1077.

**Annotations:—**Distd. **R. v. Chandler** (1811), 14 East, 267. **Refd.** **R. v. Powell** (1831), 2 B. & Ad. 75; **Newman v. Bendshye & Metcalfe** (1839), 8 L. J. M. C. 58; **Ryalls v. R.** (1849), 12 L. T. O. S. 557.

**373. —.]—****R. v. TOTNES JJ.** (1879), *Times*, May 9, D. C.

**Annotations:—**Consd. **R. v. Cable**, [1906] 1 K. B. 719. **Expld.** **Johnson v. Needham**, [1909] 1 K. B. 626.

**374. — Necessity for prosecutor to elect—Charge against master & servant—Ill-treating & causing to be ill-treated horse.]—**W., the servant of C., & C. were both summoned for illtreating & causing to be illtreated a horse. Defts. objected that these were two separate offences, & the justices required prosecutor to elect which he would proceed with, & because he declined to elect, dismissed the summons:—*Held:* the justices were wrong, & they ought to have convicted each of the offence which he had committed.—**BARTHOLOMEW v. WISEMAN** (1891), 56 J. P. 455; 8 T. L. R. 147, D. C.

**Annotation:—**Apld. **Rogers v. Richards** (1892), 66 L. T. 261.

**375. — — — "Defect in substance."]**—Though prosecutor may be required to elect on which charge he will proceed, the inclusion of two

(1915), 30 W. L. R. 396; 7 W. W. R. 1178.—**CAN.**

(**STRAND-QUIST v. THORNBERT** (1925), 19 Sask. L. R. 429; [1925] 2 W. W. R. 175.—**CAN.**

#### PART VIII. SECT. 1, SUB-SECT. 4.

**362 i. Necessity for writing.]—**The complaint on oath upon which a warrant may issue must be in writing.—**MONTAGUE v. AH SHEN**, [1907] V. L. R. 458.—**AUS.**

**362 ii. —.]—**An information laid under Summary Convictions Act, s. 13, must be in writing.—**R. v. KILMARTIN** (1923), 33 B. C. R. 151; [1924] 1 W. W. R. 107.—**CAN.**

**362 iii. —.]—***Ex p. HUGHES* (1839),

1 I. L. R. 292.—**IR.**

**362 iv. —.]—***Re COLLETT* (1897), 15 N. Z. L. R. 425.—**N.Z.**

**b. Necessity for date.]—**Where the information does not state the date of the offence charged, a conviction based thereon is bad.—**R. v. DUNLAP** (1914), 27 W. L. R. 121; 6 W. W. R. 3.—**CAN.**

#### PART VIII. SECT. 1, SUB-SECT. 5.—A. (a).

**372 i. Whether more than one offence may be charged.]—****R. v. FARRAR** (1890), 11 C. L. T. 25; 1 Terr. L. R. 306.—**CAN.**

**372 ii. —.]—****R. v. AUSTIN** (N. W. T.) (1905), 1 W. L. R. 571.—**CAN.**

**372 iii. —.]—****RIFKIN v. R.** (Man.), [1925] 2 D. L. R. 520; [1925] 2

W. W. R. 242; 43 Can. Crim. Cas. 330.—**CAN.**

**372 iv. —.]—****SALT v. SING LEE** (Sask.), [1922] 3 W. W. R. 159; 69 D. L. R. 69; 37 Can. Crim. Cas. 214.—**CAN.**

**372 v. —.]—**Where an information charges more than one offence, the magistrate may hear & adjudicate on any one of the charges, & may, with the consent of deft., hear two charges at one time.—**COOPER v. HAMILTON** (1888), 6 N. Z. L. R. 598.—**N.Z.**

**c. — Necessity for prosecutor to elect.] —***Semble:* when an information charges two offences it is the duty of the magistrate to tell the informant of his right of election to proceed on either charge.—**HEDBERG v. WOODHALL** (1913), 15 C. L. R. 531.—**AUS.**

offences in one information is a "defect in substance" within Summary Jurisdiction Act, 1848 (c. 43), s. 1, & no objection to the information can be allowed in respect of it.—*RODGERS v. RICHARDS*, [1892] 1 Q. B. 555; 56 J. P. 281; 40 W. R. 331; 36 Sol. Jo. 274; *sub nom.* *RODGERS v. RICHARDS*, 66 L. T. 261; 17 Cox, C. C. 474, D. C.

*Annotations*:—*Distd. R. v. Wood*, *Ex p. Farwell* (1918), 87 L. J. K. B. 913. *Refd. R. v. Rawson*, [1909] 2 K. B. 748.

**376. ——— Effect of refusal to elect.]—**An information was preferred against resp. for that he did "cruelly ill-treat, abuse, & torture a certain animal, to wit, a grey gelding." The justices being of opinion that the information charged three offences called upon applt. to elect upon which portion of the information he would proceed, & as applt. declined to elect the justices dismissed the information:—*Held*: the justices were right in the circumstances in declining to convict.—*JOHNSON v. NEEDHAM*, [1909] 1 K. B. 626; 78 L. J. K. B. 412; 100 L. T. 493; 73 J. P. 117; 25 T. L. R. 245; 22 Cox, C. C. 63, D. C.

**Joinder of offences in indictment.]—See** CRIMINAL LAW, Vol. XIV., pp. 226–231, Nos. 2111–2174.

**377. What amount to separate offences—Same offence on various occasions.]—**Applt. was convicted summarily by justices upon an information preferred against him under Betting Act, 1853 (c. 119), s. 3, which charged him "with having on Oct. 5, in the year aforesaid, & on divers other days & times between the said Oct. 5 & the laying of the said information" (Nov. 16, following), "being then & there the occupier of a certain house in the said city" . . . "knowingly & wilfully opened, kept & used the same for the purpose of the said O. betting with persons resorting thereto." The justices convicted him of the offence committed on Nov. 8, & in a case stated for the opinion of this Ct., they stated that it was established to their satisfaction that he did so keep & use the house on Nov. 8, but not on Oct. 5, or on any other day:—*Held*: the information was good, & did not allege more than one offence, & upon such information the justices were warranted in convicting of the offence as committed on the Nov. 8.—*ONLEY v. GEE* (1861), 30 L. J. M. C. 222; 4 L. T. 338; 25 J. P. 342; 7 Jur. N. S. 570; 9 W. R. 662.

*Annotations*:—*Consd. Ex p. Burnby*, [1901] 2 K. B. 458, *Refd. Parker v. Sutherland* (1917), 116 L. T. 820.

**378. ———.]—**An information charged deft., a licensed victualler, with permitting his house to be used as a brothel on Jan. 26, 28, 29, & 31, contrary to Feb. 1, 4, 5, & 6 in the same year, Licensing Act, 1872 (c. 94), s. 15:—*Held*: the fact of the days named being non-consecutive did not prevent the charge from being a charge of one continuing offence; the information was consequently not bad for duplicity; & deft. might on such an information be lawfully convicted of so permitting his house to be used on all the days named.—*Ex p. BURNBY*, [1901] 2 K. B. 458; 45 Sol. Jo. 579; *sub nom.* *R. v. BURNBY*, 70 L. J. K. B. 739; 85 L. T. 168; 20 Cox, C. C. 25, D. C.

**379. ——— Same offence repeated on same occasion.]—**(1) A conviction, under Profane Oaths Act, 1746 (c. 21), s. 1, charging that deft. did "profanely curse one profane curse" (setting it

out), "twenty several times repeated" & adjudging him "for his said offence" to forfeit the sum of £2, being a cumulative penalty at the rate of two shillings for each repetition of the oath, is good.

(2) An information for profanely cursing one profane curse, several times repeated, is not bad for duplicity within Summary Jurisdiction Act, 1848 (c. 43), s. 10.—*R. v. SCOTT* (1863), 4 B. & S. 368; 2 New Rep. 428; 33 L. J. M. C. 15; 8 L. T. 662; 28 J. P. 214; 122 E. R. 497.

*Annotations*:—*As to* (1) *Refd. Milnes v. Bale*, *Milnes v. Lea* (1875), L. R. 10 C. P. 591. *Generally, Mentd. Hildesheimer v. Faulkner* (1901), 70 L. J. Ch. 800.

**380. ——— Forging & uttering.]—**A summons charging A. with unlawfully forging, offering & uttering, well knowing, etc., a certificate attached to a license for removing cattle:—*Held*: not bad within Summary Jurisdiction Act, 1848 (c. 43), s. 10, as involving two offences.—*ANNAKIN v. SMITH* (1868), 32 J. P. 759.

**381. ——— Allegation of previous convictions.]—***R. v. HOLLOWAY PRISON (GOVERNOR)*, No. 387, *post*.

**Offences in respect of game.]—See** GAME, Vol. XXV., p. 388, Nos. 384–388.

**Non-payment of rates.]—See** RATES & RATING.

**Cruelty to animals.]—See** ANIMALS, Vol. II., p. 291, Nos. 621–623.

**Nuisances.]—See** NUISANCE.

**— Sale of intoxicating liquor.]—See** INTOXICATING LIQUORS, Vol. XXX., p. 103, No. 791.

#### Description of Offence.

*See, now*, Criminal Justice Act, 1925 (c. 86), s. 32.

**382. Necessity to state time.]—**(1) In an information on a penal statute it is sufficient to lay the offence as committed between such a time & such a time.

(2) The summons need not specify the time of day.—*R. v. SIMPSON* (1714), 10 Mod. Rep. 248; Gilb. 282; 88 E. R. 713; *subsequent proceedings* (1717), 10 Mod. Rep. 378.

*Annotations*:—*As to* (1) *Refd. R. v. Bissex* (1756), Say. 304. *Generally, Mentd. R. v. Clegg* (1721), 8 Mod. Rep. 4.

**383. ———.]—**G. was charged in an information with having been guilty at the election of the members of the school board of S. of corrupt practices contrary to Elementary Education Act, 1870 (c. 75), s. 91, & was thereon convicted:—*Held*: the conviction was bad, as the information insufficiently described the offence, as the offence ought to have been specified, & the time & place mentioned.—*R. v. INGALL* (1880), 42 L. T. 533; 44 J. P. 552; 29 W. R. 288, D. C.

**384. Must be in language of informer.]—**Informations before magistrates must be taken as nearly as possible in the language used by the party.—*COHEN v. MORGAN* (1825), 6 Dow. & Ry. K. B. 8; 3 Dow. & Ry. M. C. 320.

*Annotations*:—*Mentd. Carratt v. Morley* (1841), 1 Q. B. 18; *Saunders v. Swansea Finance Co. & Home* (1905), 21 T. L. R. 317.

**385. Must show subject matter within jurisdiction of justices.]—***R. v. SCOTTON*, No. 361, *ante*.

**386. Necessity to state place.]—***R. v. INGALL*, No. 383, *ante*.

**387. Necessity to follow words of statute—When elements of offence embodied.]—**D. was convicted of an offence under Licensing Act, 1872 (c. 94), s. 12, the charge sheet charging her with

#### PART VIII. SECT. 1, SUB-SECT. 5.— A. (b).

**386 i. Necessity to state place.]—**A justice has no jurisdiction to issue a

warrant upon an information which does not state the place where the offence was committed.—*CAMPBELL v. WALSH* (1910), 40 N. B. R. 186.—**CAN.**

**387 i. Necessity to follow words of statute—When elements of offence embodied.]—**In an information under 43 Vict., No. 24, it is sufficient if the offence charged be stated in the words



*Sect. 1.—Information and complaint: Sub-sect. 5, A. (b), & B.; sub-sect. 6, A., B. & C. (a) & (b); sub-sects. 7 & 8, A.]*

being "drunk & incapable of taking care of herself" in a highway. She was further charged with having been convicted of a similar offence three times during the preceding twelve months, one of these convictions being for having been "drunk & disorderly." She was fined, & in default of payment was committed to prison for thirty days. In a further commitment she was committed to prison for another sixty days for failure to comply with an order directing her to enter into a recognisance to keep the peace. On an application by D. for a writ of *habeas corpus* directed to the governor of the prison:—*Held*: (1) D. had been rightly convicted of an offence under sect. 12, although the word, "found" did not appear on her charge sheet, since the natural inference from the language of the charge sheet was that she had been "found" drunk within the meaning of the sect. & since it is not strictly necessary for the exact language of the Act of Parliament under which a person is charged to be used in the charge sheet charging such person, if the words used are sufficient to embody the elements of the offence; (2) the charge alleging previous convictions did not constitute a separate offence, but was only matter of aggravation in respect of the offence under sect. 12; (3) the conviction of being "drunk & disorderly" was a "previous conviction" within the meaning of sect. 12; & (4) the two commitments, although in two documents in fact constituted one warrant of commitment.—*R. v. HOLLOWAY PRISON (GOVERNOR)* (1916), 85 L. J. K. B. 689; *sub nom. R. v. HOLLOWAY PRISON (GOVERNOR), Ex p. DANIELS*, 80 J. P. 244, D. C.

*Offences in relation to pawnbroker.]—See PAWNS & PLEDGES.*

*Offences in relation to master & servant.]—See MASTER & SERVANT.*

*Offences in relation to game.]—See GAME, Vol. XXV., pp. 375, 379, Nos. 241, 286.*

*Offences by parish officers.]—See POOR LAW.*

*Offences under Vagrancy Acts.]—See CRIMINAL LAW, Vol. XV., p. 748, No. 8067.*

*Offence under Betting Act, 1853 (c. 119).]—See GAMING & WAGERING, Vol. XXV., p. 450, No. 416.*

#### *B. As to Persons Charged.*

**388. Whether more than one person may be charged—Several offences.]—Several persons being**

used by the Act, in declaring the offence.—*Ex p. COLLINS* (1888), 9 N. S. W. L. R. 497; 5 N. S. W. W. N. 85.—**AUS.**

**387 ii. ———.]—CHAMMEN v. GILMORE**, [1914] V. L. R. 455.—**AUS.**

**387 iii. ———.]—The information must contain a complete statement of the offence as defined by the Act conferring the summary jurisdiction.** *Ex p. MOFFATT* (1886), 9 L. N. 403.—**CAN.**

**387 iv. ———.]—AH KAN v. COX, AH WING v. COX, TONG v. COX** (1902), 21 N. Z. L. R. 645.—**N.Z.**

**387 v. ———.]—O'CONNOR v. JOHNSTON** (1903), 23 N. Z. L. R. 183.—**N.Z.**

**d. Necessity to detail facts of offence.]—An information charging vagrancy should show the particular facts on which the prosecution relies to establish the offence.—R. v. McCORMACK** (1903), 9 B. C. R. 497.—**CAN.**

**e. ———.]—Where the information omits a material allegation of fact, but the issue as to that fact is tried**

out before the magistrate, who finds the fact against the accused, the conviction will not be quashed.—*R. v. TAYLOR* (1909), 14 B. C. R. 235.—**CAN.**

**f. ———.]—An information must contain a precise charge of the thing, the guilt of which is imputed to the party charged.—R. v. MEATH JJ.** (1841), 2 Leg. Rep. 8.—**IR.**

**g. Statement of substance of action.]—HILLS v. STANFORD** (1904), 23 N. Z. L. R. 1061.—**N.Z.**

**h. ———.]—MAXWELL v. MCCARTHY** (1903), 23 N. Z. L. R. 225.—**N.Z.**

**k. Omission of words "contrary to the statute."—The omission in an information of the conclusion, "contrary to the statute," etc., is immaterial.—LANE v. DOYLE** (1892), 11 N. Z. L. R. 385.—**N.Z.**

#### **PART VIII. SECT. 1, SUB-SECT. 5.—B.**

**l. Whether more than one person may be charged.]—R. v. CARROLL** (1842), 2 Leg. Rep. 279.—**IR.**

**m. Description of party—Place of**

charged in one information with being disorderly in a licensed beerhouse, & refusing to quit on request by a constable:—*Held*: the objection that each case ought to be taken separately having been waived, a separate conviction against each was right.—*WELLS v. CHEYNEY* (1871), 36 J. P. 198.

**Offences against Old Age Pension Act, 1908 (c. 40).]—See POOR LAW.**

**Offences against Game Act, 1831 (c. 32).]—See GAME, Vol. XXV., pp. 367, 370, Nos. 159, 190.**

#### **SUB-SECT. 6.—BY WHOM LAID.**

##### **A. In General.**

*See Summary Jurisdiction Act, 1848 (c. 43), s. 10.*

**389. General rule—Any person—Unless otherwise provided by statute.]—Where an Act imposes penalties & provides that these penalties may be recovered under Summary Jurisdiction Acts, any person may take proceedings to recover the penalties unless the right to do so is taken away by express words or by necessary implication.—R. v. STEWART**, [1896] 1 Q. B. 300; 65 L. J. M. C. 83; 60 J. P. 356; *sub nom. R. v. STEWART, Ex p. BURNHAM*, 74 L. T. 54; 44 W. R. 368; 40 Sol. Jo. 259; 18 Cox, C. C. 232, D. C.

**390. ——— Conspiracy & Protection of Property Act, 1875 (c. 86).]—On an information by resp., a superintendent of police, against appls. under sect. 7 (1) of above Act for intimidating a workman by assembling in large numbers & throwing eggs at him, some of the appls. were not proved to have thrown the eggs but they were with appls. who did so, & there were shouts of "Black-legs" & "Dirty Scabs." The workman did not authorise resp. to lay the information. The justices convicted appls.:—*Held*: information could be laid by any person, & as appls. were all part of a body of men who were calling out "Black-legs" & "Dirty Scabs" the conviction was right.—YOUNG v. PECK** (1912), 107 L. T. 857; 77 J. P. 49; 29 T. L. R. 31; 23 Cox, C. C. 270, D. C.

**391. Penalty imposed for benefit of particular body.]—Where a penalty is imposed for the benefit of, & is payable to, a particular co., it can only be enforced on their complaint, although other parties may be interested in imposing it; as for instance, where only licensed hawkers were authorised to sell in a market controlled by a co., & on an information against an unlicensed hawker**

*abode.]—A magistrate's ct. has no jurisdiction to hear an action if in the plaint-note the place of abode of a party to the action is not stated.—HEWITT v. CAREW* (1903), 22 N. Z. L. R. 569.—**N.Z.**

**n. ———.]—The name of a party is sufficiently stated in a plaint-note in the magistrate's ct. by giving the surname & the initials of the Christian names.—GOLDING v. EYRE-KENNY & TAINE** (1905), 25 N. Z. L. R. 897.—**N.Z.**

#### **PART VIII. SECT. 1, SUB-SECT. 6.—A.**

**389 i. General rule—Any person—Unless otherwise provided by statute.]—Where an Act requires a particular person to prosecute for an offence, the information must be laid by him, or at least by his authority, & in his name.—ST. JOHN CORPN. v. MASTERS** (1880), 19 N. B. R. (3 P. & B.) 587.—**CAN.**

**o. ———.]—An information for an offence against an enactment for the benefit of the public at large**

by a person other than the co., the conviction on that ground was quashed.—*R. v. HICKS* (1855), 4 E. & B. 633; 3 C. L. R. 833; 24 L. J. M. C. 94; 24 L. T. O. S. 252; 19 J. P. 515; 1 Jur. N. S. 654; 3 W. R. 208; 119 E. R. 232.

*Annotations*:—*Appld.* *Anderson v. Hamlin* (1890), 25 Q. B. D. 221. *Refd.* *Cole v. Coulton* (1860), 24 J. P. 596.

**Whether corporation can be common informer.]**—*See* CORPORATIONS, Vol. XIII., p. 352, Nos. 904, 905.

**Offences under Game Act, 1831 (c. 32).]**—*See* GAME, Vol. XXV., p. 370, Nos. 187, 188.

**Offences against Larceny Acts.]**—*See* CRIMINAL LAW, Vol. XIV., p. 169, Nos. 1471, 1472.

**Offences against Pawnbrokers Act, 1800 (c. 99).]**—*See* PAWNS & PLEDGES.

**Keeping disorderly house contrary to local Act.]**—*See* INTOXICATING LIQUORS, Vol. XXX., p. 93, No. 715.

**Obstruction of highway.]**—*See* HIGHWAYS, Vol. XXVI., p. 459, Nos. 1751–1753.

**Offence against Diseases of Animals Act, 1894 (c. 57).]**—*See* ANIMALS, Vol. II., p. 303, No. 708.

**Offence against Roman Catholic Relief Act, 1829 (c. 7).]**—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 531, No. 3917.

**Offence against Public Health (London) Act, 1891 (c. 76).]**—*See* PUBLIC HEALTH.

**Offence against property of corporation.]**—*See* CORPORATIONS, Vol. XIII., p. 411, No. 1308.

#### B. Public and Other Authorities.

**Assistant overseer.]**—*See* POOR LAW.

**Officer appointed by corporation.]**—*See* CRIMINAL LAW, Vol. XIV., p. 170, Nos. 1475–1477.

**Local authority.]**—*See* LOCAL GOVERNMENT, pp. 94, 95, Nos. 642, 643, *ante*.

**Under Public Health Acts.]**—*See* LOCAL GOVERNMENT, pp. 23, 24, *ante*; PUBLIC HEALTH.

**Under Vaccination Acts.]**—*See* PUBLIC HEALTH.

**Under Mines Regulation Acts.]**—*See* MINES.

**Under Food & Drugs Acts.]**—*See* FOOD & DRUGS, Vol. XXV., pp. 104, 107, Nos. 270–277, 315, 316.

**Under game laws.]**—*See* GAME, Vol. XXV., p. 388, Nos. 390, 391.

**By inspectors & bailiffs of fisheries.]**—*See* FISHERIES, Vol. XXV., p. 43, Nos. 394, 395.

**By friendly societies.]**—*See* FRIENDLY SOCIETIES, Vol. XXV., p. 331, No. 326.

#### C. Under Particular Statutes.

##### (a) In General.

**Under bye-laws of tramway company.]**—*See* TRAMWAYS & LIGHT RAILWAYS.

**Under Metropolitan Police Act, 1839 (c. 47), s. 60.]**—*See* HIGHWAYS, Vol. XXVI., p. 424, Nos. 1434, 1435.

**Under Public Health Act, 1875 (c. 55).]**—*See* PUBLIC HEALTH.

may in general be laid by any one independently of any authority from the party or parties to whom the penalties to be recovered are to be awarded by law.—*SARGOOD v. VEALE* (1891), 17 V. L. R. 660.—**AUS.**

**p. By servant in charge of property.]**—*A.*, on going to England, left his motor car with *B.*, with instructions to get it overhauled & painted. While *A.* was away the motor was maliciously damaged:—*Held*: *B.* was competent to swear the information.—*FARRELL v. BELFAST CORPN.* (1916), 50 I. L. T. 212.—**IR.**

#### PART VIII. SECT. 1, SUB-SECT. 7.

**q. Whether before one justice.]**—An information under Canada Tem-

perance Act, 1878, must be taken before two justices.—*R. v. RISTEEN*, *R. v. BURTT* (1882), 22 N. B. R. 51.—**CAN.**

**r. —.]**—*Ex p.* *MANZER* (1883), 23 N. B. R. 315.—**CAN.**

**t. —.]**—*R. v.* *JOHNSON* (1886), 13 O. R. 1.—**CAN.**

**a. —.]**—*R. v.* *STARKEY* (1891), 7 Man. L. R. 489.—**CAN.**

**b. Magistrate where "subject-matter of complaint" arises.]**—*R. v. KNIGHT*, *Ex p.* *WILLIS*, [1916] V. L. R. 159.—**AUS.**

**c. Magistrate having territorial jurisdiction—Accused within jurisdiction at time of offence.]**—*R. v. BACHELOR*

**Under Offences against the Person Act, 1861 (c. 100).]**—*See* CRIMINAL LAW, Vol. XIV., p. 169, Nos. 1468–1470.

**Under Acts relating to fisheries.]**—*See* FISHERIES, Vol. XXV., p. 56, Nos. 486, 487.

**Under Acts relating to markets.]**—*See* MARKETS.

**Under Acts relating to mines.]**—*See* MINES.

##### (b) Necessity for Consent.

*See, generally*, CRIMINAL LAW, Vol. XIV., p. 170, Nos. 1481–1487.

**Proceedings for malicious damage to forests.]**—*See* CONSTITUTIONAL LAW, Vol. XI., p. 586, No. 876.

**Under Sunday Observance Prosecution Act, 1871 (c. 87).]**—*See* CRIMINAL LAW, Vol. XIV., p. 171, No. 1487; **TIME.**

**Under Weights & Measures Act, 1904 (c. 28).]**—*See* WEIGHTS & MEASURES.

**Under Fertilisers & Feeding Stuffs Act, 1906 (c. 27).]**—*See* CRIMINAL LAW, Vol. XIV., p. 170, No. 1481.

**Under Public Health Act, 1875 (c. 55).]**—*See* PUBLIC HEALTH.

**Under Acts relating to mines.]**—*See* MINES.

**Under Dangerous Performances Acts, 1879 (c. 34), & 1897 (c. 52).]**—*See* MINES.

#### SUB-SECT. 7.—BEFORE WHOM LAID.

**Whether before one justice—Offence under Betting Act, 1853 (c. 119).]**—*See* GAMING & WAGERING, Vol. XXV., p. 450, No. 417.

#### SUB-SECT. 8.—LIMITATION OF TIME.

##### A. In General.

*See* Summary Jurisdiction Act, 1848 (c. 43), s. 11; & *generally*, CRIMINAL LAW, Vol. XIV., pp. 151–153.

**392. General rule—Within six months.]**—Summary Jurisdiction Act, 1848 (c. 43), s. 11, enacts that, where a complaint shall be laid before a justice, on which he shall have authority to grant an order, such complaint shall be made within six calendar months from the time when the matter of complaint arose. By sect. 38, the Act is to commence & take effect seven weeks after its passing:—*Held*: a complaint, after the Act came into operation, upon matter which arose before, was barred by sect. 11, though six calendar months from the time when the matter of complaint arose had elapsed when the statute passed: for, the Act having given time for preferring any such complaint before the limitation clause came into operation, no such injury was done as giving full effect to sect. 11 as would warrant the

(1888), 15 O. R. 641.—**CAN.**

**d. Where no police magistrate—As required by statute—Power of ordinary magistrate.]**—*HAKALA v. WARNER* (Ont.) (1922), 39 Can. Crim. Cas. 88.—**CAN.**

#### PART VIII. SECT. 1, SUB-SECT. 8.—A.

**392 i. General rule—Within six months.]**—In the case of any offence punishable on summary conviction, if no time is especially limited for making any complaint or laying any information under the Act or law relating to the particular case, the complaint must be made or the information laid within six months from time the matter of complaint or information arose.—*R. v. MCKINNON*



*Sect. 1.—Information and complaint: Sub-sect. 8, A. & B. (a) & (b), C. (a) & (b), & D. Sect. 2: Sub-sect. 1, A.]*

ct. in putting upon it a restricted construction.—*R. v. LEEDS & BRADFORD RY. Co.* (1852), 18 Q. B. 343; 21 L. J. M. C. 193; 19 L. T. O. S. 86; 16 J. P. 631; 16 Jur. 817; 118 E. R. 129; *previous proceedings, sub nom. Re EDMUNDSON* (1851), 17 Q. B. 67.

*Annotations:—Consd. R. v. Hannay* (1874), 44 L. J. M. C. 27. *Dbtd. R. v. Edwards* (1884), 13 Q. B. D. 586. *Refd. New River Co. v. Mather* (1875), 44 L. J. M. C. 105.

### *B. Application of Summary Jurisdiction Acts.*

#### *(a) In General.*

*See Summary Jurisdiction Act, 1848 (c. 43), s. 11.*

393. General rule—When no time limited by statute.]—*JACOMB v. DODGSON*, No. 395, *post*.

394. Continuing offence—When penalty imposed per diem.]—*R. v. SLADE, Ex p. SAUNDERS*, No. 666, *post*.

Claim for maintenance of pauper.]—*See POOR LAW.*

Non-payment of water rates.]—*See WATER SUPPLY.*

Breach of Registration of Business Names Act, 1916 (c. 58), s. 9.]—*See TRADE MARKS.*

Offences in relation to friendly societies.]—*See FRIENDLY SOCIETIES*, Vol. XXV., p. 331, Nos. 328, 329.

Complaints between husband & wife.]—*See HUSBAND & WIFE*, Vol. XXVII., p. 560, Nos. 6161–6169.

Offences against Food & Drugs Acts.]—*See FOOD & DRUGS*, Vol. XXV., p. 101, Nos. 241–243.

Offences against London Building Acts 1894–1909.]—*See METROPOLIS.*

Offences against Metropolis Management (Amendment) Act, 1862 (c. 102).]—*See HIGHWAYS*, Vol. XXVI., p. 509, Nos. 2138–2141.

Offences against Salmon & Freshwater Fisheries Act, 1923 (c. 16).]—*See FISHERIES*, Vol. XXV., p. 62, No. 517.

Offences against Highway Acts.]—*See HIGHWAYS*, Vol. XXVI., p. 459, Nos. 1756–1758.

Claims for repair of private streets, etc.]—*See HIGHWAYS*, Vol. XXVI., p. 535, Nos. 2345–2348.

Claims for compensation for compulsory purchase of land.]—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 189, Nos. 688–691.

Bastardy orders.]—*See BASTARDY*, Vol. III., p. 403, No. 367.

Application for distress warrant.]—*See DISTRESS*, Vol. XVIII., p. 241, No. 1595.

#### *(b) When Not Applicable.*

*See Summary Jurisdiction Act, 1848 (c. 43), ss. 11, 35.*

Offences under Poor Law Amendment Acts.]—*See POOR LAW.*

Continuing offence—Non-delivery up of rate book by collector.]—*See RATES & RATING.*

—Nuisance.]—*See NUISANCE.*

—Under Public Health Act, 1875 (c. 55), s. 156.]—*See HIGHWAYS*, Vol. XXVI., p. 562, No. 2572.

(1902), 22 C. L. T. 161; 3 O. L. R. 508; 1 O. W. R. 199.—CAN.

e. —Within twelve months.]—*Ex p. FORSMAN* (1878), 4 V. L. R. (L.) 55.—AUS.

f. —Within thirty days.]—By Liquor License Act, 1897, s. 95, an information for an offence must

be laid within thirty days of the commission thereof.—*R. v. HUDGINS* (1907), 9 O. W. R. 289, 376; 14 O. L. R. 139.—CAN.

—Within three months.]—It being essential that a prosecution for an alleged offence should be commenced "within three months" after

—Under London Building Act, 1894 (c. ccxiii).]—*See METROPOLIS.*

—Under Metropolis Management Acts.]—*See HIGHWAYS*, Vol. XXVI., p. 515, No. 2185.

—Under Electric Lighting (Clauses) Act, 1899 (c. 19), s. 18.]—*See ELECTRIC LIGHTING*, Vol. XX., p. 203, No. 27.

—Under Companies Acts.]—*See COMPANIES*, Vol. IX., p. 536, No. 3923.

—Under Food & Drugs Acts.]—*See FOOD & DRUGS*, Vol. XXV., p. 101, No. 243.

—Desertion of wife.]—*See HUSBAND & WIFE*, Vol. XXVII., p. 561, Nos. 6165–6167.

—Recovery of money from member of friendly society.]—*See FRIENDLY SOCIETIES*, Vol. XXV., p. 335, No. 367.

Dispute under Employers & Workmen Act, 1875 (c. 90).]—*See MASTER & SERVANT.*

For recovery of expenses of fire brigade proceeding under Town Police Clauses Act, 1847 (c. 89), s. 33.]—*See PUBLIC HEALTH.*

Offences in prejudice of recruiting under Defence of Realm Regulations.]—*See ROYAL FORCES.*

Application for discharge of order of separation.]—*See HUSBAND & WIFE*, Vol. XXVII., p. 568, No. 6256.

### *C. When Time Begins to Run.*

#### *(a) Orders for Recovery of Money and Other Orders.*

*See Summary Jurisdiction Act, 1848 (c. 43), s. 11.*

395. When matter of complaint complete—Interpretation of Summary Jurisdiction Act, 1848 (c. 43), s. 11.]—I think the object of Jervis's Act [above Act] is to fix a time within which proceedings must be taken to recover expenses where no time was limited by statutory authority, & it is very reasonable there should be some limit to such proceedings. I take the meaning of that Act to be that the claim should be enforced within six months after the complete matter of complaint arose. Now according to Public Health & Local Government Acts three months were given to debt. after notice of the sum claimed in order that he might dispute the amount. So long as the three months ran payment of his proportion could not be enforced, for it was not then conclusively fixed. Therefore, if we were to hold that those three months were to count as part of the six months given by Jervis's Act we should place this class of cases on a very different footing from all other similar cases under other Acts. It is clear that the debt was not absolutely due till the end of the three months; debt. was not bound to obey the notice to pay till that time, & payment could not till then be enforced. Therefore it is only doing justice to the Public Health Acts, & giving effect to Jervis's Act, to say that the time of limitation began at the end of the three months. The justices, therefore, were wrong in holding otherwise (*COCKBURN, C.J.*).—*JACOMB v. DODGSON* (1863), 3 B. & S. 461; 32 L. J. M. C. 113; 7 L. T. 674; 27 J. P. 548; 9 Jur. N. S. 848; 11 W. R. 308; 122 E. R. 174.

*Annotation:—Consd. Grece v. Hunt* (1877), 2 Q. B. D. 389.

Recovery of rates.]—*See RATES & RATING.*

Recovery of money from member of friendly

its commission:—*Held*: an information laid on Mar. 1, was within the time for an offence of Dec. 1 preceding.—*R. v. NOLAN (N.S.)* (1917), 28 Can. Crim. Cas. 100.—CAN.

h. In case of continuing offence.]—*Ex p. WOODSTOCK ELECTRIC LIGHT Co.* (1898), 34 N. B. R. 460.—CAN.

society.]—See FRIENDLY SOCIETIES, Vol. XXV., p. 335, No. 367.

Recovery of water rate.]—See WATER SUPPLY.

Proceedings under Public Health Acts.]—See PUBLIC HEALTH.

Complaints under local Improvement Acts.]—See PUBLIC HEALTH.

Recovery of expenses of paving streets, etc.]—See HIGHWAYS, Vol. XXVI., pp. 499, 500, 518, 535, Nos. 2074–2077, 2203, 2204, 2345–2349.

(b) Summary Offences.

Offences under Vagrancy Acts.]—See POOR LAW.  
Offences relating to buildings.]—See PUBLIC HEALTH.

D. Under Particular Statutes.

See Titles *passim*.

SECT. 2.—SUMMONS OR WARRANT.

SUB-SECT. 1.—SUMMONS.

A. Necessity for.

396. General rule—Summons necessary—Unless defendant appears without.]—Summons necessary in summary convictions, unless deft. appears without.—R. v. DYER (1703), 1 Salk. 181; Holt, K. B. 157; 6 Mod. Rep. 41; 91 E. R. 165.

Annotations:—Apld. R. v. Hall (1825), 6 Dow. & Ry. K. B. 84. Refd. R. v. Venables (1725), Fortes. Rep. 325; Painter v. Liverpool Gas Co. (1836), 2 Har. & W. 233. Mentd. R. v. Wind (1729), 1 Barn. K. B. 162; Tutton v. Darke, Nixon v. Freeman (1860), 5 H. & N. 647.

397. ———.]—R. v. VENABLES, No. 221, ante.

398. ———.]—R. v. HEBER (1731), 2 Barn. K. B. 101; 2 Stra. 915; 94 E. R. 382.

Annotations:—Refd. R. v. Hughes (1879), 4 Q. B. D. 614. Mentd. Cropps v. Durden (1777), 2 Cowp. 640.

399. ———.]—The committing a pauper to the house of correction without any summons, or any oath made of his return, after removal, is contrary to natural justice; & is, therefore, a ground for an information against the justices.—R. v. ANGELL (1735), Lee temp. Hard. 124; 95 E. R. 78.

400. ———.]—A conviction where no summons is stated to have issued, quashed.—R. v. HAWKER (1735), Lee temp. Hard. 130; Cald. Mag. Cas. 391, n.; 95 E. R. 82.

Annotation:—Refd. Dingsdale v. Clarke (1829), 8 L. J. O. S. M. C. 137.

401. ———.]—R. v. HARWOOD (1738), 2 Stra. 1088; Andr. 152; 93 E. R. 1050.

402. ———.]—The record of a conviction by default upon the 5 Ann. c. 25, must show that deft. has been personally summoned to appear to the information.—R. v. HALL (1825), 6 Dow. & Ry. K. B. 84; 3 Dow. & Ry. M. C. 19.

Annotation:—Refd. R. v. Commins (1826), 8 Dow. & Ry. K. B. 344.

403. ———.]—Evidence in support of an information before a magistrate under the game laws, cannot be received in the absence of deft., at least, where he has not been personally summoned to appear to the information.—R. v. COMMINS (1826), 8 Dow. & Ry. K. B. 344; 4 Dow. & Ry. M. C. 94.

404. ———.]—Where, in a conviction, the summons is recited, such recital of it is evidence

of the summons; but, in an action against the convicting magistrate for false imprisonment, pltf. may show that there was no summons, & if he does so, the conviction is bad. *Qu.*: whether a conviction, drawn up in a form given by statute not reciting the summons, is *prima facie* evidence of the summons.—MASON v. BARKER (1843), 1 Car. & Kir. 100; 2 L. T. O. S. 107, N. P.

405. ———.]—Where the interests of any person are to be affected by an order of justices, it is essential to the validity of such order that he should have an opportunity afforded him of being heard before the order is made; & the same rule applies, although the Act of Parliament under which the order is made does not require any previous summons.

Where an order of justices was made under Poor Law Amendment Act, 1834 (c. 76), s. 27, directing the guardians of a union to administer relief to a pauper unable to work, without requiring her to reside in the workhouse:—*Held*: a good return to a *mandamus*, that neither the guardians nor the churchwardens of the parish from which it was alleged that the pauper is entitled to relief had been summoned to attend, or were present at the hearing of the complaint or the making of the order.—R. v. TOTNES UNION GUARDIANS (1845), 7 Q. B. 690; 2 New Sess. Cas. 82; 14 L. J. M. C. 148; 5 L. T. O. S. 240; 9 J. P. 584; 9 Jur. 660; 115 E. R. 649.

Annotations:—Refd. R. v. Norfolk JJ. (1845), 9 J. P. Jo. 774; R. v. Brown (1859), 8 W. R. 600. Mentd. Parkes v. Parkes (1852), 16 Jur. 1093.

406. ———.]—Deft. was indicted for perjury alleged to have been committed by him on the hearing before justices of a summons charging him with being the father of an illegitimate child:—*Held*: to support the indictment, it was necessary to give evidence of the charge made by the mother, either by production of the original order made thereon, or by giving secondary evidence of the summons after notice to deft. to produce it; & in the absence of such notice, it was not sufficient to produce the minutes of the proceedings by the clerk to the justices, those minutes being of no greater authority than the notes of a shorthand writer.

The statute provides that, upon complaint by the mother, the justice shall have power to summon the putative father before him, & upon the appearance of the person so summoned, or upon proof of the service of such summons to hear & adjudicate upon the case. A summons is therefore necessary to give the magistrates jurisdiction (WIGHTMAN, J.).—R. v. NEWALL (1852), 19 L. T. O. S. 34; 6 Cox, C. C. 21.

407. Duty of justices to issue—Before granting warrant of apprehension—Non-payment of money.]

It is the general duty of magistrates . . . where the complaint is merely for non-payment of money to issue a summons in the first instance before they grant a warrant of apprehension, & it requires very strong words to take away the necessity of the summons (LORD ELLENBOROUGH, C.J.).—R. v. MARTYR (1810), 13 East, 55; 104 E. R. 287.

408. ——— Before granting distress warrant—Non-payment of rates.]—By a local Act comrs. were empowered to make paving rates, & to hear & relieve parties complaining of such rates. The Act also gave an appeal from the comrs. to the

PART VIII. SECT. 2, SUB-SECT. 1.—A.

396 i. General rule—Summons necessary—Unless defendant appears without.]—*Held*: deft., by his presence & by entering on his defence, had waived the service of a summons upon him.

—R. v. BENNETT (1883), 3 O. R. 45. —CAN.

396 ii. ———.]—R. v. CLARKE (1890), 19 O. R. 601.—CAN.

397 i. ———.]—The party cannot

be arrested on the complaint, he must be summoned.—SHEA v. CHOAT (1845), 2 U. C. R. 211.—CAN.

397 ii. ———.]—CRONKHITE v. SOMMERVILLE (1845), 3 U. C. R. 129. —CAN.



**Sect. 2.—Summons or warrant: Sub-sect. 1, A., B. (a) & (b), & C.]**

sessions; & it provided that, on non-payment of rates for seven days after personal demand, it should be lawful for certain justices, upon proof on oath of such demand & non-payment, to issue a distress warrant. Justices, being applied to for such warrant, refused to grant it, but stated that they would do so if a proper information were sworn, & the party summoned before them. The ct. refused a *mandamus* to compel the justices to issue a warrant without summoning the party. Supposing that the Acts authorised the justices to grant a warrant without summons:—*Held*: nevertheless, they acted rightly in not so granting it.—*R. v. HUGHES* (1835), 3 Ad. & El. 425; 111 E. R. 475.

**409. ——— Non-payment of penalty.]**—Where an order has been made on the owner of premises to abate a nuisance, & a summons has issued, & at the hearing the party has been convicted in a penalty for disobeying the order, the warrant of distress & conviction cannot be issued for non-payment of the penalty until a further summons has been served, so as to enable the party to show cause, such as poverty, for not having paid the penalty.—*R. v. JENKINS* (1862), 3 B. & S. 116; 1 New Rep. 21; 32 L. J. M. C. 1; 7 L. T. 272; 26 J. P. 775; 9 Jur. N. S. 570; 11 W. R. 20; 122 E. R. 44.

—*See, further*, DISTRESS, Vol. XVIII., pp. 402, 418, 451, 452, Nos. 1428, 1429, 1573, 1875, 1879.

**Proceedings relating to sale of intoxicating liquor.]**—*See* INTOXICATING LIQUORS, Vol. XXX., p. 87, No. 677.

—**Proceedings for recovery of expenses of special constable.]**—*See* POLICE.

—**Proceedings under Musical (Summary Proceedings) Copyright Act, 1902 (c. 15).]**—*See* COPYRIGHT, Vol. XIII., p. 229, No. 695.

**When not necessary—Condemnation of meat under Public Health Act, 1875 (c. 55).]**—*See* PUBLIC HEALTH.

—**Adjudication of settlement of lunatic.]**—*See* LUNATICS, pp. 260 *et. seq.*, *ante*.

**Effect of non-issue—As to distress warrant.]**—*See* DISTRESS, Vol. XVIII., p. 406, No. 1460.

—*See, generally*, Part VIII., Sect. 4, sub-sect. 3, B., *post*.

#### *B. Issue of.*

##### *(a) In General.*

*See* Summary Jurisdiction Act, 1848 (c. 43), s. 2; & *generally*, CRIMINAL LAW, Vol. XIV., pp. 166–168, Nos. 1450–1467.

**410. Who may issue—Justice not receiving complaint.]**—A complaint having been made to two justices of a borough against applt. for an offence under Food & Drugs Acts, 1875 (c. 63), & 1879 (c. 30), a summons was signed & issued by another justice, who had not heard the complaint, & was served on applt. Applt. thereupon appeared before the stipendiary magistrate of the borough, but objected that the summons was invalid & the magistrate had no jurisdiction to hear the case. The magistrate being of opinion that the defect, if any, in the summons was cured

by the appearance of applt. heard the case & convicted him:—*Held*: (1) the summons, having been signed & issued by a justice who had not heard the complaint was invalid; (2) the defect was not cured by the appearance of applt., as he appeared under protest; (3) the provisions of Food & Drugs Act, 1879 (c. 30), s. 10, were imperative, & not merely directory, & as no summons had been duly served in accordance with them the magistrate had no jurisdiction, & the conviction was wrong.—*DIXON v. WELLS* (1890), 25 Q. B. D. 249; 59 L. J. M. C. 116; 62 L. T. 812; 54 J. P. 725; 38 W. R. 606; 6 T. L. R. 322; 17 Cox, C. C. 48, D. C.

*Annotations*:—*As to* (2) *Refd.* Whiffen & Bligh *v. Mallings*, Kent, Licensing JJ. (1891), 66 L. T. 333. *As to* (3) *Refd.* *R. v. Garrett-Pegge, Ex p. Brown*, [1911] 1 K. B. 880; *Conn v. Turnbull* (1925), 89 J. P. Jo. 300.

**411. ——— Condemnation of meat—Towns Improvement Clauses Act, 1847 (c. 34), s. 13.]**—Where, under above sect., a magistrate condemns meat brought before him as unfit for human food, a summons in respect thereof may be issued by another magistrate, though the magistrate who adjudicates upon the summons must be the magistrate who condemned the meat.—*R. v. THOMAS* (1901), 18 T. L. R. 71, D. C.

*Annotation*:—*Mentd.* *R. v. Part* (1906), 70 J. P. 398.

—**In bastardy cases.]**—*See* BASTARDY, Vol. III., pp. 389, 391, Nos. 275, 276, 290.

**412. Against whom summons may be issued—Infants.]**—The power given under 29 & 30 Vict. c. 118, s. 14, & 43 & 44 Vict. c. 15, s. 1, to any person to bring before justices a child residing with prostitutes includes the bringing of the child by way of legal process. Hence a summons may be served on the child, & process to arrest in the usual way may follow, as provided by Summary Jurisdiction Acts.—*R. v. MOORE* (1888), 52 J. P. 375.

**413. ——— Corporation.]**—There is nothing in the provisions of Shops Act, 1912 (c. 3), to exclude an incorporated co. which occupies a shop from the obligation imposed by s. 4 of that Act upon occupiers of shops to close their shops on the afternoon of one day in the week.

The provisions of Summary Jurisdiction Acts as to summoning offenders before a ct. of summary jurisdiction to answer an information for a penalty apply to corpns. as well as to natural persons.—*EVANS & CO., LTD. v. LONDON COUNTY COUNCIL*, [1914] 3 K. B. 315; 83 L. J. K. B. 1264; 111 L. T. 288; 78 J. P. 345; 30 T. L. R. 509; 12 L. G. R. 1079; 24 Cox, C. C. 290, D. C.

**Time of issue—In bastardy cases.]**—*See* BASTARDY, Vol. III., p. 391, Nos. 291, 292.

**Offences against Food & Drugs Acts.]**—*See* FOOD & DRUGS, Vol. XXV., pp. 101, 102, Nos. 247–249.

**Issue of several summonses—In bastardy cases.]**—*See* BASTARDY, Vol. III., p. 391, Nos. 293–298.

#### *(b) Discretion of Justices.*

*See, generally*, CRIMINAL LAW, Vol. XIV., p. 168, Nos. 1462–1467.

**414. Discretion to refuse grant—When *prima facie* case.]**—*R. v. NORTH SHIELDS JJ.* (1875), 39 J. P. Jo. 761.

#### **PART VIII. SECT. 2, SUB-SECT. 1.—** **B. (a).**

**k. Summons issued to be served out of county—Indorsement of defendant's travelling expenses.]**—*MOFFATT*

—*Re CAMERON* (1907),

41 N. S. R. 457.—CAN.

#### **PART VIII. SECT. 2, SUB-SECT. 1.—** **B. (b).**

**414 i. Discretion to refuse grant—When *prima facie* case.]**—The mere fact that a summons might have been issued or would have been sufficient

in the opinion of a judge is no ground for interfering with the discretion exercised by a justice in issuing a warrant so long as there were some facts upon which that discretion might reasonably have been exercised.—*WHITE v. DUNNING & BROWN* (1915), 30 W. L. R. 585; 7 W. W. R. 1210.—CAN.

**415. ——— Where case would be dismissed.]**

—On an application for a summons if the magistrate, after hearing appct.'s statement, is of opinion that if the summons were issued & the offence were proved he would nevertheless under the circumstances dismiss the summons at the hearing, he may in the exercise of his discretion refuse to issue the summons.—*R. v. BROS* (1901), 85 L. T. 581; 66 J. P. 54; 18 T. L. R. 39; 20 Cox, C. C. 89, D. C.

—**Proceedings against steward of friendly society.]**—See *FRIENDLY SOCIETIES*, Vol. XXV., p. 330, No. 309.

**416. ——— When summons previously refused.]**

—When a justice has refused to issue a summons upon complaint, other justices may subsequently refuse to hear an information, & take the recognisances of prosecutor to prosecute in the same matter. Vexatious Indictments Act, 1859 (c. 17), does not apply to such proceedings unless a summons or a warrant has been granted upon which it can take effect. Two police officers charged G., a publican, with supplying with liquor three men whom they alleged to be intoxicated. The charge was dismissed, & an application was made on behalf of G. to a justice of the peace for summonses for perjury against the policeman. The summonses were refused. Subsequently an application was made by G. to a bench of magistrates sitting in petty sessions to grant summonses against the policemen, or, in the alternative, to take the recognisances of G. under Vexatious Indictments Act:—*Held*: the bench were not bound, under the circumstances to hear the information at all, & Vexatious Indictments Act, 1859 (c. 17), s. 2 did not apply until after a summons or a warrant had been granted.—*R. v. BATHER* (1880), 42 L. T. 532; 44 J. P. 490, D. C.

*Annotation*:—*Refd. Ex p. Reid* (1885), 49 J. P. 600.

**417. ———.]**—In 1879 complainant laid an information, upon which a summons was issued, against a gas & water co. for penalties alleged to have been incurred in consequence of non-compliance with certain provisions of a local Act. The justices dismissed the summons, on the ground that the complaint had not been made within six months after the commission of the offence, which they considered was not a continuing offence. They offered to state a case, but the matter was allowed to drop. In 1890 the same complainant laid a similar information against the co., when the justices, having regard to their previous decision, considered they had no jurisdiction to go into the matter again, & refused to issue a summons:—*Held*: instead of declining jurisdiction, the justices should have heard & determined whether, upon the circumstances disclosed, a summons ought to have been issued.—*R. v. BYRDE & PONTYPOOL GAS CO., Ex p. WILLIAMS* (1890), 60 L. J. M. C. 17; 63 L. T. 645; 55 J. P. 310; 39 W. R. 171; 17 Cox, C. C. 187; *sub nom. Re MONMOUTHSHIRE JJ., Ex p. WILLIAMS*, 7 T. L. R. 79, D. C.

*Annotation*:—*Consd. R. v. Kennedy* (1902), 86 L. T. 753.

—**Proceedings in matrimonial causes.]**—See *HUSBAND & WIFE*, Vol. XXVII., p. 565, Nos. 6237–6238.

—**Proceedings for cruelty to animals.]**—See *ANIMALS*, Vol. II., p. 291, Nos. 614, 615.

See, further, Part XIII., Sect. 3, sub-sect. 3, *post*.

**C. Form of.**

See Summary Jurisdiction Act, 1848 (c. 43), ss. 1, 29; Summary Jurisdiction Rules 1886, r. 31; Criminal Justice Act, 1925 (c. 86), s. 32.

**418. Error in parties—Complainant—Where error immaterial.]**—*Semle*: although the husband was the tenant & the hirer, the proceedings could be maintained by the wife, but that in any case the proceedings could be put right, either by having fresh proceedings or substituting the husband for the wife as complainant.—*MASTERS v. FRASER* (1901), 85 L. T. 611; 66 J. P. 100; 18 T. L. R. 31, D. C.

*Annotation*:—*Mentd. Lavell v. Richings*, [1906] 1 K. B. 480.

**419. ——— Defendant—Where error immaterial.]**

—An information under the 4 Geo. 4, c. 34, s. 3, described deft. as having contracted to serve “B. & his partners.” At the hearing it appeared that the contract of service was between deft. & “B. on behalf of himself & his partners, constituting the R. M. & H. Coal co., Ltd.:—*Held*: this variance, if it were one was cured by Summary Jurisdiction Act, 1848 (c. 43), s. 1.—*WHITTLE v. FRANKLAND* (1862), 2 B. & S. 49; 31 L. J. M. C. 81; 5 L. T. 639; 26 J. P. 372; 8 Jur. N. S. 382; 121 E. R. 992.

*Annotation*:—*Mentd. Devonald v. Rosser*, [1906] 2 K. B. 728.

**420. ———.]**—*R. v. NORKETT, Ex p. GEACH* (1915), 139 L. T. Jo. 316.

**421. ——— Substitution of new defendant for party charged.]**

—S. summoned H., the manager of the O. Tramway co., for breach of a bye-law, & on objection taken, the justices amended the summons by substituting the O. co. for H., & then convicted the O. co.:—*Held*: the justices had no power to amend by substituting one name for the other.—*CITY OF OXFORD TRAMWAY CO. v. SANKEY* (1890), 54 J. P. 564; *sub nom. OXFORD TRAMWAY CO. v. SANKEY, BADCOCK v. SANKEY*, 6 T. L. R. 151, D. C.

*Annotation*:—*Refd. Hawkins v. Williams* (1894), 59 J. P. 533.

**422. Error as to place of offence.]**—*FOWLER v. ST. MARY ABBOT'S VESTRY* (1872), 36 J. P. 69.

**423. Error as to date of offence.]**—Resp. was charged before the magistrates of the city of E. for having infringed a local Act which imposed a fine on any person selling, offering, or exposing for sale any carcasses or meat within the limits of the city & county of E., except within the markets. It was proved on Jan. 12, 1877, resp. delivered certain carcasses at a door within the limits, & that the carcasses were then weighed & paid for, but it was alleged that they were delivered in pursuance of a previous contract, entered into between the same parties at the same place on Jan. 5. The summons was taken out for Jan. 12, & the magistrates found that there had been a previous sale & purchase on Jan. 5:—*Held*: they should have convicted applt. on the above facts, & if they had thought it necessary, they should have amended the summons by altering the date on which the offence was alleged to have been committed from Jan. 12 to Jan. 5.—*EXETER CORPN. v. HEAMAN* (1877), 37 L. T. 534; 42 J. P. 503, D. C.

*Annotations*:—*Mentd. Torquay Market Co. v. Burrridge, Torquay Market Co. v. Middleton* (1883), 48 J. P. 71; *Jenkins v. Thomas* (1910), 104 L. T. 74; *Lambert v. Rowe*, [1914] 1 K. B. 38.

**PART VIII. SECT. 2, SUB-SECT. 1.—C.**

**m. Failure to specify exact cause of complaint.]**—*CLARSON v. BLAIR* (1872), 3 V. R. (Law.) 202.—**AUS.**

**n. ———.]**—*R. (BUNTING) v. ANTRIM*

*JJ.* (1905), 39 I. L. T. 82.—**IR.**

**o. Necessity for indorsement of notice.]**—A magistrate's summons not indorsed with the notice required by Provincial Act, 1865 (c. 1), s. 6, is

absolutely void.—*MCDONALD v. MILLS* (1866), 2 Old. 165.—**CAN.**

**p. ——— Waiver.]**—The objection to the want of the notice on a magistrate's summons is waived by deft.



*Sect. 2.—Summons or warrant: Sub-sect. 1, C., D. & E.]*

**424. Error as to ownership of property.]**—In an information for malicious injury to property under Malicious Damage Act, 1861 (c. 97), s. 52, where the ownership is laid in several persons, & it appears that only one of these is the legal owner, the justices ought not to dismiss the information, but ought to hear the case, or, if they think the variance likely to mislead, to adjourn the hearing.—*RALPH v. HURRELL* (1875); 44 L. J. M. C. 145; 32 L. T. 816; 40 J. P. 119, D. C.

**425. Failure to specify exact cause of complaint—Nuisance from smoke—Several chimneys.]**—B. charged N. that black smoke issued from certain chimneys on his premises so as to be a nuisance, & this was caused by the act & default of N. The fact was that there were five separate chimneys together, each used for a separate purpose. N. objected that the summons was bad for not showing from which of the chimneys was said to issue the smoke:—*Held*: the justices were wrong in allowing this objection to the summons, & they ought to have heard the evidence & made their order as to one or more of the chimneys.—*BARNES v. NORRIS* (1876), 41 J. P. 150, D. C.

**426. Signature by other than justice hearing complaint.]**—*DIXON v. WELLS*, No. 410, *ante*.

**427. Absence of seal—Effect of Summary Jurisdiction Act, 1848 (c. 43), s. 1.]**—By above sect. it is provided that no objection shall be taken or allowed to any summons for any alleged defect therein in substance or in form.

An information having been laid before a justice of the peace charging a person with an offence punishable under Summary Jurisdiction Acts, the justice issued an instrument which bore no seal but was in all other respects sufficient as a summons. This instrument was served upon the person charged, who appeared before the justices at the time & place specified therein & objected to the jurisdiction of the ct. on the ground that he had not been duly summoned. The justices overruled the objection & convicted the person charged. A rule *nisi* having been obtained to quash the conviction:—*Held*: if the absence of the seal was a defect, it was a defect in form within above sect. & the conviction was good.—*R. v. GARRETT-PEGGE, Ex p. BROWN*, [1911] 1 K. B. 880; 80 L. J. K. B. 609; 104 L. T. 649; 75 J. P. 169; 27 T. L. R. 187; 22 Cox, C. C. 445, D. C.

*In bastardy cases.]—See BASTARDY, Vol. III., p. 392, Nos. 299–301.*

*Proceedings under Food & Drugs Acts.]—See FOOD & DRUGS, Vol. XXV., p. 106, Nos. 301–306.*

*Proceedings relating to sale of intoxicating liquor.]—See INTOXICATING LIQUOR, Vol. XXX., p. 86, No. 670.*

*Proceedings under Motor Car Act, 1903 (c. 36).]*—*See STREET & AERIAL TRAFFIC.*

#### D. Service.

*See Summary Jurisdiction Act, 1848 (c. 43), s. 1.*

**428. What is sufficient service—Service on person at place of abode—Menial servant.]**—The

when he goes into his evidence at the trial before the magistrate.—*BELLONI MURPHY* (1866), 2 Old. 166.—CAN.

**PART VIII. SECT. 2, SUB-SECT. 1.—D.**

**a. What is sufficient service—Service on person at place of abode.]**—*R. v. FRANEY* (1909), 7 E. L. R. 411.—CAN.

*v. CORK JJ.,*

[1911] 2 I. R. 258.—IR.

**t. ——— Defendant outside province.]**—The service of a summons at deft.'s usual place of abode while he is without the province is void.—*Ex p. DONOVAN* (1894), 32 N. B. R. 374.—CAN.

**431 i. ——— Service at place of business.]**—*NIXON v. AH FOOK* (1892), 18

leaving with a woman at deft.'s house, whom the witness believed to be a menial servant of deft., a copy of the summons to appear & answer to the offence charged, to which woman the original was also shown, is a sufficient summons within 32 Geo. 2, c. 17.—*R. v. CHANDLER* (1811), 14 East, 267; 104 E. R. 603.

*Annotation:—Reid. R. v. Nat Bell Liquors, [1922] 2 A. C. 128.*

**429. ——— Nature to be explained.]**—*R. v. SMITH*, No. 434, *post*.

**430. ——— When party absent at sea.]**—*R. v. SMITH*, No. 434, *post*.

**431. ——— Service at place of business.]**—A summons issued by justices was served on appct.'s clerk at the lock up shop of the appct.:—*Held*: the service was bad, as the shop was not his "place of abode" within Summary Jurisdiction Act, 1848 (c. 43), s. 1, & the conviction of appct. must be quashed.—*R. v. RHODES, Ex p. McVITTEE, R. v. MULLIN, Ex p. McVITTEE* (1915), 85 L. J. K. B. 830; 113 L. T. 1007; 79 J. P. 527; 25 Cox, C. C. 212, D. C.

*Annotations:—Reid. McVitte v. Marsden* (1917), 116 L. T. 629; *R. v. Braithwaite*, [1918] 2 K. B. 319.

**432. ——— Public Health Act, 1875 (c. 55), s. 267.]**—(1) A summons for non-payment of a general district rate is an "other document" within the meaning of above sect.

(2) For the purposes of the service of such a summons the ratepayer's place of business is to be treated as his "residence" within the meaning of that sect. although he does not sleep there.

(3) Service of such a summons at his place of business under that sect. will be good, notwithstanding the provisions of sect. 256 of the Act & of Summary Jurisdiction Act, 1848 (c. 43), s. 1, under the latter of which it has been held that a man's place of business at which he does not sleep is not his "place of abode."—*R. v. BRAITHWAITE*, [1918] 2 K. B. 319; *sub nom. R. v. BRAITHWAITE, Ex p. DOWLING*, 87 L. J. K. B. 864; 119 L. T. 170; 82 J. P. 242; 34 T. L. R. 406; 16 L. G. R. 580, C. A.

**433. ——— ]**—*R. v. HASTINGS JJ., Ex p. MITCHELL* (1925), 89 J. P. Jo. 86.

*See, further, PUBLIC HEALTH.*

**434. Time for service—Necessity for reasonable time.]**—By Summary Jurisdiction Act, 1848 (c. 43), s. 2, . . . if upon the day & at the place appointed for the appearance of the party so summoned he shall fail to appear in obedience to such summons, then, if it be proved upon oath or affirmation to the justices then present that such summons was duly served upon such party a reasonable time before the time so appointed for his appearance, it shall be lawful for such justices to proceed *ex p.* to the hearing of such information, & to adjudicate thereon as fully & effectually as if such party had personally appeared in obedience to the summons. Deft. was a fisherman, & went to sea in pursuit of his calling on Mar. 9. On the same day a summons for an assault was taken out against him, requiring him to appear to answer the charge upon Mar. 12. On that day, it having been proved that a summons was served on deft. on Mar. 10, by leaving it with his mother at his usual place of abode, the justices convicted

V. L. R. 121.—AUS.

**a. ——— ]**—*R. v. ZICKRICK* (1897), 11 Man. L. R. 452.—CAN.

**b. ——— Service by constable not appointed for parish.]**—A summons may be served in any parish within the jurisdiction of the magistrate issuing the same by a constable who has not been appointed for such

him in his absence. Upon Apr. 9, he returned from sea, & was arrested under the conviction:—*Held*: there was no evidence before the justices that a reasonable time had elapsed between the time of the service of the summons & the day for hearing the summons, & the justices had therefore no jurisdiction to convict. The nature of the summons must be explained to the person with whom it is left.—*R. v. SMITH* (1875), L. R. 10 Q. B. 604; *sub nom. Re SMITH*, 32 L. T. 394; *sub nom. Ex p. SMITH*, 39 J. P. 613.

**435.** ———.]—On Apr. 30, a constable told C., who was a chauffeur, that he would be summoned for driving a motor car contrary to Motor Car Act, 1903 (c. 36), s. 1, on that date. On May 2, C. left his lodgings at N., taking his motor car to C. on his master's business. Before leaving he told his landlady to take in the summons if it came for him. On May 4, the summons, returnable on May 7, was left with his landlady, & on May 7, he was convicted, in his absence & without his knowledge, of an offence under the Act. On May 9, C. returned to N. It appeared that the justices were under the impression that the summons had actually reached C. The ct. made absolute a rule for *certiorari* to bring up & quash the conviction on the ground that if the justices had known that the summons did not reach C. they might well have formed a different conclusion as to whether there had been a reasonable time between the service & the hearing of the summons.—*R. v. ANWYL, ETC. MERIONETHSHIRE JJ.*, *Ex p. COOKSON* (1909), 73 J. P. 485.

**436.** ——— **What is reasonable time—Question for justices.**—A summons to answer a charge of assault was served upon deft.'s wife at his house at nine o'clock in the morning, to appear the next day at eleven o'clock at a place eight miles distant. Deft., who was a collier, had gone to his work at the mine, & did not return till eleven a night. The next morning, having left some work unfinished, he went to the mine. The justices proceeded to hear the case in his absence, & adjudged him guilty of an assault, & sentenced him to pay a fine or be imprisoned. On motion for a *certiorari* to bring up the conviction for the purpose of being quashed:—*Held*: it was for the justices to decide whether the time was reasonable under the circumstances; & having so decided, this ct. would not review their decision.—*Ex p. WILLIAMS* (1851), 2 L. M. & P. 580; 18 L. T. O. S. 98; 15 J. P. 757; 15 Jur. 1060; *sub nom. Re WILLIAMS*, 21 L. J. M. C. 46.

*Annotation*:—*Reid. Re Smith* (1875), 32 L. T. 394.

**437.** ———.]—*R. v. CAMBRIDGESHIRE JJ.* (1880), 44 J. P. Jo. 168.

parish.—*Ex p. DOHERTY* (1894), 32 N. B. R. 375.—CAN.

**c.** ———.]—*R. v. DOHERTY* (1899), 32 N. S. R. 235.—CAN.

**d.** ——— *Service on defendant's wife—Defendant outside province.*—Service of a summons on a man's wife at a time when he is absent from the province on business does not give a magistrate jurisdiction, & a conviction made on such service will be removed by *certiorari* & quashed.—*R. (ISAACS) v. DIMOND* (1916), 33 W. L. R. 803; 9 W. W. R. 1529.—CAN.

**436 i.** *Time for service—What is reasonable time—Question for justices.*—*R. v. DIBBLEE, Re THOMPSON* (1893), 32 N. B. R. 242.—CAN.

**436 ii.** ———.]—*Ex p. HOGAN* (1893), 32 N. B. R. 247.—CAN.

**436 iii.** ———.]—A summons was issued on June 20, requiring deft. to appear at 10 o'clock on the following

morning:—*Held*: the question of the reasonableness of the service was one for the justice, & there was evidence to justify him in coming to the conclusion that a reasonable time had elapsed between the time of service & the time fixed for the trial.—*R. v. CRAIG* (1905), 38 N. S. R. 345.—CAN.

**e.** ———.]—*R. v. MCKENZIE* (1890), 23 N. S. R. 6.—CAN.

**f.** ———.]—The reasonable time for the service of a summons means a reasonable time for enabling deft. to present his defence, & does not necessarily connote that the summons has been brought personally to the knowledge of deft.—*R. (LAMBE) v. LOUTH JJ.*, [1914] 2 L. R. 54.—IR.

**g.** *Necessity for affidavit of service—Where defendant absent from proceedings.*—*Re MCEACHERN* (1880), 1 R. & G. 321.—CAN.

**h.** *Necessity for person serving to*

*Bastardy summonses.*]—See BASTARDY, Vol. III., p. 392, Nos. 302–312.

*Under Food & Drugs Acts.*]—See FOOD & DRUGS, Vol. XXV., p. 105, Nos. 288–300.

*Under London Building Act, 1894 (c. cxxiii).*]—See METROPOLIS.

*Under Motor Car Act, 1903 (c. 36).*]—See STREET & AERIAL TRAFFIC.

#### *E. Withdrawal.*

**438.** *Power to withdraw—Necessity for leave of justices—Criminal proceeding.*]—The withdrawal of a summons under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), has the effect of putting an end to the complaint in respect of which it is issued, & after the withdrawal, no fresh summons can be issued upon the same cause of complaint.

It is to be remembered as a very important element in these cases, that the withdrawal of a summons can only take place by leave of the justices or magistrate; a complainant cannot put an end to a criminal proceeding except by leave of the ct. & if that leave is given & the summons is withdrawn, that amounts to a consent by the ct.; & that involves the obvious effect that the complaint upon which the summons was founded necessarily falls to the ground (JEUNE, P.).

—*PICKAVANCE v. PICKAVANCE*, [1901] P. 60; L. J. P. 14; 84 L. T. 62,

*Annotations*:—*Consd. Davis v. Morton*, [1913] 2 K. B. 479; *Hopkins v. Hopkins*, [1914] P. 282; *R. v. Seddon, Ex p. Hall* (1916), 85 L. J. K. B. 806. *Reid. Stokes v. Stokes*, [1911] P. 195; *Blackledge v. Blackledge* (1912), 82 L. J. P. 13.

**439.** *Effect of withdrawal—One of two summonses—Jurisdiction to proceed on other.*]—Two informations were laid against a party, one charging him with the rescue of a person out of lawful custody, & the other with an assault on two police constables; but on the party being brought up before the petty sessions, the first of these informations was withdrawn:—*Held*: this was no valid ground of objection to proceeding on the second information.—*GALLIARD v. LAXTON* (1862), 2 B. & S. 363; 31 L. J. M. C. 123; 5 L. T. 835; 26 J. P. 230; 8 Jur. N. S. 642; 10 W. R. 353; 9 Cox, C. C. 127; 121 E. R. 1109.

*Annotations*:—*Mentd. R. v. Chapman* (1871), 12 Cox, C. C. 4; *Codd v. Cabe* (1876), 1 Ex. D. 352; *Ex p. Smith* (1897), 61 J. P. Jo. 410.

**440.** ——— *Whether bar to subsequent proceedings.*]—*PICKAVANCE v. PICKAVANCE*, No. 438, *ante*.

**441.** ——— *When withdrawal by reason of technical informality.*]—Upon the hearing of an information preferred by resp. against applt. under Betting Act, 1853 (c. 119), s. 1, for using a

*be qualified to serve.*]—*Re KENNEDY* (1907), 3 E. L. R. 554.—CAN.

**k.** *Effect of defective service—Magistrate deprived of jurisdiction.*]—*OKREY v. SPANGLER*, [1925] 1 D. L. R. 859; [1925] 1 W. W. R. 518; 19 Sask. L. R. 256.—CAN.

#### PART VIII. SECT. 2, SUB-SECT. 1.—E.

**440 i.** *Effect of withdrawal—Whether bar to subsequent proceedings.*]—An order of justices permitting a summons for an offence punishable on summary conviction to be withdrawn does not amount to an acquittal of deft., & a fresh summons may subsequently be issued for the same offence.—*R. (MCDONNEIL) v. TYRONE JJ.*, [1912] 2 L. R. 44.—IR.

**l.** *After full trial—To institute fresh proceedings—Necessity for consent of accused.*]—After a full trial on the merits on summary proceedings a



*Sect. 2.—Summons or warrant: Sub-sect. 1, E.; sub-sect. 2, A., B. & C. Sects. 3 & 4: Sub-sects. 1 & 2.]*

house for the purpose of betting with persons resorting thereto, it was discovered, when the third of resp.'s witnesses was being examined, that applt. had not through inadvertence, been informed before the charge was proceeded with, as required by Summary Jurisdiction Act, 1879 (c. 49), s. 17, of his right to be tried by a jury, & thereupon the solr. for resp. withdrew the summons with the consent of the justices; although the solr. for applt. contended that there was no power to withdraw it.

A further information was subsequently preferred by resp. under the same sect. of the Act, against applt. for using the house for the purpose of certain moneys being received by him as for the consideration for assurances to pay or give certain sums of money on the happening of certain events or contingencies relating to certain horse races. The evidence given on the hearing of both information was substantially the same:—*Held*: the withdrawal of the first summons in consequence of the technical informality was not equivalent to a dismissal which could be pleaded in bar of the subsequent proceedings.

The dictum in *Pickavance v. Pickavance*, No. 438, *ante*, that the withdrawal of a summons by leave of the ct. puts an end to the complaint upon which the summons is founded, does not apply where the withdrawal is owing to a technical informality in the proceedings on the hearing of the complaint.—*DAVIS v. MORTON*, [1913] 2 K. B. 479; 82 L. J. K. B. 665; 108 L. T. 677; 77 J. P. 223; 29 T. L. R. 466; 23 Cox, C. C. 359, D. C. *Annotation*:—*Reid*. *Hopkins v. Hopkins*, [1914] P. 282.

—*Bastardy proceedings.*—*See* BASTARDY, Vol. III., p. 390, No. 286.

**442. Effect of compromise by parties—Jurisdiction to proceed—Complaint of assault.**—When a complaint has been made to the magistrates of an assault with a view to an adjudication thereon, they thereby gain jurisdiction to determine the case, & the party injured cannot by afterwards compromising the case take away the jurisdiction.—*R. v. HAWKINS* (1863), 2 New Rep. 62; *sub nom.* *Ex p. BRYANT*, 27 J. P. Jo. 277; *sub nom.* *R. v. WILTSHIRE JJ.*, 8 L. T. 242; *sub nom.* *Re HAWKINS & SEYMOUR*, WILTSHIRE JJ., 11 W. R. 594.

**Withdrawal of complaints under Summary Jurisdiction (Married Women) Act, 1895 (c. 39).**—*See* HUSBAND & WIFE, Vol. XXVII., pp. 561, 562, Nos. 6170–6172, 6182.

## SUB-SECT. 2.—WARRANT.

### A. In General.

*See* Summary Jurisdiction Act, 1848 (c. 43), s. 2; & generally, CRIMINAL LAW, Vol. XIV., pp. 166–191, Nos. 1450–1702.

magistrate an informant cannot without consent of accused withdraw the case for the purpose of instituting fresh proceedings.—*KEMPSTON v. DESGAGNIS* (Sask.), [1921] 1 W. W. R. 244.—CAN.

## PART VIII. SECT. 2, SUB-SECT. 2.—A.

**m. Alteration of warrant by magistrate—Whether initials sufficient.**—A magistrate who initials an alteration made by him in a special warrant need not re-sign re-seal & re-date it.—*Ex p. NOY SHING* (1904), 4 S. R. N. S. W. 480.—AUS.

**n. Absence of seal—Whether invalid.**—A bench warrant issued at the quarter sessions, tested in open

sessions, & signed by the clerk of the peace:—*Held*: not invalid for want of a seal.—*FRASER v. DICKSON* (1847), 5 U. C. R. 231.—CAN.

**o. Warrant to be executed in another county—Recital of proof of justice's handwriting.**—*REID v. MAYBEE* (1880), 31 C. P. 384.—CAN.

**p. Omission in warrant to state information on oath—Irregularity.**—Where an information is on oath, the omission to state that fact in a warrant to arrest is an irregularity only.—*KINGSTON v. WALLACE* (1886), 25 N. B. R. 573.—CAN.

**q. Necessity for stamp.**—*R. v. HAMELIN* (1907), 3 E. L. R. 279.—CAN.

**443. Form of warrant—Specific offence to be stated.**—*CAUDLE v. SEYMOUR*, No. 450, *post*.

**Search warrants.**—*See* CRIMINAL LAW, Vol. XIV., p. 189, Nos. 1694–1702.

**Distress warrants.**—*See* DISTRESS, Vol. XVIII., pp. 430–433, 450, Nos. 1675–1698, 1863.

### B. Issue of.

*See, generally*, CRIMINAL LAW, Vol. XIV., pp. 166–168.

**444. Whether judicial act.**—An Act, incorporating a gas co., enacted, that in case any party who should contract with the co. for gas, should neglect, after ten days after demand made, to pay the gas rents, such rents might be recovered by the co. by warrant under the hand & seal of a justice of the peace, & that it should be lawful for the co., with such warrant, to levy the sums so due & owing as aforesaid by distress & sale:—*Held*: (1) the granting of the warrant was a judicial & not merely a ministerial act; & therefore a magistrate could not issue a warrant without a previous summons.

*Semble*: (2) in no case can a magistrate issue a warrant of distress in the nature of an execution, without previously summoning the party whose goods are to be distrained, in order that he may have an opportunity of being heard.—*PAINTER v. LIVERPOOL GAS CO.* (1836), 3 Ad. & El. 433; 2 Har. & W. 233; 6 Nev. & M. K. B. 736; 5 L. J. M. C. 108; 111 E. R. 478.

*Annotations*:—*As to* (1) *Apld.* *Hammond v. Bendyshe* (1849), 13 Q. B. 869. *Reid.* *Morrell v. Martin* (1841), 3 Man. & G. 581; *Labalmondiere v. Frost* (1859), 5 Jur. N. S. 789. *As to* (2) *Reid.* *Attwood v. Jolliffe* (1848), 10 L. T. O. S. 392; *Re Hammersmith Rent-charge* (1849), 4 Exch. 87. *Generally*, *Mentd.* *Cronmire v. MacColla* (1893), 9 T. L. R. 549.

**445. Power to issue—On ex parte application—When charge on oath.**—The judgment of the magistrate upon an *ex p.* representation warranted by oath, is decisive as to the issuing the warrant to search (LORD MANSFIELD, C.J.).—*COOPER v. BOOTH* (1785), as reported in 3 Esp. 135.

*Annotation*:—*Reid.* *R. v. Watts* (1830), 1 B. & Ad. 166.

**446.** — — — — — *Butt v. CONANT*, No. 763, *post*.

*See, also*, Sect. 1, *ante*.

**447.** — — — — — *Distress warrant.*—*PAINTER v. LIVERPOOL GAS CO.*, No. 444, *ante*.

**448.** — — — — — *When summons not obeyed.*—Where a statute gives a justice jurisdiction over an offence, it impliedly gives him power to apprehend any person charged with such offence:—*Held*: therefore, a magistrate might issue a warrant to apprehend a person charged with an offence under 1 Geo. 4, c. 56, especially after the offender had neglected a summons.—*BANE v. METHUEN* (1824), 2 Bing. 63; 9 Moore, C. P. 161; 3 Dow. & Ry. M. C. 523; 2 L. J. O. S. C. P. 121; 130 E. R. 228.

**449.** — — — — — *Young child.*—The ct. will require justices to whom complaint has been made

**r. Invalid information—Whether warrant invalid.**—Where an information is invalid a warrant of arrest issued thereon & the arrest are invalid.—*RIFKIN v. R.* (Man.), [1925] 2 D. L. R. 520; [1925] 2 W. W. R. 242; 43 Can. Crim. Cas. 330.—CAN.

## PART VIII. SECT. 2, SUB-SECT. 2.—B.

**448 i. Power to issue—When summons not obeyed.**—The jurisdiction of a magistrate to issue a warrant for the apprehension of a person who does not appear to a summons does not depend upon an affidavit being made by the person who served the summons; it is sufficient that it appear to the satisfaction of the magistrate that the sum-

[under Industrial Schools Act, 1866 (c. 118), s. 14], to issue a summons against the child. If the child does not appear, then a warrant may be issued to bring her before the justices.—*Re HAMPSHIRE JJ.* (1888), 52 J. P. 311, D. C.

**450. — When information taken by clerk.]—**

(1) A warrant issued by a magistrate for the apprehension of a party to answer a charge, should state the specific offence with which the party is charged, & that information thereof was duly made on oath before the magistrate.

(2) A warrant granted upon an information taken by the clerk of a magistrate, is no justification to the magistrate in an action of trespass & false imprisonment.—*CAUDLE v. SEYMOUR* (1841), 1 Q. B. 889; 1 Gal. & Dav. 454; 10 L. J. M. C. 130; 113 E. R. 1372; *sub nom.* *CANDLE v. SEYMOUR*, 5 Jur. 1196.

*Annotation:—As to (2) Rejd. R. v. Hughes* (1879), 4 Q. B. D. 614.

**451. When justices must issue — Charge of keeping disorderly house—Criminal Law Amendment Act, 1885 (c. 19), s. 13.]—**(1) The provision contained in Disorderly Houses Act, 1752 (c. 36), s. 6, that a warrant shall be issued for the arrest of a person accused, on notice given by two inhabitants to a constable under that Act, of keeping a disorderly house, applies to a prosecution by summary proceedings, under above sect., of a person accused of keeping a brothel, & therefore, in such a case, if an application for a warrant is made in accordance with Disorderly Houses Act, 1752 (c. 36), a magistrate is bound to grant a warrant.

(2) In summary proceedings before a magistrate against the keepers of a brothel, there need not be an information upon oath.—*R. v. NEWTON*, [1892] 1 Q. B. 648; 61 L. J. M. C. 121; 66 L. T. 830; 56 J. P. 408; 40 W. R. 688; 8 T. L. R. 487; 36 Sol. Jo. 414; 17 Cox, C. C. 530, D. C.

**452. When warrant should not be issued — When summons would effect purpose.]—***O'BRIEN v. BRABNER* (1885), 49 J. P. Jo. 227, D. C.

#### C. Withdrawal and Suspension.

**Power of justices to suspend—Distress warrant.]—**

—*See* DISTRESS, Vol. XVIII., p. 450, No. 1862.

**Power of justices to withdraw.]—***See* Part XIII., Sect. 3, sub-sect. 3, *post*.

### SECT. 3.—ABATEMENT OF PROCEEDINGS.

**453. Effect of death of informer.]—**Complaint having been duly made under 20 & 21 Vict. c. 83, that obscene books were kept by deft in his shop for sale, a warrant for the seizure of such books was issued, & after they had been seized deft. was summoned to show cause why they should not be destroyed. Upon the hearing of the summons an order was made for the destruction of the books. After the issuing of the summons, but before the hearing, the complainant died, & no application to substitute another complainant

mons was served within a reasonable time.—*READ v. HUNTER*, 8 C. L. T. Occ. N. 428.—CAN.

**t. —.]—***MOORE v. FURLONG* (1847), 1 Legge, 397.—AUS.

**a. — For non-payment of statute labour tax.]—**A warrant may issue to imprison a person for non-payment of statute labour tax, without first summoning him to answer or making a conviction.—*R. v. MORRIS* (1862), 21 U. C. R. 392.—CAN.

**b. — For apprehension of lunatic.]**

— Before two justices can issue a warrant for the apprehension of a person charged with being a dangerous lunatic the evidence required by statute must be given before them, both acting together, & it is not sufficient that an affidavit be made before one & shown to the other.—*McGUIRK v. RICHARD* (1874), 15 N. B. R. (2 Pug.) 240.—CAN.

**c. — Provisional warrant.]—**A justice is not competent to issue a provisional warrant.—*Re HOLMES* (1903),

was made:—*Held*: the proceedings against deft. did not lapse upon the death of complainant, & the order was valid.—*R. v. TRUELOVE* (1880), 5 Q. B. D. 336; 49 L. J. M. C. 57; 42 L. T. 250; 44 J. P. 436; 28 W. R. 413; 14 Cox, C. C. 408, D. C.

*Annotation:—Rejd. R. v. Spokes, Ex p. Buckley* (1912), 107 L. T. 290.

### SECT. 4.—THE HEARING.

#### SUB-SECT. 1.—PLACE OF HEARING.

*See, now, Summary Jurisdiction Act, 1848* (c. 43), s. 12.

**454. Open court — Right of public to attend.]—**In general, the ct. in which magistrates are sitting judicially is an open ct., to which the public have a right of access; & supposing there to be room, that a person conducts himself properly, & there be no reason to justify an order for his removal, every one of the public has a right to be present.

Accordingly, where magistrates sitting judicially ordered an attorney, who attended on behalf of the accused, to be turned out of the room:—*Held*: independent of any question as to his right as an attorney, he was entitled to maintain an action of trespass for being thus turned out, on the ground of right, as one of the public, to be present.—*DAUBNEY v. COOPER* (1829), 10 B. & C. 237; 5 Man. & Ry. K. B. 314; 3 Man. & Ry. M. C. 23; 8 L. J. O. S. K. B. 21; 109 E. R. 438.

*Annotations:—Rejd. Collier v. Hicks* (1831), 9 L. J. O. S. M. C. 138. *Mentd. R. v. York Sheriffs* (1832), 1 L. J. K. B. 211; *Rawlings v. Till* (1837), 7 L. J. Ex. 6; *Newton v. Constable* (1841), 6 Jur. 317.

—*See, generally, COURTS*, Vol. XVI., pp. 128–131, Nos. 259–289.

—*See* Summary Jurisdiction Act, 1879 (c. 49), s. 20 (2).

#### SUB-SECT. 2.—BEFORE WHOM.

*See, now, Summary Jurisdiction Acts, 1848* (c. 43), s. 29; 1879 (c. 49), s. 37.

**455. Magistrate other than that receiving information.]—**Where the convicting magistrate, under 52 Geo. 3, c. 93, Sched. (L.), r. 13, which authorises a magistrate, on information, or complaint to him, to proceed to hear the same, was not the same magistrate who took the information:—*Held*: he had acted without jurisdiction.—*JONES v. GURDON* (1842), 2 Q. B. 600; 2 Gal. & Dav. 133; 11 L. J. M. C. 45; 6 J. P. 24; 6 Jur. 482; 114 E. R. 235.

*Annotation:—Rejd. R. v. Wilcock* (1845), 14 L. J. M. C. 104.

**456. —.]—***TARRY v. NEWMAN*, No. 626, *post*.

**457. One justice absent for part of evidence—Necessity for reswearing witness—Waiver by defendant.]—**Where one of the justices comes into ct. at petty sessions after part of the case had been heard, & some of the witnesses examined, & desires to take part in the decision, the correct course is to have the case commenced *de novo*, & to have the witnesses re-sworn and re-examined. Nevertheless, the parties may waive all objection & consent

23 N. Z. L. R. 11.—N.Z.

#### PART VIII. SECT. 4, SUB-SECT. 1.

**d. In the court most accessible.]—***R. v. STRICKLAND, Ex p. KING* (1887), 13 V. L. R. 708.—AUS.

**e. —.]—***DAHLEN v. LOADER* (1893), 19 V. L. R. 398.—AUS.

#### PART VIII. SECT. 4, SUB-SECT. 2.

**457 i. One justice absent for part of evidence—Necessity for reswearing witness—Waiver by defendant.]—***R. v.*



**Sect. 4.—The hearing: Sub-sects. 2 & 3, A. & B. (a).]**

that the notes of evidence only should be read over to the justice, & after consenting to this, & going on with the case, neither party can take advantage of the irregularity.—*R. v. JEFFREYS* (1870), 22 L. T. 786; 34 J. P. 727.

*Annotations:—Distd. Re Guerin* (1888), 58 L. J. M. C. 42. *Refd. Ex p. Bottomley*, [1909] 2 K. B. 14.

**458. Rehearing before different magistrate or justices—Reswearing witness—Reading signed deposition.]—**Upon a hearing a witness gave his evidence before a police magistrate A. in the presence of accused & signed his deposition. The further hearing of the case was then adjourned & on the adjournment day the further hearing was resumed before B., another police magistrate, but as the witness before examined before A. refused to attend & had gone abroad his deposition made before A. was proved to have been duly taken & was read as part of the case against accused, whereupon, additional evidence having been taken, the prisoner was committed... pursuant to the Act:—*Held*: the deposition so taken at the former hearing by A. was properly receivable by B. upon the subsequent hearing.—*Ex p. HUGUET* (1873), 29 L. T. 41; 12 Cox, C. C. 551.

*Annotations:—Consd. Re Guerin* (1888), 58 L. J. M. C. 42. *Mentd. R. v. Maurer* (1883), 10 Q. B. D. 513; *Ex p. Castioni* (1890), 7 T. L. R. 50; *Re Bluhm*, [1901] 1 K. B. 764; *R. v. Brixton Prison, Ex p. Shure*, [1926] 1 K. B. 127.

**459. ———.]—**The judicial discretion which a magistrate has to exercise on cases brought before him must be based on the evidence taken before him, & it is not competent for him to act upon evidence taken before another magistrate.—*Re GUERIN* (1888), 58 L. J. M. C. 42; 60 L. T. 538; 53 J. P. 468; 37 W. R. 269; 16 Cox, C. C. 596, D. C.

*Annotation:—Refd. Ex p. Bottomley*, [1909] 2 K. B. 14.

**460. ———.]—**Several persons having been charged with conspiracy to defraud, a summons was issued & the hearing commenced before a magistrate. When the inquiry had lasted a considerable time, & the evidence of a large number of witnesses had been taken the magistrate fell ill & was unable to continue the hearing which had to be recommenced before another magistrate. At the commencement of the rehearing counsel for the prosecution proposed to take the following course:—To recall some of the witnesses called at the first hearing; to reswear them; to read to

them their depositions taken at that hearing, directing them to correct the evidence if & where it was inaccurate; to ask them any additional questions that might be thought advisable; then to tender these witnesses for cross-examination with liberty for the prosecution to re-examine where necessary; & then to proceed with the oral examination of those witnesses whom the prosecution intended to call but had not called on the first hearing:—*Held*: there was nothing illegal in the course proposed & to accede to the proposal if he thought it expedient in the interests of justice so to do was within the discretion of the magistrate with which the ct. would not interfere.—*Ex p. BOTTOMLEY*, [1909] 2 K. B. 14; 78 L. J. K. B. 547; 100 L. T. 782; 73 J. P. 246; 25 T. L. R. 371; 22 Cox, C. C. 106, D. C.

**461. ———.]—**The hearing of a summons under Elementary Education Act, 1876 (c. 79), s. 12, against the parent of a child, between five and fourteen years of age, for failing without reasonable excuse to comply with a school attendance order was adjourned by a ct. of summary jurisdiction from time to time to give the parent an opportunity of complying with the order. At each adjourned hearing the bench of justices was differently constituted, & only one of the justices had attended throughout the different adjournments. It was, however, proved that at each adjourned hearing there had been a rehearing of the evidence given on former hearings:—*Held*: the provisions as to two justices being present & acting together during the whole of the hearing & determination of the case, contained in Summary Jurisdiction Act, 1848 (c. 43), s. 29, & Elementary Education Act, 1873 (c. 86), s. 23, as applied by Elementary Education Act, 1876 (c. 79), s. 37, had not been violated.—*R. v. WALTON, ETC., JJ., Ex p. DUTTON* (1911), 75 J. P. 558; 27 T. L. R. 569; 9 L. G. R. 1231, D. C.

**462. Withdrawal of justice sitting with stipendiary—Decision by stipendiary alone.]—***R. v. THOMAS, Ex p. O'HARE*, No. 328, *ante*.

**SUB-SECT. 3.—APPEARANCE.**

**A. Of Complainant.**

*See, now*, Summary Jurisdiction Act, 1848 (c. 43), ss. 12–14.

**463. Necessity for presence of complainant—Dismissal of summons—Refusal by magistrate to**

*BROWNE, Ex p. SANDILANDS* (1878), 4 V. L. R. (L.) 138.—AUS.

**f. Withdrawal of justice sitting with stipendiary—Return & signature of conviction irregular.]—***SHUMBHU NATH SARKAR v. RAM KOMUL GUHA*, 13 C. L. R. 212.—IND.

**g. One justice absent for all the evidence.]—**Where a second magistrate was not present when the evidence was given & he merely considered it as it appeared on the depositions in conference with the other adjudicating magistrate:—*Held*: conviction was wrong.—*R. v. RYAN* (1864), 3 N. S. W. S. C. R. (L.) 221; 2 N. S. W. W. N. 3.—AUS.

**h. Adjourned hearing—To be taken by justices at original hearing.]—**Where the hearing of a complaint is adjourned the case must be adjudicated upon by two justices who have been present on each occasion on which it comes up for hearing.—*R. v. MARSDEN, Ex p. CORBETT* (1878), 4 V. L. R. (L.) 30.—AUS.

**k. ———.]—***RAM SUNDER DE v. RAJAB ALI* (1886), 1 L. R. 12 Calc. 558.—IND.

**l. Exclusive jurisdiction of justice**

*issuing warrant, writ or summons.*

**Qu.:** whether a complaint should be tried by the same justices who issued the summons.—*Ex p. COLL* (1854), 8 N. B. R. (3 All.) 48.—CAN.

**m. ———.]—**Unless some special reason is shown a cause must be tried by the same two justices who signed the writ.—*WEEKS v. BONHAM* (1877), 11 N. S. R. (2 R. & C.) 377.—CAN.

**n. ———.]—***Re LUCIANO* (1921), 54 N. S. R. 273; 56 D. L. R. 646; 35 Can. Crim. Cas. 28.—CAN.

**o. ———.]—**Where a justice has issued the warrant to have deft. brought before him, he has seisin of the case & any other justices present are in the position of intruders on the bench.—*R. (BRANSFIELD) v. FRENCH, ETC., COUNTY OF CORK JJ.*, [1912] 2 I. R. 151; 46 I. L. T. 55.—CAN.

**p. ———.]—***Waiver of objection by appearance.]—R. v. BERNARD* (1884), 4 O. R. 603.—CAN.

**q. Exclusive jurisdiction of magistrate first hearing the case.]—**Where a party charged comes or is brought before a magistrate in obedience to a summons or warrant, no other magistrate can interfere in the investigation

of or adjudication upon the charge, except at his request.—*R. v. MCRAE* (1897), 28 O. R. 569.—CAN.

**r. ———.]—**Once a magistrate is seised of a prosecution for an indictable offence he has no power to discharge himself or request another magistrate to act for him.—*Re HOLMAN & REA* (1912), 23 O. W. R. 428; 4 O. W. N. 434; 27 O. L. R. 432; 9 D. L. R. 234.—CAN.

**t. ———.]—**The provision that jurisdiction in any particular case shall exclusively attach in the first instance in the first justice who has possession & cognisance of the fact, applies to a police magistrate exercising the jurisdiction of two justices.—*R. v. BLOOM* (1913), 26 W. L. R. 459; 5 W. W. R. 897; 15 D. L. R. 484; 7 Alta. L. R. 1.—CAN.

**u. Two justices unable to agree—Right to co-opt a third.]—***Ex p. GUSLAND* (Sask.) (1925), 44 Can. Crim. Cas 376.—CAN.

**PART VIII. SECT. 4, SUB-SECT. 3.—A.**

**b. Necessity for presence of complainant.]—**A justice of the peace has



**grant further summons.]**—A police magistrate issued a warrant for deft.'s arrest upon a charge of libel. When the case came on for hearing prosecutor did not appear, & the magistrate discharged deft. Prosecutor a few days afterwards applied for a summons against deft. in respect of the same alleged libel, stating that he understood from the police that his attendance was unnecessary on the former occasion, as a remand would be asked for & granted upon evidence of arrest, & that that was the cause of his absence & his not being represented. The police officer denied that he had made such a statement. It appeared that shortly after the date of the alleged libel prosecutor had sued deft. for publishing similar libels, & the matter was settled, all further proceedings in the action having been stayed & imputations on each side withdrawn. The magistrate, without going into the merits, refused to grant a summons, mainly upon the ground that prosecutor did not appear upon the first occasion, at the same time pointing out that the prosecutor had a civil remedy. Upon an application for a rule to hear & determine the application for the summons:—**Held:** in the circumstances the rule must be made absolute.—*R. v. BENNETT & BOND, Ex p. BENNETT* (1908), 72 J. P. 362; 24 T. L. R. 681; 52 Sol. Jo. 583, D. C.

**464. — Case proceeded with at request of defendant.]**—An information was preferred by resp. against applt. under Motor Car Act, 1903 (c. 43), s. 1 (1), for driving a motor car at a speed which was dangerous to the public having regard to all the circumstances of the case. Applt. appeared before the justices with his solr. at the hearing of the information, but resp. was not present either personally or by counsel or solr.

A police officer, who was one of the witnesses for the prosecution, examined the other witnesses for the prosecution, & during the course of the case, applt.'s solr. requested the justices' clerk to make a note of the police officer's name. The justices thereupon announced that the case was adjourned. Applt.'s solr., however, said that he preferred that the case should proceed. Accordingly the hearing proceeded & applt. was convicted:—**Held:** the offer to adjourn having been declined by applt.'s solr., neither the absence of resp. nor the fact that the police officer, although a witness, conducted the examination of the other witnesses for the prosecution invalidated the conviction.—*MAY v. BEELEY*, [1910] 2 K. B. 722; 79 L. J. K. B. 852; 102 L. T. 326; 74 J. P. 111; 8 L. G. R. 166; 22 Cox, C. C. 306, D. C.

### B. Of Defendant.

#### (a) In General.

**465. Failure to appear—Adjudication in absence.]**—If deft. to an information on a penal statute be duly summoned, & neglect to appear, the justice may proceed to examine the case, & on proof of the offence may convict the offender.—*R. v. SIMPSON* (1717), 10 Mod. Rep. 341, 378;

no power to sign a judgment in favour of pltf. in a cause, unless pltf. or some person on his behalf appears at the return of the summons & when neither party appears at the return of the summons, the suit is at an end.—*WRIGHT v. PARLEE* (1876), 16 N. B. R. (3 Pug.) 381.—CAN.

**c. — Waiver by defendant.]**—In a prosecution for selling liquor without license, the informant did not appear, but no objection was taken, & witnesses were examined & deft. convicted:—**Held:** deft. could not after-

wards object to the conviction on that ground.—*Ex p. GOLDING* (1879), 19 N. B. R. (3 P. & B.) 47.—CAN.

### PART VIII. SECT. 4, SUB-SECT. 3.—B. (a).

**465 i. Failure to appear—Adjudication in absence.]**—A magistrate exceeds his jurisdiction in making the conviction in the absence of deft.—*R. v. SALTER* (1887), 20 N. S. R. (8 R. & G.) 206; 8 C. L. T. 380.—CAN.

**465 ii. ———.]**—Where the parties charged are arrested on a warrant &

*Gilb.* 282; 1 Sess. Cas. K. B. 346; 1 Stra. 44; 88 E. R. 756, 771.

**Annotations:—***Consd. R. v. Clegg* (1721), 8 Mod. Rep. 3. **Refd. R. v. Hall (1825), 6 Dow. & Ry. K. B. 48. **Mentd. R. v. Bissex (1756), Say. 304; *R. v. Darlington Free Grammar School* (1844), 6 Q. B. 682.****

**466. ———.]**—Sessions may make an original order of bastardy but the party ought to be summoned; & therefore the ct. will intend a summons, though not stated in the order.—*R. v. CLEG* (1721), 1 Stra. 475; 8 Mod. Rep. 4; 93 E. R. 643.

**Annotations:—***Mentd. R. v. Austin* (1725), 8 Mod. Rep. 309; *R. v. Venables* (1725), 8 Mod. Rep. 377.

**467. ——— Committal for non-payment of fine.]**—*ARNOLD v. DIMSDALE*, No. 1727, *post*.

*See, now, Criminal Justice Administration Act, 1914 (c. 58), s. 3 (1).*

**468. ———.]**—*R. v. CAMBRIDGESHIRE JJ.* (1880), 44 J. P. Jo. 168.

**469. ———.]**—The father of a child failed to appear before justices in petty sessions upon being summoned to do so, under Vaccination Act, 1867 (c. 84), s. 31. In his absence the justices made an order that the child should be vaccinated within twenty-eight days:—**Held:** the justices had power to make such an order in the absence of the father, & his presence was not a condition precedent to the making of such an order.—*R. v. CINQUE PORTS JUSTICE* (1886), 17 Q. B. D. 191; 55 L. J. M. C. 156, D. C.

**470. ———.]**—Applt., Lionel Walker Birch Martin, of Ryder Street Chambers, St. James's Street, London, who held a licence to drive a motor car issued by the London County Council & numbered 5080, was in 1909 convicted by a ct. of summary jurisdiction of driving a motor car on a public highway at a speed exceeding twenty miles an hour contrary to Motor Car Act, 1903 (c. 36), s. 9. It was then proved that the driver of a motor car of the name of Lionel Martin & of the same address as applt. had been convicted of a similar offence in 1907; & that a person having the same four names & of the same address as applt. had held a licence from the London County Council from a date before 1907 continuously down to the present time, that the licence was numbered 5080, & that no one having a London address could have that number except the person having those four names & that address. A police constable gave evidence that he stopped the motor car upon the occasion in 1907, & the driver upon demand produced to him a licence which was issued by the London County Council & numbered 5080. No notice to produce the licence was given. It was next proved by the production of a certified copy of the conviction that a person with the same four names & of the same address as applt. was convicted of a similar offence in 1908. Applt., who was represented by counsel at the hearing, absented himself from the ct. & was not called as a witness. The justices found upon the above evidence that applt. was the person who had been convicted on both the

give bail, & a time is fixed in their presence for the hearing, & they do not appear at the time so fixed, the justice may proceed with the hearing, in their absence, to judgment & sentence.—*R. v. HORN BROOK, Ex p. MADDEN* (1908), 38 N. B. R. 358; 4 E. L. R. 309.—CAN.

**465 iii. ———.]**—*LACASSE v. FORTIER (Que.)* (1918), 30 Can. Crim. Cas. 87.—CAN.

**465 iv. ———.]**—*ROY KING v. R.* (1925), 43 Can. Crim. Cas. 20; 57 N. S. R. 540.—CAN.



*Sect. 4.—The hearing: Sub-sect. 3, B. (a) & (b) i. ii. &*

former occasions, & they imposed a fine of £20 & ordered his licence to be indorsed:—*Held*: with regard to the conviction in 1907, the evidence of the police constable as to the contents of the licence produced to him on the occasion when the offence was committed was admissible as evidence of the identity of applt. with the person who was then convicted, & that no notice to produce the licence was necessary; with regard to the conviction in 1908, the identity of the names & of the address was some evidence of the identity of applt. with the person who was then convicted; & the justices were entitled to have regard to applt.'s wilful absence, & conclude that he was the person who was convicted on both those occasions & to order his licence to be indorsed.—*MARTIN v. WHITE*, [1910] 1 K. B. 665; 79 L. J. K. B. 553; 102 L. T. 23; 74 J. P. 106; 26 T. L. R. 218; 8 L. G. R. 218; 22 Cox, C. C. 236, D. C.

**471. Appearance by counsel or solicitor—Personal attendance unnecessary.**—Where a person who had been convicted by a justice & ordered to pay penalties, neglected to pay, & was summoned for that neglect to appear before the justice to show cause why he should not be further dealt with according to law:—*Held*: an appearance by counsel & attorney was an appearance according to the exigency of that summons.—*BESSELL v. WILSON* (1853), 1 E. & B. 489; 22 L. J. M. C. 94; 20 L. T. O. S. 233; 17 J. P. 567; 17 Jur. 664; 1 W. R. 126; 118 E. R. 518.

*Annotation*:—*Consd.* *R. v. Thompson*, [1909] 2 K. B. 614.

**472.** ———.]—Where in answer to a summons issued by a ct. of summary jurisdiction deft. has appeared by counsel there is no obligation upon him to appear personally, & the justices have no jurisdiction to compel his personal appearance by warrant.—*R. v. THOMPSON*, [1909] 2 K. B. 614; 78 L. J. K. B. 1085; 25 T. L. R. 651; 7 L. G. R. 979; *sub nom.* *R. v. THOMPSON, Ex p. MARTIN*, 100 L. T. 970; 73 J. P. 403; 22 Cox, C. C. 129, D. C.

*Annotations*:—*Consd.* *Martin v. White*, [1910] 1 K. B. 665; *R. v. Montgomery, Ex p. Long* (1910), 102 L. T. 325; *R. v. Garrett-Pegge, Ex p. Brown* (1911), 80 L. J. K. B. 609. *Mentd.* *R. v. Turner* (1909), 3 Cr. App. Rep. 103; *R. v. Clarke, Ex p. Crippen* (1910), 103 L. T. 636.

**473.** ———.]—On the hearing of a summons for driving a motor car at a speed exceeding the limit, deft. appeared by his solr., who pleaded guilty on his behalf, & also to a previous conviction. The inspector of police intimated that he required deft.'s personal appearance, & thereupon the justices granted a warrant:—*Held*: under the circumstances, a warrant ought not to have been issued.—*R. v. MONTGOMERY, Ex p. LONG* (1910), 102 L. T. 325; 74 J. P. 110; 26 T. L. R. 225; 8 L. G. R. 234; 22 Cox, C. C. 304, D. C.

**474.** ——— **Plea of guilty in absence of defendant—Want of authority.**—Deft., residing in London, was summoned before justices at H. to answer to two informations for maliciously injuring a window & maliciously injuring a bell pull. Being unable from illness to attend, he admitted to his father

that he had broken the window, but had not done it intentionally, & that there ought to be compensation. The father thereupon went to H. & communicated with an attorney there, who, under all the circumstances, recommended that he should appear & plead guilty. Accordingly on the day of hearing the attorney pleaded guilty, & the justices thereupon convicted deft. & sentenced him to a term of imprisonment. From the affidavits it appeared that deft. had given neither to his father nor to the attorney any authority whatever to plead guilty, nor did it appear that he was aware that his father intended to employ an attorney:—*Held*: as deft. had not authorised any attorney to appear & plead guilty, the conviction was bad.

*Qu.*: whether it is competent to justices to convict upon a plea of guilty by an attorney in the absence of deft.—*R. v. AVES, R. v. AVES* (1871), 24 L. T. 64; 35 J. P. 533.

**475.** ——— **Right to cross-examine.**—Certain justices at a preliminary inquiry into an alleged case of highway robbery declined to permit the solr. representing prisoners to cross-examine the witnesses for the prosecution, believing that they possessed a discretionary power in the matter:—*Held*: the justices had no discretion to prohibit the solr. to prisoners from cross-examining the witnesses for the prosecution, & the right to cross-examine was absolute both under Summary Jurisdiction Acts & by the common law. *Qu.*: as to the course to be adopted when justices have prohibited cross-examination.—*R. v. GRIFFITHS & WILLIAMS* (1886), 54 L. T. 280; 16 Cox, C. C. 46.

*(b) Defective Process.*

*i. Illegal Arrest.*

**476. Cured by appearance before justices with jurisdiction.**—H., a police constable, procured a warrant to be illegally issued, without a written information or oath, for the arrest of S., upon a charge of "assaulting & obstructing him, H., in the discharge of his duty." Upon such warrant S. was arrested & brought before justices, & was, without objection, tried by them & convicted. H., was afterwards indicted for perjury committed on the trial of S., & convicted:—*Held*: H. was rightly convicted, notwithstanding there was neither written information, nor oath, to justify the issue of the warrant, & the justices had jurisdiction to hear the charge, though the warrant upon which accused was brought before them was illegal.

The information is the statement by which the magistrate is informed of the offence for which a summons or warrant is required (*HUDDLESTON, B.*).—*R. v. HUGHES* (1879), 4 Q. B. D. 614; 48 L. J. M. C. 151; 40 L. T. 685; 43 J. P. 556; 14 Cox, C. C. 284, C. C. R.

*Annotations*:—*Consd.* *Re Maltby* (1881), 7 Q. B. D. 18. *Apprvd.* *Gray v. Customs Comrs.* (1884), 48 J. P. 343; *Expld. & Apld.* *R. v. Fletcher* (1884), 51 L. T. 334. *Expld. & Distd.* *Dixon v. Wells* (1890), 25 Q. B. D. 249. *Apprvd.* *R. v. Garrett-Pegge, Ex p. Brown*, [1911] 1 K. B. 880. *Refd.* *R. v. D'Eyncourt* (1888), 21 Q. B. D. 109; *Ex p. Hopkins* (1891), 61 L. J. Q. B. 240; *R. v. Tabrum, Ex p. Dash* (1907), 97 L. T. 551; *Inkpin v. Roll* (1922), 126 L. T. 517. *Mentd.* *R. v. Beckley* (1887), 20 Q. B. D. 187; *Conn v. Turnbull* (1925), 89 J. P. Jo. 300.

**471 i. Appearance by counsel or solicitor—Personal attendance unnecessary.**—*R. v. O'HEARON* (1901), 34 N. S. R. 491.—CAN.

**d. Necessity for appearance.**—*R. v. COOTE* (1910), 17 O. W. R. 470; 2 O. W. N. 1.—CAN.

**PART VIII. SECT. 4, SUB-SECT. 3.—B. (b) i.**

**476 i. Cured by appearance before**

**justice with jurisdiction.**—*RAWILLER v. SMITH*, [1919] V. L. R. 216.—AUS.

**476 ii.** ———.]—*R. v. KOSITCH* (Alta.) [1919] 3 W. W. R. 378.—CAN.

**476 iii.** ———.]—*R. v. MORRIS* (No. 2) (1920), 69 D. L. R. 117; 37 Can. Crim. Cas. 256; 53 N. S. R. 525.—CAN.

**476 iv.** ———.]—When a person arrested is before a magistrate under an information laid against him, & the magistrate has jurisdiction over the

person & the offence stated, it matters not how he was brought there, the magistrate has jurisdiction to convict.—*R. v. McLATCHY, Ex p. WONG* (N. B.), [1923] 3 D. L. R. 291; 40 Can. Crim. Cas. 32; 50 N. B. R. 320.—CAN.

**476 v.** ———.]—*R. v. KILMARTIN* (1923), 33 B. C. R. 151; [1924] 1 W. W. R. 107.—CAN.

**e.** ——— **Where objection not taken promptly.**—An objection to the magis-

477. —G., licensed to sell tobacco at his house in the city of N., was found hawking & selling at a public-house in the county division of T., four miles distant, & was arrested & conveyed before justices at N. next day, but, no justices then sitting, he was, on his own recognisance, remitted to justices who sat in T. seven days after the offence, & was convicted. (i. objected to the jurisdiction, as the justices were not acting forthwith nor near the place, within Tobacco Act, 1842 (c. 93), s. 13 :—*Held* : whether G. was illegally arrested & detained or not, the justices of T. having jurisdiction, & he being charged before them, the conviction was valid.—(GRAY v. CUSTOMS COMRS. (1884), 48 J. P. 343, D. C.

ii. *Absence of Information.*

Proceedings preliminary to indictment.]—See CRIMINAL LAW, Vol. XIV., pp. 167, 168, Nos. 1456–1459.

478. Cured by appearance.]—Appls. were apprehended & brought before a magistrate charged with setting fire to the letters in a pillar box. On their appearance at a petty sessions to answer the charge, after witnesses had been examined & cross-examined, they were, at the application of the prosecutor, remanded on bail for a week. At the adjourned sessions the attorney for the prosecution stated that he should proceed against the applts. under Malicious Damage Act, 1860 (c. 97), s. 52, & asked their attorneys whether they would plead guilty to such charge, or whether further evidence should be offered in support of it; they answered that he must go on & prove his case: other witnesses were then examined & cross-examined; & after the case for the prosecution was closed, the attorneys for applts. objected that as no information on oath had been taken, as required by sect. 62, & applts. were not found committing the offence, they were not legally in custody, & therefore the justices had no jurisdiction to convict them of the offence then charged. The offence with which applts. were first charged was a felony punishable under sect. 10; the offence of which they were convicted was punishable on summary conviction :—*Held* : the want of an information & a summons was cured by the appearance of applts. before the justices, & they had waived the objection that they were not legally in custody on a charge under sect. 52, & therefore the justices had jurisdiction to convict under that section.—TURNER v. POSTMASTER-GENERAL (1864), 5 B. & S. 756; 34 L. J. M. C. 10; 11 Jur. N. S. 137; 122 E. R. 1011; *sub nom.* SHEPHERD v. POSTMASTER-GENERAL, 5 New Rep.

trate's jurisdiction because of the arrest of accused without warrant must be taken promptly.—R. v. TEY SHING (Alta.), [1920] 1 W. W. R. 546; 51 D. L. R. 173; 15 Alta. L. R. 185; 32 Can. Crim. Cas. 315.—CAN.

f. —Notwithstanding objection by defendant.]—R. v. ALBERTS (B. C.) (1923), 42 Can. Crim. Cas. 64.—CAN.

g. —Where an accused person is before a magistrate who has jurisdiction over the offence, the magistrate need not enquire how he came there, but may proceed to try the case, notwithstanding objection by the accused that he was wrongfully arrested without warrant.—R. v. ALBERTS (B. C.), [1924] 2 D. L. R. 863, [1923] 1 W. W. R. 863.—CAN.

R. v. BOVERO, [1925] 4 D. L. R. 474; [1925] 1 W. W. R. 304; 44 Can. Crim. Cas. 275; 35 B. C. R. 95; *affg.*, [1924]

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80; 11 L. T. 369; 29 J. P. 160; 13 W. R. 89; 10 Cox, C. C. 15.

Annotation.—*Expld.* Egginton v. Pearl (1875), 33 L. T. 428. *Reid.* R. v. Shaw (1865), L. & Ca. 579; Blake v. Beech (1876), 1 Ex. D. 320; R. v. Hughes (1879), 4 Q. B. D. 614; R. v. D'Eyncourt (1888), 21 Q. B. D. 109. *Mentd.* R. v. Dobbins (1883), 48 J. P. 182; *Ex p.* Hopkins (1891), 61 L. J. Q. B. 240; Conn v. Turnbull (1925), 89 J. P. Jo.

479. —.]—R. v. HUGHES, No. 476, *ante*.

iii. *Absence of Summons.*

T.

481. —.]—If a conviction before a justice of peace on the game laws state that deft. was present at the time when the information was read & the witnesses examined; & that when called on for his defence he produced no evidence & did not require any further time; that is sufficient without stating that he was previously summoned to answer, etc.—R. v. STONE (1801), 1 East, 639; 102 E. R. 247.

Annotations :—*Consd.* R. v. Hughes (1879), 4 Q. B. D. 614. *Mentd.* R. v. Crispo (1806), 3 Smith, K. B. 377; R. v. Turner (1816), 5 M. & S. 206; Doe d. Bridger v. Whitehead (1838), 3 Nev. & P. K. B. 557.

482. —.]—Where deft. appears in answer to an information, any defect in, or the want of a summons, becomes immaterial, even in cases where a special form of summons is required by the statute under which the information is laid.—R. v. KINGSLEY (1851), 16 L. T. O. S. 408; 15 J. P. Jo. 65; *previous proceedings, sub nom.* R. v. HERTFORDSHIRE JJ. (1850), 14 J. P. Jo. 702.

483. —.]—*Ex p.* BRAYFORD (1859), 23 J. P. Jo. 404.

484. —Further charge preferred after disposal of first charge.]—TURNER v. POSTMASTER-GENERAL, No. 478, *ante*.

485. —.]—R. v. GLOUCESTERSHIRE JJ. (1871), 35 J. P. Jo. 372.

486. —.]—A man was brought before a magistrate upon one charge which the evidence wholly failed to support, whereupon another & a different charge was preferred against him, no fresh summons being taken out. He defended himself against the second charge at first, but after being remanded took objection to the magistrate's jurisdiction, that he was not legally in custody after the dismissal of the charge on which he had been summoned :—*Held* : his objection was too late; he having submitted to the second charge being entered upon, the want of any summons or warrant to bring him legally before

offence & deft. had appeared, the conviction must stand.—*Ex p.* SONIER (1896), 34 N. B. R. 84.—CAN.

478 iii. —.]—Where an accused person appears voluntarily before a magistrate to answer a charge, the want of a complaint on oath, necessary for the issuing of a summons or warrant becomes immaterial.—R. v. SADA SHIVAPPA PANDURANGAPPA (1868), 5 Bom. Cr. Ca. 29.—IND.

PART VIII. SECT. 4, SUB-SECT. 3.—B. (b) iii.

480 i. Cured by appearance.]—R. v. GASCOIGNE, *Ex p.* MILLIDGE (1883), 9 V. L. R. (L.) 108.—AUS.

480 ii. —.]—Where a party appears & defends a suit without any summons being issued, he cannot afterwards object that there was no complaint on oath.—*Ex p.* Wood (1849), 6 N. B. R. (1 All.) 422.—CAN.

3 D. L. R. 321; [1924] 2 W. W. R. 958; 42 Can. Crim. Cas. 266; 33 B. C. R. 501.—CAN.

if objection taken promptly.]—R. v. ROACH, [1923] 1 D. L. R. 334; 38 Can. Crim. Cas. 294; (1922), 19 Alta. L. R. 119; [1923] 1 W. W. R. 433.—CAN.

PART VIII. SECT. 4, SUB-SECT. 3.—B. (b) ii.

478 i. Cured by appearance.]—*Qu.* : whether the deft. could object to the regularity of the information, he having appeared in obedience to the summons & pleaded not guilty.—R. v. ROE (1888), 16 O. R. 1.—CAN.

478 ii. —.]—An information was defective in that it was not sworn to by the prosecutor at the place & time stated therein. Deft. appeared & pleaded not guilty :—*Held* : as the magistrate had jurisdiction of the



**Sect. 4.—The hearing: Sub-sect. 3, B. (b) iii. & iv.; sub-sects. 4, 5 & 6, A. (a).]**

the magistrate was cured by his voluntary submission.—*EGGINTON v. PEARL* (1875), 33 L. T. 428; 40 J. P. 56.

**iv. Defective Summons.**

**487. Cured by appearance.]—**(1) Appearance cures defects in summons. (2) It must appear in the conviction that the justices are of the county where the offence was committed.—*R. v. JOHNSON* (1720), 1 Stra. 261; 93 E. R. 510.

**488. —.]—***R. v. KINGSLEY*, No. 482, *ante*.

**489. —.]—**They [the justices] heard the evidence without any such objection being made by deft. as is here contended for. Deft. appeared in answer to the information, he allowed the evidence to be given, & was convicted upon that evidence without this objection being raised at the time. There was no point, in my opinion, at the hearing of the case where the justices were bound to stop for want of jurisdiction (*MATHEW, J.*).—*R. v. BRADLEY* (1894), 63 L. J. M. C. 183; 70 L. T. 379; 58 J. P. 199; 10 T. L. R. 346; 17 Cox, C. C. 739; 10 R. 183, D. C.

**490. — Objection taken at time of appearance.]—***DIXON v. WELLS*, No. 410, *ante*.

**SUB-SECT. 4.—CONDUCT OF CASE.**

**491. By police officer.]—***WEBB v. CATCHLOVE* (1886), 3 T. L. R. 159; 50 J. P. Jo. 795, D. C.

*Annotation:—*Distd. *Duncan v. Toms* (1887), 56 L. J. M. C. 81.

**492. —.]—**A local board acting under Public Health Act, 1875 (c. 55), s. 259, passed a resolution to authorise the superintendent of police to prosecute offences under the local Act:—*Held*: the local board could only delegate the authority to their officer, but not to a constable.—*KYLE v. BARBOR* (1888), 58 L. T. 229; 52 J. P. 725; 4 T. L. R. 206; 16 Cox, C. C. 378, D. C.

*Annotation:—*Mentd. *Foster v. Fyfe*, [1896] 2 Q. B. 104.

**493. —.]—***MAY v. BEELEY*, No. 464, *ante*.

**494. By inspector of society—Right to cross-examine.]—**An inspector of a society for the pre-

vention of cruelty to animals may, under Summary Jurisdiction Act, 1848 (c. 43), s. 14, conduct the case & examine & cross-examine witnesses at the hearing before the magistrates of an information preferred at the instance of the society.—*DUNCAN v. TOMS* (1887), 56 L. J. M. C. 81; 56 L. T. 719; 51 J. P. 631; 35 W. R. 667; 16 Cox, C. C. 267, D. C.

**495. By supervisor of Inland Revenue.]—**In prosecutions for taking game without a licence the supervisor of Inland Revenue for the district has a right to conduct the case, though the prosecution is not in his name; & a general authority given to him by the commissioners is sufficient compliance with Inland Revenue Regulation Act, 1890 (c. 21), s. 27.—*R. v. TURNER* (1894), 58 J. P. 320, D. C.

*See, generally, REVENUE.*

**SUB-SECT. 5.—JOINT OFFENDERS.**

**496. Separate summonses against two persons for joint assault—Power of magistrates to try together.]—***Re BRIGHTON STIPENDIARY MAGISTRATE* (1893), 9 T. L. R. 522, D. C.

**SUB-SECT. 6.—MATTERS OF DEFENCE.**

**A. Claim of Right.**

**(a) In General.**

*See, generally, TRESPASS.*

**497. Ouster of jurisdiction of magistrates—By bonâ fide claim.]—**A conviction under Game Act, 1831 (c. 32), s. 30, & Summary Jurisdiction Act, 1848 (c. 43), s. 23, against four defts. for trespass in pursuit of game:—*Held*: (1) the conviction was bad; for it adjudicated each deft. to be imprisoned for one month, unless the costs & charges of conveying all to gaol should be sooner paid, & it was not in the form authorised by Summary Jurisdiction Act, 1848 (c. 43), s. 17, or to the like effect.

(2) *Seem*: when a *bonâ fide* claim of title is set up to an information for an offence under Game Act, 1831 (c. 32), s. 30, the jurisdiction of the

**PART VIII. SECT. 4, SUB-SECT. 3.—**  
**B. (b) iv.**

**487 i. Cured by appearance.]—**Where a person has been summoned to answer an information under an entirely wrong name if he appear in answer thereto justices may convict him.—*R. v. CARR, Ex p. AH YING* (1879), 5 V. L. R. 391.—**AUS.**

**487 ii. —.]—**Issuing a defective summons is a mere irregularity, which is waived by appearing in the summons.—*R. v. COLLINS, R. v. GOULAIS* (1887), 14 O. R. 613.—**CAN.**

**1. Summons containing more than one complaint.]—***R. v. MOLLISON, Ex p. SANDRIDGE BOROUGH* (1876), 2 V. L. R. (L.) 51.—**AUS.**

**m. Misdating summons.]—**Misdating petty sessions summons is an irregularity only & conviction on it cannot be set aside by petty sessions.—*GREGORY v. MURPHY*, [1906] V. L. R. 71.—**AUS.**

**PART VIII. SECT. 4, SUB-SECT. 4.**

**n. By any person at discretion of justice.]—**Justices Act, 1890, s. 77, does not preclude justices from allowing any person whom they may think fit to conduct a prosecution under special circumstances.—*RITTER v. CHARLTON* (1904), 29 V. L. R. 558.—**AUS.**

**o. By a solicitor.]—***Mandamus* lies to command justices to admit & hear a solr. engaged in a case before them.—*R. (ALLEN) v. COUNTY CORK JJ.* (1913), 47 I. L. T. 109.—**IR.**

**PART VIII. SECT. 4, SUB-SECT. 5.**

**p. Separate informations against three persons for same offence—Power of justices to try together.]—***DAVIDSON v. DARLINGTON* (1899), 24 V. L. R. 667.—**AUS.**

**q. Separate cases against three defendants—Decision postponed until all cases heard—Particular evidence in one case not affecting others.]—***LOASBY v. MAIN* (1914), 33 N. Z. L. R. 974.—**N.Z.**

**PART VIII. SECT. 4, SUB-SECT. 6.—**  
**A. (a).**

**497 i. Ouster of jurisdiction of magistrates—By bonâ fide claim.]—**The ct. is justified in refusing to adjudicate if satisfied that a question of title is *bonâ fide* raised.—*FALKINGHAM v. FREGON* (1899), 25 V. L. R. 211.—**AUS.**

**497 ii. —.]—**In the absence of any evidence to suggest that the claim of right is frivolous, the claim of right ousts the jurisdiction of the magistrate.—*KEABLE v. CLANCY, Ex p. CLANCY*, [1909] S. R. Q. 345.—**AUS.**

**497 iii. —.]—***SLOAN v. DAVIS*

(1853), 7 N. B. R. (2 All.) 593.—**CAN.**

**497 iv. —.]—**If in an action of trespass to land tried before a justice, the title is *bonâ fide* in question, the justice has no jurisdiction.—*R. v. HARSHMAN* (1873), 14 N. B. R. (1 Pug.) 346.—**CAN.**

**497 v. —.]—***R. v. DAVIDSON* (1880), 45 U. C. R. 91.—**CAN.**

**497 vi. —.]—**The jurisdiction of a magistrate is not ousted by a mere assertion of title & he must enquire fully into all the circumstances before he can be satisfied that title does come in question.—*Re LEWIS* (1885), 7 Nfld. L. R. 70.—**NFLD.**

**497 vii. —.]—***MATHEWS v. CARPENTER* (1885), 16 L. R. Ir. 420.—**IR.**

**497 viii. —.]—***R. (KENNEDY) v. CORK JJ.*, [1913] 2 I. R. 391.—**IR.**

**497 ix. —.]—***TALBOT DE MALAHIDE (LORD) v. DUNNE*, [1914]

**497 x. —.]—**Where a deft. seeks to justify the act complained of as done in exercise of a right which could not exist in law, he cannot have fair & reasonable grounds for a *bonâ fide* claim of right, & the justices should convict.—*R. (O'NEILL) v. TYRONE COUNTY JJ.*, [1917] 2 I. R. 96.—**IR.**

**497 xi. —.]—***Seem*: it is

judges is ousted, unless deft., under the proviso to the sect. require the magistrate to determine the defence founded on the claim.—*R. v. CRIDLAND* (1857), 7 E. & B. 853; 27 L. J. M. C. 28; 29 L. T. O. S. 210; 3 Jur. N. S. 1213; 119 E. R. 1463; *sub nom.* *R. v. BACON*, *R. v. CRIDLAND*, 21 J. P. 404; 5 W. R. 679.

*Annotations*:—*As to* (1) *Distd.* *R. v. Walker* (1881), 45 J. P. 682. *As to* (2) *Appld.* *Legg v. Pardoe* (1860), 9 C. B. N. S. 289. *Distd.* *Morden v. Porter* (1860), 7 C. B. N. S. 641; *Leatt v. Vine* (1861), 30 L. J. M. C. 207; *Williams v. Adams* (1862), 2 B. & S. 312. *Appld.* *Cornwell v. Sanders* (1862), 3 B. & S. 206; *Hudson v. Mac Rae* (1863), 4 B. & S. 585; *R. v. Stimpson* (1863), 4 B. & S. 301; *Consd.* *Raby v. Seed* (1864), 29 J. P. 37; *R. v. Farrer* (1866), 7 B. & S. 554. *Folld.* *Penwarden v. Palmer* (1894), 10 T. L. R. 362. *Refd.* *Ex p. Whittaker* (1859), 23 J. P. Jo. 84; *Watkins v. Major* (1875), 44 L. J. M. C. 164; *Birnie v. Marshall* (1876), 35 L. T. 373; *R. v. French*, [1902] 1 K. B. 637.

498. ———.]—It is my decided opinion that a question of title to take away the jurisdiction of the justices, must be one arising from a claim of right set up by the party against whom the proceedings are instituted. If he asserts a title, though only a colourable one, *bonâ fide*, the jurisdiction of the magistrate falls to the ground, but the claim must have some colour, & not be merely a frivolous one (*COCKBURN, C.J.*).—*CORNWELL v. SANDERS* (1862), 3 B. & S. 206; 1 New Rep. 57; 32 J. L. M. C. 6; 7 L. T. 356; 27 J. P. 148; 9 Jur. N. S. 540; 11 W. R. 87; 122 E. R. 78.

*Annotations*:—*Consd.* *R. v. Stimpson* (1863), 4 B. & S. 301. *Refd.* *Hudson v. Macrae* (1863), 3 New Rep. 76; *Watkins v. Major* (1875), L. R. 10 C. P. 662.

499. ———.]—When upon the hearing by justices of an information, a claim of right is set up by deft., such claim, if made *bonâ fide* & with some show of reason, will oust their jurisdiction; & although it is for the justices to determine whether or not such claim of right is made *bonâ fide* & with a show of reason, yet, if they determine that it is not so made, this ct. will review their determination & overrule it if come to upon insufficient grounds.—*R. v. STIMPSON* (1863), 4 B. & S. 301; 2 New Rep. 422; 10 Jur. N. S. 41; 122 E. R. 472; *sub nom.* *R. v. STIMPSON*, *R. v. PEEK*, 32 L. J. M. C. 208; 8 L. T. 536; 27 J. P. 678; 9 Cox, C. C. 356.

*Annotations*:—*Consd.* *Hudson v. Mac Rae* (1863), 4 B. & S. 585. *Distd.* *Paley v. Birch* (1867), 8 B. & S. 336; *Booth v. Brough* (1869), 33 J. P. 694. *Appld.* *Lovesy v. Stallard* (1874), 30 L. T. 792; *Burton v. Hudson*, [1909] 2 K. B. 564. *Refd.* *Colonial Bank of Australasia v. Willan* (1874), L. R. 5 P. C. 417; *R. v. Critchlow* (1878), 26 W. R. 681.

500. ———.]—The Board of Trade, by order, prohibited the taking of shingle from a part of the shore of a harbour, of which shore resp. was the owner. Resp. subsequently removed shingle from the shore, & proceedings were taken against him in a ct. of summary jurisdiction under Harbours Act, 1814 (c. 159), s. 14 for the recovery of the penalty. Resp. contended before the justices that he had acted under a *bonâ fide* claim of right as owner of the shore, & the justices, without considering the question whether the fact of ownership afforded any defence to proceedings under sect. 14, dismissed the information on the ground that, a *bonâ fide* claim of right having been raised, their jurisdiction was ousted:—*Held*: the decision of the justices was right.—*BURTON v. HUDSON*, [1909] 2 K. B. 564; 78 L. J. K. B. 905;

101 L. T. 233; 73 J. P. 401; 25 T. L. R. 641, D. C.

501. ——— Claim necessarily involved in question to be determined.]—(1) The rule which ousts justices of the peace from entering upon a question of title does not apply where title is an essential element in the inquiry & the application of the rule would deprive them of jurisdiction to enter upon it.

(2) When the facts to be proved are of the very essence of the inquiry, & there is evidence before the justices on both sides, this ct. will not interfere with their decision simply because they think it would have been better if the justices had decided differently.

(3) In Feb. parish officers gave M. who occupied a parish house, notice to quit. Before the expiration of the notice V., by whom M. had been let into possession, & who claimed title to the house, received possession of it from him, & let it to W. On Apr. 4 the parish officers, upon complaint to justices under Poor Relief Act, 1818 (c. 12), s. 24, obtained a summons against M. for refusing to deliver up possession. On the hearing neither M. nor V. who had knowledge of the notice given to M. appeared, & the justices issued their warrant, under which the churchwardens & overseers were put into possession:—*Held*: the justices had jurisdiction to issue their warrant, notwithstanding the claim of title.—*Ex p. VAUGHAN* (1866), L. R. 2 Q. B. 114; 36 L. J. M. C. 17; 15 W. R. 198; *sub nom.* *R. v. ALLEN*, 7 B. & S. 902; *sub nom.* *R. v. LLANFILLO, BRECKNOCKSHIRE JJ.*, 15 L. T. 277; 31 J. P. 7.

*Annotations*:—*As to* (1) *Appld.* *R. v. Critchlow* (1878), 26 W. R. 681. *As to* (2) *Refd.* *Whennan v. Clark*, [1916] 1 K. B. 94; *R. v. Nat Bell Liquors*, [1922] 2 A. C. 128. *Generally*, *Mentd.* *Brown v. Cocking* (1868), L. R. 3 Q. B. 672.

502. ——— Claim must be by persons prosecuted.]—*CORNWELL v. SANDERS*, No. 498, *ante*.

503. ———.]—Information having been laid against resps. for having unlawfully damaged certain notice-boards placed by applt. on a common on which the parishioners had certain rights, resps., at the hearing, set up a claim of right to the common, & the justices held that their jurisdiction in the matter was ousted:—*Held*: as resps. were not shown to have been parishioners no *bonâ fide* claim of right had been set up on their behalf & the justices had had jurisdiction.—*TURNER v. SALMON* (1885), 1 T. L. R. 482, D. C.

—— *Fisheries.*]—*See FISHERIES*, Vol. XXV., pp. 63–65, Nos. 526–545.

—— *Game.*]—*See GAME*, Vol. XXV., pp. 367–370, Nos. 160–186.

—— *Highways.*]—*See HIGHWAYS*, Vol. XXVI., pp. 291, 458, 476, Nos. 231, 1740–1747, 1894.

—— *Church rates.*]—*See ECCLESIASTICAL LAW*, Vol. XIX., p. 518, Nos. 3808–3811.

504. Jurisdiction expressly conferred by statute —Harbour, Docks & Pier Clauses Act, 1847 (c. 27).]—Above Act, s. 63, which imposes a penalty upon the master of any vessel who shall without the permission of the harbour-master moor the same in the entrance, or within the prescribed limits, of any dock or harbour, & who shall not remove the same upon notice, overrides & extinguishes all local & private rights of property therein. The

open to a magistrate to conclude that a claim is too far-fetched & visionary to be *bonâ fide* set up.—*RYAN v. STANFORD* (1897), 15 N. Z. L. R. 390.—N.Z.

497 xii. ———.]—If deft.'s claim of right is merely fanciful the justices' jurisdiction exists.—*JAMES v. BUTLER*, *JAMES v. HOULAHAN* (1906), 25 N. Z.

L. R. 653.—N.Z.

497 xiii. ———.]—*LUDEMANN v. BARNETT*, 2 J. R. N. S. 108.—N.Z.

497 xiv. ———.]—*COMERFORD v. TURNER*, [1918] 2 I. R. 207.—IR.

r. *Bonâ fide claim of right* —*Rebuttal of wilfulness.*]—Where, in a

proceeding for wilfully cutting & carrying away timber off complainant's land, there is shown to be a *bonâ fide* question of title or boundaries, & the act was done under a *bonâ fide* claim of right, the wilfulness of the act is negatived.—*Ex p. DONOVAN* (1874), 15 N. B. R. (2 Pug.) 389.—CAN.



Sect. 4.—*The hearing: Sub-sect. 6, A. (a), (b) (c).]*

assertion of such local or private rights does not exclude the jurisdiction of the justices under the Act.—*GARDNER v. WHITFORD* (1858), 4 C. B. N. S. 665; 23 J. P. 358; 140 E. R. 1253.

*Annotation:—Mentd. Garnsworthy v. Pyne* (1870), 35 J. P. 21.

505. — *Railways Regulation Act, 1840* (c. 97), s. 16.]—Above sect. enables justices to try a question of right arising in connection with a prosecution for wilful trespass thereunder.—*LONDON, BRIGHTON & SOUTH COAST RY. CO. v. FAIRBROTHER* (1900), 16 T. L. R. 167, D. C.

(b) *On Charge of Assault.*

*See, now, Offences against the Person Act, 1861* (c. 100), s. 46.

506. *Whether jurisdiction ousted—No title to land involved in offence.*]—Where there is evidence before justices on which they can decide a complaint of assault under 9 Geo. 4, c. 31, s. 27, without deciding a question of interest in land set up by deft., they have jurisdiction so to decide. It is for the justices to determine whether the title or interest in land comes in question, & when they act *bonâ fide* in determining that it is not material for them to decide such question of title, this ct. will not interfere.—*R. v. EDWARDS* (1856), 26 L. T. O. S. 257; 4 W. R. 257; 20 J. P. Jo. 68.

507. — — —.]—The question as to property which will oust the jurisdiction of justices to determine a charge of assault under *Offences against the Person Act, 1861* (c. 100), s. 42, must be a question as to real property. Where two persons who were gamekeepers in the employ of a landlord of a farm to whom the right to game & rabbits was reserved, were charged before the justices by the tenant of such farm, under *Offences against the Person Act, 1861* (c. 100), s. 42, with assaulting & beating him, & the acts complained of were done in a scuffle to take from the tenant whilst on his farm his bag, in which were rabbits claimed as the landlord's property:—*Held*: the fact that the justices were of opinion that the gamekeepers acted under a *bonâ fide* belief that they had a right to do the acts complained of did not oust the jurisdiction of the justices, no question having arisen as to title to any interest in land within *Offences against the Person Act, 1861* (c. 100), s. 46.—*WHITE v. FOX* (1880), 49 L. J. M. C. 60; 44 J. P. 618, D. C.

*Annotation:—Folld. Lucan v. Barrett* (1915), 84 L. J. K. B. 2130.

508. — — —.]—(1) A person making a *bonâ fide* claim of right to be present as one of the public in a law ct. at the hearing of a suit is not justified in committing an assault on a police constable & an official who endeavour to remove him. Such a claim of right does not oust the jurisdiction of a magistrate who has to try the charges of assault, & he may refuse to admit evidence & to allow cross-examination in respect of the said claim.

(2) If a charge be dismissed, it is discretionary with the justice to grant or refuse a certificate of dismissal.—*R. v. STANBURY EARDLEY* (1885), 49 J. P. 551, D. C.

*Annotation:—As to (1) Refd. Lucan v. Barrett* (1915), 113 L. T. 737.

PART VIII. SECT. 4, SUB-SECT. 6.—  
A. (b).

511 i. *Whether jurisdiction ousted—Bonâ fide question as to title involved.*]—Summary conviction for assault quashed on the ground that a question

as to the title to land arose & the magistrate had no jurisdiction to try the case.—*R. (CUNNINGTON) v. THORBURN* (Alta.), [1924] 4 D. L. R. 1258; [1924] 3 W. W. R. 867; *reversg.*, [1924] 4 D. L. R. 942; [1924] 3 W. W. R. 474.—CAN.

509. — — —.]—In the proviso to s. 46 of the *Offences against the Person Act, 1861* (c. 100), which enacts that nothing therein contained shall authorise any justice to hear & determine any case of assault in which "any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom," the words "title to" govern, not only the words "lands, etc.," but also the words "any interest therein or accruing therefrom."

An assault was committed by one commoner upon another commoner in the course of a dispute as to whether the latter was or was not at the time of the assault in the act of using the common land in a manner in excess of the right of common. The latter summoned the former for assault, & he was convicted:—*Held*: there was no question raised as to the title to any lands or as to the title to any interest in land, & the jurisdiction of the justices to hear & determine the case of assault was not ousted.—*R. v. FRENCH*, [1902] 1 K. B. 637; *sub nom. R. v. FRENCH. Ex p. ROBERTS*, 71 L. J. K. B. 382; 86 L. T. 587; 66 J. P. 487; 50 W. R. 555; 20 Cox, C. C. 200; *sub nom. R. v. FRENCH, Ex p. ROBERTS, Ex p. SIMMONDS*, 18 T. L. R. 440; 46 Sol. Jo. 360, D. C.

510. — — —.]—Applt., the chairman of the managers of a voluntary school, ordered one of the pupils to leave the school for alleged disobedience & directed the headmistress to take her name off the register. Upon subsequently visiting the school applt. found the girl there sitting at a desk in the room of the headmistress. He told the girl to leave the school, & as she did not obey, he forcibly removed her from the school into the highway, & locked the gate to prevent her from returning. Upon an information charging applt. with assault, he contended that, after the directions he had given, the girl had no right in law to attend the school, & was a trespasser; that he had sole control of the school; that a question of title had arisen, & that under *Offences against the Person Act, 1861* (c. 100), s. 46, the jurisdiction of the justices was ousted:—*Held*: assuming that applt. was a trustee of the school, & that in acting as he did he was asserting a title to, or an interest in land, yet it was a title which was not disputed, & therefore the jurisdiction of the justices was not ousted.—*LUCAN v. BARRETT* (1915), 84 L. J. K. B. 2130; 113 L. T. 737; 79 J. P. 463; 31 T. L. R. 508; 13 L. G. R. 1361; 25 Cox, C. C. 103, D. C.

511. — *Bonâ fide question as to title involved.*]—On the hearing of a complaint for an assault, under *Offences against the Person Act, 1861* (c. 100), s. 42, if it be shown that a *bonâ fide* question as to title to land is involved, the jurisdiction of the justices is at once ousted by sect. 46, which provides that nothing in the Act shall authorise justices to hear & determine any case of assault in which any question shall arise as to the title to any lands, etc.; & the justices cannot proceed to inquire into & determine by summary conviction any excess of force alleged to have been used in the assertion of title.—*R. v. PEARSON* (1870), L. R. 5 Q. B. 237; 39 L. J. M. C. 76; 22 L. T. 126; 34 J. P. 582; 11 Cox, C. C. 493.

*Annotation:—Distd. R. v. French*, [1902] 1 K. B. 637.

512. *Whether title to land involved—Question for magistrates.*]—*R. v. EDWARDS*, No. 506, *ante*.

t. *In defence of title to land.*]—Deft. in a prosecution for an assault has a right to show that the assault was committed on his land in defence of his title.—*Ex p. ESTABROOKS* (1879), 19 N. B. R. (3 P. & B.) 283.—CAN.

(c) *On Charge of Malicious Damage.*

See, now, Criminal Justice Administration Act, 1914 (c. 58), s. 14 (1); CRIMINAL LAW, Vol. XV., pp. 1023-1026, 1039, 1040, Nos. 11,506-11,527, 11,721-11,725.

513. Whether jurisdiction ousted—Fair & reasonable claim.]—Where a person convicted under 7 & 8 Geo. 4, c. 30, of a malicious trespass, admitted the act complained of before the justice, but said that he did it as an act of ownership, this ct. will not grant a writ of *habeas corpus* upon an affidavit setting forth this fact, for otherwise this ct. would be reviewing the justice's decision upon the facts.—*Re* — (1857), 29 L. T. O. S. 160; 5 W. R. 607.

514. ———.]—SMITH v. FOTHERGILL (1859), 34 L. T. O. S. 66.

515. ———.]—Certain Crown lands lay as an open space, over which for fifty years the public had used several footpaths. S. obtained a lease of the land from the Crown & inclosed it, & put up a gate with a lock on it. J. broke the lock & opened the gate. Being summoned before the justices for a malicious trespass, & having set up a claim of right of way, the justices convicted him:—*Held*: there being ground for a fair supposition of right after so long a user, the justices were wrong & it was immaterial that J. had other modes of vindicating his right, for breaking the lock was one mode.—JOHNSON v. SIMPSON (1860), 24 J. P. 532.

516. ———.]—A. was summoned before justices for unlawfully & maliciously damaging grass used for the food of beasts, the property of W., & employed an attorney to set up a claim of right to the soil as being part of the waste of a manor which he had recently bought, but he admitted that he did not know the boundaries of the manor, & it was proved that W. & his predecessors had occupied the soil for the last sixty years without any adverse claim having ever been set up:—*Held*: A. had not set forth enough to oust the jurisdiction of justices, & acted rightly in convicting A.—ANKERSON v. WEBBER (1868), 32 J. P. 613.

517. ———.]—E. being summoned before justices under Malicious Damage Act, 1861 (c. 97), s. 25, for unlawfully & maliciously injuring a fence of M., set up a claim of right of way. The fence was alleged by E. to obstruct a public footpath, & it was admitted there was a footpath, though the precise point of its crossing the fence was in dispute between E. & his neighbours, both owners of adjoining land near the spot. E. not only pulled out some thorns recently put there, but also threw down more of the fence than was necessary to enable him to pass:—*Held*: as E. had at most only committed an excess in vindicating the public right of way, the justices ought to have declined jurisdiction, & were wrong in convicting him.—EVISON v. MARSHALL (1868), 32 J. P. 691.

518. ———.]—R. was charged by C. with wilfully damaging a stone wall, which was a party wall, & at the hearing he produced deeds showing that he & C.'s predecessor had joined in an award whereby if R. used the wall he should pay for it, & another deed by which the premises held by C.'s predecessor were demised to R.:—*Held*: this was

sufficient evidence to sustain a claim of right, & the justices ought to have declined jurisdiction.—REBS v. COLLIER (1870), 34 J. P. 613.

519. ———.]—Where the justices on a summons under the Malicious Damage Act, 1861 (c. 97), are satisfied that the injury was wilful, & that there was no fair & reasonable claim of right to justify the act they ought to convict, & a *certiorari* to quash the conviction will not be allowed merely on showing that the claim was made *bonâ fide*.—R. v. MUSSETT (1872), 26 L. T. 429; 37 J. P. 133; *sub nom.* R. v. ESSEX JJ., R. v. MUSSETT, 20 W. R. 670.

520. ———.]—T. cut off the top rail of a stile which he thought obstructed a public footway. On being summoned under Malicious Damage Act, 1861 (c. 97), s. 52, for malicious injury, his attorney appeared & claimed the right to destroy the top rail, & moreover, that the whole stile was illegal, & went into evidence on both points. The justices overruled the claim of right, & convicted T., who moved to quash the conviction:—*Held*: T. had not waived his claim of right by going into evidence, & as the claim had been made *bonâ fide* the conviction must be quashed.—R. v. TOWGOOD (1871), 35 J. P. 791.

521. ———.]—EVANS v. SMITH (1874), 38 J. P. Jo. 85.

522. ———.]—R. broke padlocks securing S.'s shop, & entered into the premises. On being charged with unlawfully & wilfully doing injury, R. set up a verbal agreement between S. & himself, whereby S. agreed to let R. occupy the shop for a limited time to do certain work. Witnesses were also produced to support this claim. The justices disbelieved the evidence as to the agreement, & convicted R.:—*Held*: the justices were right, & had jurisdiction to decide the fact whether there was such an agreement or not.—REEVE v. STONHAM (1879), 43 J. P. 732, D. C.

523. ———.]—R. v. FANE, ETC., JJ. (1885), 49 J. P. Jo. 329, D. C.

524. ———.]—Where a person is charged under the Malicious Damage Act, 1861 (c. 97), & sets up a claim of right, the justices are to decide whether the claim is *bonâ fide* & reasonable, & a *certiorari* will not lie.—*Ex p.* SMITH (1890), 7 T. L. R. 42, D. C.

525. ———.]—E. was charged under Malicious Damage Act, 1861 (c. 97), s. 24, with unlawfully damaging growing oats & dredge corn, to the amount of £1. At the hearing E. claimed a right of highway, there being evidence for & against; & the justices convicted E., though several old witnesses spoke of a highway being claimed & used:—*Held*: deft.'s evidence was sufficient to support his claim of right, & the justices were wrong in convicting E.—EDWARDS v. COCK (1893), 58 J. P. 398, D. C.

526. ——— Act unnecessary to assertion of right.]—*Ex p.* CHILTON (1878), 42 J. P. Jo. 69.

527. Whether claim fair & reasonable—Question for magistrates.]—*Re* — (1857), 29 L. T. O. S. 160; 5 W. R. 607.

528. ———.]—R. v. MUSSETT, No. 519, ante.

529. ———.]—REEVE v. STONHAM, No. 522, ante.

530. ———.]—*Ex p.* SMITH, No. 524, ante.

## PART VIII. SECT. 4, SUB-SECT. 6.—A. (c).

513 i. Whether jurisdiction ousted—Fair & reasonable claim.]—The jurisdiction of the justices is ousted by a

*bonâ fide* claim by deft. that the land where the fence, alleged to be maliciously damaged, stood, belongs to him solely, although the justices may think that in fact he is only jointly interested with some other person.—MCLAREN v. BRADLEY, [1908] V. L. R. 318.—AUS.

527 i. Whether claim fair or reasonable—Question for magistrates.]—R. v. McDONALD (1886), 12 O. R. 381.—CAN.



Sect. 4.—*The hearing: Sub-sect. 6, B.; sub-sects. 7,*  
8

*B. Res judicata.*

531. Before whom objection taken — Magistrates hearing second summons.]—*R. v. HASTINGS JJ., Ex p. KINNIS* (1897), 61 J. P. Jo. 740, D. C.

532. What amounts to a hearing—Refusal by magistrate to entertain jurisdiction.]—A summons was taken out before a magistrate, & on the party appearing & objecting that the magistrate had not jurisdiction in the case, the objection was held good, & the summons was dismissed. A second summons was taken out, & it appeared that further evidence would be adduced to show jurisdiction, but the magistrate refused to entertain the complaint, on the ground that it had been already decided, & that all the evidence should have been brought forward on the first summons:—*Held: a mandamus* should go to the magistrate to rehear the complaint. *Semble: it would have been otherwise had the merits of the case been gone into & decided.*—*R. v. BINGHAM* (1842), 3 Ry. & Can. Cas. 390; 7 J. P. 144.

Plea of autrefois acquit or autrefois convict.]—See CRIMINAL LAW, Vol. XIV., pp. 336 *et seq.*

*Res judicata.*]—See ESTOPPEL, Vol. XXI., pp. 159 *et seq.*

Further hearings on bastardy proceedings.]—See BASTARDY, Vol. III., pp. 398–400, Nos. 331–335.

SUB-SECT. 7.—WITNESSES.

See, generally, EVIDENCE, Vol. XXII., pp. 388 *et seq.*

Power to order examination.]—See EVIDENCE, Vol. XXII., p. 568, No. 6185.

Summonses to attend.]—See EVIDENCE, Vol. XXII., p. 427, No. 4410.

Inspection of books.]—See BANKERS, Vol. III., p. 309, No. 1021.

Cross-examination of witnesses.]—See Sub-sect. 3, B. (a), sub-sect. 4, *ante*.

PART VIII. SECT. 4, SUB-SECT. 6.—B.

a. Dismissal—Whether a bar to subsequent proceedings—Not in a superior court.]—*R. v. SKINNER* (1867), 4 W. W. & A'B. 39.—AUS.

b. ————Necessity for certificate.]—If the magistrate dismisses the case & mark the summons dismissed that is a bar to further prosecution for the same offence notwithstanding that no certificate of dismissal has been granted.—*LENTHALL v. GAZZARD* (1895), 16 N. S. W. L. R. 22; 11 N. S. W. W. N. 118.—AUS.

c. ————]—*Ex p. TOOMEY* (1901), 1 S. R. N. S. W. 24; 18 N. S. W. W. N. 42.—AUS.

d. ————]—A certificate of dismissal is a bar to subsequent proceedings.—*Re KELLY, R. v. DIBBLEE* (1891), 31 N. B. R. 3.—CAN.

e. ————]—*FLICK v. BRISBIN* (1895), 26 O. R. 423.—CAN.

f. ————]—*R. v. JOHNSON* (N. S.) (1910), 9 E. L. R. 37.—CAN.

g. ————]—An order of justices stating that a charge is "dismissed," without adding "on the merits" or "without prejudice," is a good order, & a bar to subsequent proceedings for the same offence.—*R. (WALSH) v. TIPPERARY JJ.*, [1917] 1 I. R. 250.—IR.

h. Prior civil proceedings—Whether a bar to subsequent criminal proceedings.]—*R. v. CALL* (1883), 9 V. L. R. 120.—AUS.

k. Conviction—Whether bar to sub-

sequent proceedings—Convicting justice must have had jurisdiction.]—*R. v. ROBERTS* (1863), 10 N. B. R. (5 All.) 531.—CAN.

l. ————Onus of proof.]—If a party charged with an offence sets up as a defence a previous conviction for the same offence, the onus is on him to prove the identity of the offences.—*R. v. KAY, Ex p. GALLAGHER* (1907), 38 N. B. R. 325; 4 E. L. R. 216.—CAN.

PART VIII. SECT. 4, SUB-SECT. 8.

533 i. Must be given in presence of accused.]—Where the magistrates action amounts to the taking of additional evidence in private, the proceedings are rendered irregular, & conviction will be quashed.—*ATTKEN v. WOOD*, [1921] S. C. (J.) 84; 58 Sc. L. R. 475.—SCOT.

538 i. Must be relevant—Discretion of magistrate to reject.]—*BIGGS v. JENNINGS* (1925), 46 N. L. R. 22.—S. AF.

m. Evidence for defence—Duty of magistrate to hear.]—Deft.'s evidence must be taken for the defence & a magistrate is bound to accept such evidence & give it such weight as he thinks proper.—*R. v. MEYER* (1886), 11 P. R. 477.—CAN.

n. ————]—*Re ELLIS* (1894), 13 N. Z. L. R. 229.—N. Z.

o. ————Discretion of magistrate to refuse to hear on adjournment—Where defendant refused to call evidence at original hearing.]—*Ex p. ARMSTRONG*

SUB-SECT. 8.—EVIDENCE.

Evidence, generally, see EVIDENCE, Vol. XXII., pp. 19 *et seq.*

533. Must be given in presence of accused.]—*R. v. VIPONT* (1761), 2 Burr. 1163; 97 E. R. 767.

Annotations:—*Folld. R. v. Benwell* (1794), 6 Term Rep. 75; *Re Tordoff* (1844), 13 L. J. M. C. 145. *Reid. Re Jaques* (1822), 2 Dow. & Ry. K. B. 64. *Mentd. R. v. Killeit* (1767), 4 Burr. 2063; *R. v. Harris* (1797), 7 Term Rep. 238; *R. v. Surrey JJ.*, [1892] 2 Q. B. 719.

534. ————]—Conviction on 5 Anne, c. 14, quashed, because the witness was not sworn & examined in the presence of deft. It is not sufficient to read over the deposition in deft.'s presence.—*R. v. CROWTHER* (1786), 1 Term Rep. 125; 99 E. R. 1009.

Annotation:—*Mentd. R. v. Stone* (1801), 1 East, 639.

535. ————]—It is a good objection to a conviction that it does not state that the evidence was given in deft.'s presence.—*R. v. BENWELL* (1794), 6 Term Rep. 75; 101 E. R. 443.

536. ————]—*R. v. COMMINS*, No. 403, *ante*.

537. Must not be given before plea of accused—Waiver by subsequent plea of guilty.]—The offender should be called on to plead to the charge before any evidence in support of it is given; but if the evidence be given first, though not in his presence, & he confesses the offence, the irregularity is cured.—*R. v. HALL* (1786), 1 Term Rep. 320; 99 E. R. 1117.

Annotations:—*Mentd. Wilkins v. Wright* (1833), 2 Cr. & M. 191; *Doe d. Payne v. Bristol & Exeter Ry.* (1840), 2 Ry. & Can. Cas. 75.

538. Must be relevant—Discretion of magistrate to reject.]—A magistrate cannot be required to hear evidence which ought not to affect his determination.—*R. v. MINSHULL* (1833), 1 Nev. & M. K. B. 277; 1 Nev. & M. M. C. 74.

539. ————]—Applt. was summoned before a metropolitan police magistrate for an offence against Metropolitan Police Act, 1839 (c. 47). It was proved that he used affixed to the front of the shop a movable show board, 11½ inches of which projected at a height of 2 feet 3 inches over the footway of the street, which was 36 feet 8 inches wide. Applt. proposed to call

(1892), 31 N. B. R. 411.—CAN.

p. Evidence to show jurisdiction—Discretion to admit after close of case for prosecution.]—*WEBB v. ROONEY* (1895), 21 V. L. R. 355.—AUS.

q. Evidence in other separate proceedings—Not to be taken into consideration.]—*REIDY v. HERRY* (1897), 23 V. L. R. 508.—AUS.

r. ————]—*R. v. BURKE* (1903), 36 N. S. R. 408.—CAN.

t. Uncontradicted evidence.]—Where facts, which might have occurred, are sworn to have in fact occurred, & the evidence is uncontradicted, magistrates are bound in accordance with such evidence, however much they may suspect it.—*STEPHENS v. MCKENZIE* (1904), 29 V. L. R. 652.—AUS.

aa. ————Not to be disregarded without reason given.]—Justices are not at liberty, by disregarding uncontradicted evidence before them, to find a verdict against it unless they at the same time give some definite reason justifying their decision.—*RICHARDS v. JAGER*, [1909] V. L. R. 140.—AUS.

bb. Evidence of prior convictions—Admissibility after conviction.]—Justices, may after finding an accused person guilty receive evidence of prior convictions to aid them in exercising their discretion as to the amount of punishment they will impose.—*O'DONNELL v. PERKINS*, [1908] V. L. R. 537.—AUS.

cc. ————Admission before convic-

witnesses to prove that they were not incommoded by the projection; but the magistrate refused to hear them, & convicted applt.:—*Held*: the magistrate had power to reject the evidence proposed to be adduced as irrelevant, & the conviction must be affirmed.—*READ v. PERRETT* (1876), 1 Ex. D. 349; 41 J. P. 135, D. C.

540. ———.]—*R. v. KNIGHT & RUTTY* (1897), 41 Sol. Jo. 276, D. C.

541. Evidence for defence—Discretion to refuse to hear in absence of accused.]—A justice of the peace is not bound to hear witnesses on behalf of the party accused, unless he, being summoned, shall attend in person.—*R. v. NEAL* (1735), *Lee temp. Hard.* 112; 95 E. R. 70.

In extradition proceedings.]—See EXTRADITION, Vol. XXIV., pp. 878–880, Nos. 60, 61, 64, 65.

#### SUB-SECT. 9.—VARIATION BETWEEN INFORMATION OR SUMMONS AND EVIDENCE.

See, now, Summary Jurisdiction Act, 1848 (c. 43), ss. 1, 4, 9.

542. Difference between offence charged & proved—Evidence disclosing offence ousting summary jurisdiction—Jurisdiction to convict on offence charged.]—By 9 Geo. 4, c. 31, s. 27, two justices may convict summarily of a common assault, & conviction or acquittal before them bars further proceedings. Sect. 29 precludes them from exercising this jurisdiction, if they find the assault to have been accompanied by any attempt to commit felony. Two justices convicted summarily, as of a common assault, where it appeared, by the deposition, that deft. had laid hands upon the prosecutor in an indecent manner, but without violence. A *certiorari* being moved for, on the ground that the offence, if committed, was accompanied by a felonious attempt, & therefore, within s. 29, the ct. refused to interfere, inasmuch as no excess of jurisdiction appeared on the face

tion.]—Where a convicting magistrate improperly admits evidence of previous convictions before the determination of deft.'s guilt the conviction will be quashed.—*R. v. NURSE* (1904), 24 C. L. T. 222; 7 O. L. R. 418; 3 O. W. R. 224.—CAN.

d. Evidence amounting to suspicion only—Jurisdiction to detain for further evidence.]—*Qu.*: can a committing magistrate detain a prisoner upon evidence amounting only to a ground of suspicion, for the purpose of other evidence being imported into the case.—*Re KERMOTT* (1850), 1 C. L. Ch. 253.—CAN.

e. Duty of magistrate to take evidence in writing.]—*Semble*: it is the duty of a magistrate at a trial under his summary jurisdiction, to take the examination & evidence in writing.—*R. v. FLANNIGAN* (1872), 32 U. C. R. 593.—CAN.

f. ———.]—The omission of the magistrate to have the evidence taken down in writing at the hearing is fatal to the conviction.—*R. v. MCGREGOR* (1905), 11 B. C. R. 350.—CAN.

g. ——— Not necessarily in long-hand by magistrate himself.]—*R. v. BOND* (1911), 21 Man. L. R. 366.—CAN.

h. Duty of magistrate to read over depositions to witness—Effect of omission.]—*Ex p. DOHERTY* (1894), 3 N. B. R. 479.—CAN.

k. ———.]—*R. v. KAY, Ex p. GALLAGHER* (1908), 38 N. B. R. 498; 5 E. L. R. 153.—CAN.

l. ———.]—*R. v. KAY, Ex p. WILSON* (No. 1) (1908), 38 N. B. R. 498.—CAN.

m. ———.]—*R. v. KAY, Ex p. STEEVES* (1908), 39 N. B. R. 2; 15 Can. Crim. Cas. 160.—CAN.

n. Request for magistrate to give evidence—To be made in good faith.]—Where the presiding magistrate has refused to give evidence when requested by defts., it must be shown that the request was made in good faith, & that deft. was prejudiced by the refusal.—*Ex p. FLANNAGAN* (1897), 34 N. B. R. 326; 2 Can. Crim. Cas. 513.—CAN.

o. Information—Proof of contents by oral evidence.]—*R. v. HOARE* (1907), 2 E. L. R. 314.—CAN.

p. Evidence not necessary after plea of guilty.]—*R. v. DAGENAIS* (1911), 19 O. W. R. 252; 2 O. W. N. 1091.—CAN.

q. ——— Except to guide justice as to sentence.]—A plea of guilty is not avoided because the presiding justice calls evidence with a view to ascertaining the circumstances of the case, in order to enable him to judge of the penalty to be imposed.—*TAYLOR v. BEETHAM* (1898), 17 N. Z. L. R. 405.—N.Z.

r. Weight to be given to evidence—Discretion of magistrate—Absolute.]—A conviction cannot be quashed on the ground that the magistrate improperly weighed the evidence.—*R. v. BARBER ASPHALT PAVING CO.* (1911), 18 O. W. R. 778; 2 O. W. N. 819; 23 O. L. R. 372.—CAN.

t. ———.]—Magistrates should clearly understand that, whilst the police perform their proper duty in collecting evidence, it is the function of the magistrate alone to decide upon the sufficiency or credibility of such

of the conviction, & the evidence, of which the magistrates were the judges, did not clearly show an intention to commit felony.—*ANON.* (1830), 1 B. & Ad. 382; 109 E. R. 829; *sub nom. R. v. VIRGIL*, 9 L. J. O. S. M. C. 43.

Annotation:—*Refd. R. v. Nat. Bell Liquors* (1922), 91 L. J. P. C. 146.

543. ———.]—An information in writing was laid before justices, charging deft. with having "unlawfully assaulted & abused" a female. Prosecutrix & deft. were each represented by attorneys, & at the hearing, while the attorney for prosecutrix was opening his case, the attorney for deft. objected that the facts he had stated constituted a case of rape, & that the justices had no jurisdiction. It was then suggested that the case should be treated as a charge of an aggravated assault. The case proceeded, & deft. was convicted of an aggravated assault. It appeared by affidavits upon an application for a *habeas corpus*, with a view to the discharge of deft., that the evidence of the woman was to the effect that deft. had ravished her:—*Held*: (1) (*POLLOCK, C.B., WILDE, B.*) the charge was one over which the justices had no jurisdiction; & further, it was competent for the ct. to look at the evidence with a view to see whether, in point of fact, the case was within the jurisdiction of justices; (2) (*BRAMWELL, B., CHANNELL, B.*) the charge did not imply more than a common assault, the justices had jurisdiction, & the ct. could not review the decision of the justices upon the fact.—*Re THOMPSON* (1860), 6 H. & N. 193; 30 L. J. M. C. 19; 3 L. T. 409; 25 J. P. 166; 7 Jur. N. S. 48; 9 W. R. 203; 9 Cox, C. C. 70; 158 E. R. 80.

Annotations:—As to (1) *N.F. Wilkinson v. Dutton* (1863), 3 B. & S. 821. *Refd. Re Dawson* (1878), 42 J. P. 456. Generally, *Refd. R. v. Elrington* (1861), 1 B. & S. 688; *Wellock v. Constantine* (1863), 32 L. J. Ex. 285; *Shepherd v. Postmaster-General* (1864), 11 L. T. 369; *Munday v. Maiden* (1875), 33 L. T. 377; *Crocker v. Raymond* (1886), 3 T. L. R. 181; *R. v. Miles* (1890), 24 Q. B. D. 423.

544. ———.]—Upon the hearing of an information for an assault, the justices have

evidence when collected.—*THE GOVERNMENT v. KARIMDAD* (1880), 1 L. R. 6 Calc. 496; 7 C. L. R. 467.—IND.

a. ———.]—*R. v. BELINSKY*, [1925] App. D. 363.—S. AF.

b. Evidence taken in shorthand—Necessity for swearing in stenographer.]—*R. v. KNIGHT* (Alta.), [1919] 3 W. W. R. 529; 48 D. L. R. 577.—CAN.

c. ———.]—Where evidence before a magistrate is taken in shorthand everything that occurs should, for the purposes of consideration by a higher ct., be taken down, including arguments & objections & statements of the magistrate in regard thereto. But the omission to do so may not be sufficient ground for quashing a conviction.—*R. v. HILLS* (Alta.), [1924] 1 W. W. R. 636.—CAN.

aa. Personal knowledge of magistrate—Not to be taken into consideration.]—A magistrate acting judicially should not import into the case before him his previous knowledge of the character of the accused, but should determine his guilt or innocence upon the evidence given in the case.—*R. v. VYANKATRAV SHRINIVAS* (1870), 7 Bom. Cr. Ca. 50.—IND.

bb. Unsworn evidence—Inadmissibility—For assessing damage after conviction.]—*LEAVACK v. MACLEOD*, [1913] S. C. (J.) 51; 50 Sc. L. R. 699.—SCOT.

#### PART VIII. SECT. 4, SUB-SECT. 9.

cc. Difference between offence charged & proved—As to time—No jurisdiction to convict without amendment.]—



**Sect. 4.—The hearing: Sub-sects. 9, 10 & 11.]**

jurisdiction to convict deft. of that offence, although evidence be given which, if true, would prove that not only had complainant been assaulted, but that a rape had been committed upon her.—*WILKINSON v. DUTTON* (1863), 3 B. & S. 821; 32 L. J. M. C. 152; 8 L. T. 276; 9 Jur. N. S. 1104; 122 E. R. 307.

*Annotations:—*Consd. *R. v. Miles* (1890), 24 Q. B. D. 423. Refd. *Turner v. Postmaster-General* (1864), 5 B. & S. 756.

**545. Conviction for offence other than that charged.]—**Applt. was summoned before justices, under Town Police Clauses Act, 1847 (c. 89), s. 29, on a charge of drunkenness & riotous behaviour. The justices held the riotous behaviour not proved: but convicted him of drunkenness, & fined him, under 21 Jac. 1, c. 7, s. 3:—*Held*: the conviction was bad; & the defect was not one which could be cured under Summary Jurisdiction Act, 1848 (c. 43), s. 1.—*MARTIN v. PRIDGEON* (1859), 1 E. & E. 778; 28 L. J. M. C. 179; 33 L. T. O. S. 119; 23 J. P. 630; 5 Jur. N. S. 894; 7 W. R. 412; 8 Cox, C. C. 170; 120 E. R. 1102.

*Annotations:—*Folld. *Soden v. Cray* (1862), 7 L. T. 324. Apld. *R. v. Brickill* (1864), 4 New Rep. 166. Distd. *Turner & Shepherd v. Postmaster-General* (1864), 34 L. J. M. C. 10. Consd. *Blake v. Beech* (1876), 1 Ex. D. 320. Refd. *R. v. Carr* (1867), 17 L. T. 217; *R. v. Hughes* (1879), 4 Q. B. D. 614; *Boaler v. R.* (1888), 59 L. T. 554; *R. v. Jennings* (1895), 73 L. T. 412. Mentd. *Ex p. Hopkins* (1891), 61 L. J. Q. B. 240.

**546. —.]—**Where a person is charged under Refreshment Houses Act, 1860 (c. 27), s. 40, with being drunk & guilty of riotous conduct, the justices cannot convict him of drunkenness merely.—*SODEN v. CRAY* (1862), 7 L. T. 324; *sub nom. LOADMAN v. CRAGG*, 26 J. P. 743.

**547. —.]—**Deft. was summoned before justices, under Municipal Corporation Act, 1835 (c. 76), s. 81, on a charge of assaulting a constable in the execution of his duty. The justices found the offence not proved, but convicted him of a common assault, under Offences against the Person Act, 1861 (c. 100), s. 42:—*Held*: the justices had exceeded their jurisdiction in convicting deft. under a statute different from that under which the summons was issued.—*R. v. BRICKILL* (1864), 4 New Rep. 166; 33 L. J. M. C. 156; 10 L. T. 385; 28 J. P. 359; 10 Jur. N. S. 677; 12 W. R. 826.

*Annotations:—*Distd. *Turner & Shepherd v. Postmaster-General* (1865), 11 Jur. N. S. 137. Consd. *Blake v. Beech* (1876), 1 Ex. D. 320. Refd. *R. v. Hughes* (1879), 4 Q. B. D. 614; *R. v. Jennings* (1895), 73 L. T. 412. Mentd. *Ex p. Hopkins* (1891), 61 L. J. Q. B. 240.

**548. —.]—***CROCKER v. RAYMOND* (1886), 3 T. L. R. 181, D. C.

*Annotation:—*Refd. *Pickering v. Willoughby* (1907), 97 L. T. 244.

**549. — Charge under Sale of Food & Drugs Act, 1875 (c. 63), ss. 6, 14—Conviction under Sale of Food & Drugs Amendment Act, 1879 (c. 30), s. 3.]—**A consigner of milk having been summoned under above Act, sect. 6, the evidence against him disclosed an offence under sect. 3 of the Amendment Act, 1879:—*Held*: the variance was curable by Summary Jurisdiction Act, 1848 (c. 43), s. 1, & applt. was rightly convicted.—*HIETT v. WARD* (1894), 70 L. T. 374; 58 J. P.

*ZUCKER v. JENNINGS* (1875), 1 V. L. R. 168.—AUS.

**g. — As to place—Evidence supplementing information—Amendment not necessary.]—***R. v. WILLIAMS* (1876), 37 U. C. R. 540.—CAN.

**545 i. Conviction for offence other than that charged.]—**Where there was no evidence to support the charge in

the information but there was evidence to support a charge for a different offence:—*Held*: not having been charged with the latter, accused could not be convicted of it.—*Ex p. GLASHEEN* (1898), 19 N. S. W. L. R. 141; 14 N. S. W. W. N. 197.—AUS.

**h. Information disclosing no offence—Evidence disclosing offence—Juris-**

461; 10 T. L. R. 284; 17 Cox, C. C. 736; 10 R. 406, D. C.

**550. Power of justices to treat offence as indictable—Summons issued under Summary Jurisdiction Acts.]—**Where a criminal offence is punishable either summarily or on indictment, justices, sitting in petty sessions on a day appointed for hearing indictable offences of which public notice has been given, may treat that offence as an indictable offence & commit deft. for trial, although he has been summoned under above Acts to appear before them as a ct. of summary jurisdiction to answer the information preferred against him.

Trading with the Enemy Act, 1914 (c. 87), enacts that trading with the enemy is punishable either under Summary Jurisdiction Acts or indictment. Twenty-three summonses, in accordance with the form contained in the schedule to the Summary Jurisdiction Acts, to appear before the justices of B. on a day of which public notice had been given that they would sit as justices in petty sessions for the hearing of indictable offences were served on appcts. The summonses required them to answer an information preferred against them of having committed twenty-three separate offences under the Trading with the Enemy Act, 1914 (c. 87), but twenty-one of them were alleged to have been committed more than six months prior to the preferring of the information. At the hearing the justices treated the charges as indictable offences, & committed appcts. for trial. On an application for a writ of *certiorari* to quash the warrants of commitment:—*Held*: the justices had jurisdiction to treat the offences as indictable offences & to commit appcts. for trial.—*R. v. BOLTON JJ., Ex p. HOLT (WILLIAM A.), LTD.* (1916), 85 L. J. K. B. 649; *sub nom. R. v. WALMSLEY, Ex p. HOLT (WILLIAM A.), LTD.*, 80 J. P. 209, D. C.

**Defect in form of summons.]—**See Sect. 2, subsect. 1, C., *ante*.

**SUB-SECT. 10.—RE-OPENING CASE FOR PROSECUTION.**

**551. To prove order to prosecute.]—**In a prosecution for pursuing game without a licence the information alleged that it was by order of the comrs., & objection was taken that no evidence was given thereof:—*Held*: (1) the justices were wrong in allowing such an objection & in ignoring Excise Management Act, 1827 (c. 53), s. 71; (2) the justices were wrong in resolving not to reopen case before they knew on what ground it would be asked for.—*HARGREAVES v. HILLIAM* (1894), 58 J. P. 655, D. C.

*Annotation:—*As to (1) Refd. *Duffin v. Markham* (1918), 88 L. J. K. B. 581.

**552. To prove statutory order.]—**Informations were preferred by applt., a police inspector, against resps. for alleged offences against the Bread Order, 1917 (No. 189) & the Defence of the Realm Regulations, & resps. having pleaded "Not guilty," it was agreed that all four informations, should be heard together. The applt. having called evidence in support of each of the informations stated to the justices that his case was

diction to convict without amendment.]—*COOPER v. HAMILTON* (1888), 6 N. Z. L. R. 598.—N.Z.

**k. — — — —.]—**A magistrate may convict without amending where the information discloses no offence, but the evidence does.—*BROWN v. KENNEDY* (1888), 7 N. Z. L. R. 255.—N.Z.

closed. The solr. for resps. thereupon, before going into the merits of the defence or calling any evidence, took the preliminary objection that no proof had been offered of any order or regulations under which the proceedings had been taken, that as such proof had not been given, no convictions could take place, & that no proof could then be given to remedy the defect. Applt. submitted that the justices had judicial cognisance of the order & the regulations, as of an Act of Parliament, but the justices held that they had no judicial cognisance of the Bread Order, 1917, & it ought to have been proved, & therefore they dismissed the informations:—*Held*: although the case for the prosecution had been closed, the justices ought to have allowed applt. to prove the order by putting in a Stationery Office copy in accordance with the New Ministries & Secretaries Act, 1916 (c. 68), & if applt. had no Stationery Office copy in ct., they should have adjourned the case to enable him to procure one, & the case must be remitted to the justices for hearing & determination.—*DUFFIN v. MARKHAM* (1918), 88 L. J. K. B. 581; 119 L. T. 148; 82 J. P. 281; 16 L. G. R. 807; 26 Cox, C. C. 308, D. C.

## SUB-SECT. 11.—REMAND AND ADJOURNMENT.

*See, now*, Summary Jurisdiction Act, 1848 (c. 43), s. 16; Criminal Justice Administration Act, 1914 (c. 58), s. 20 (2).

**Proceedings preliminary to indictment.]—See** CRIMINAL LAW, Vol. XIV., pp. 198, 199, Nos. 1781–1787.

**553. Discretion to remand—For reasonable time.]—A** commitment for further examination must not be made use of as a commitment for trial & the examination must take place in a reasonable time, otherwise an action will be against the magistrate.—*ARBUCKLE v. TAYLOR* (1815), 3 Dow, 160; 3 E. R. 1023.

**554. ———.]—A** warrant of commitment for re-examination for an unreasonable time, as for fourteen days, is wholly void; & trespass lies against the committing magistrate, though he acted without any indirect or improper motive.

A magistrate may legally commit for further examination, but I think it equally clear that it should have been left to the jury to say whether the commitment was made *bonâ fide* for the pur-

pose of further examination, or for the purpose of inducing the pltf. to make a confession (*BAILEY, J.*).

The duty of a magistrate is to commit for a reasonable time, & if he commit for an unreasonable time, he thereby does an act which he is not authorised by law to do (*LORD TENTERDEN, C.J.*).—*DAVIS v. CAPPER* (1829), 10 B. & C. 28; 2 Man. & Ry. M. C. 570; 5 Man. & Ry. K. B. 53; 8 L. J. O. S. M. C. 67; 109 E. R. 362.

*Annotations:—Reid. Cave v. Mountain* (1840), 1 Man. & G. 257; *Ash v. Dawnay* (1852), 8 Exch. 237; *Kemp v. Neville* (1861), 21 L. J. C. P. 158.

**555. ——— Under Summary Jurisdiction Act, 1848 (c. 43), s. 16—Though no power given by statute creating offence.]—By** a railway Act, penalties for breach of bye-laws, were recoverable before a justice of the peace, & officers of the railway co. were empowered to seize offenders under certain circumstances, & to convey them before a justice without any warrant, such justice being “empowered & required to proceed immediately to the conviction or acquittal of such offender”:—*Held*: although the Act constituting the offence gave no power to the justice to remand the accused, yet that by above sect. the justice had power to adjourn the hearing & to issue a warrant for committal of accused to the house of correction.—*GELEN v. HALL* (1857), 2 H. & N. 379; 27 L. J. M. C. 78; 29 L. T. O. S. 183; 21 J. P. 710; 5 W. R. 757; 157 E. R. 157.

*Annotations:—Reid. Fuller v. Sutton* (1864), 28 J. P. 391; *Shepherd v. Postmaster-General* (1864), 5 New Rep. 80; *Scott v. Stansfield* (1868), L. R. 3 Exch. 221; *Everett v. Griffiths*, [1920] 3 K. B. 163.

**556. Discretion to adjourn—To allow defendant to employ counsel.]—Where** a servant is arrested & brought before a justice for unlawfully absenting himself, the justice is not bound to postpone the hearing merely in order to give deft. an opportunity to get legal assistance; though if an attorney is present & ready to go on, the justice cannot refuse to hear such attorney.—*R. v. BIGGINS* (1862), 5 L. T. 605; *sub nom. R. v. LIPSCOMBE, Ex p. BIGGINS*, 26 J. P. 244.

*Annotations:—Reid. R. v. Glamorganshire JJ.* (1889), 5 T. L. R. 636; *Re Appln. for Mandamus to Brighton Stipendiary Magistrate* (1893), 9 T. L. R. 522.

**557. ———.]—R. v. CAMBRIDGESHIRE JJ.** (1880), 44 J. P. Jo. 168.

**558. ——— Length of adjournment.]—R. v. SMITH** (1894), *Times*, Jan. 29.

## PART VIII. SECT. 4, SUB-SECT. 11.

**l. Discretion to remand.]—R. v. MCKAY, R. v. HORAN** (1889), 28 N. B. R. 564.—CAN.

**m. ———.]—Re WALTON** (1905), 11 O. L. R. 94; 6 O. W. R. 905.—CAN.

**n. ——— Necessity for production of evidence of guilt.]—With** each remand by a magistrate the necessity for production of evidence of guilt becomes stronger.—*PONNUSAMI CHETTI v. R.* (1882), 1 L. R. 6 Mad. 69.—IND.

**556 i. Discretion to adjourn—To allow defendant to employ counsel.]—Deft.** applied for an adjournment to instruct a solr. The justices determined to proceed with the case on the ground that it was a small one & he was convicted:—*Held*: although the justices had a discretion as to granting adjournments, they had refused it on a wrong ground.—*KISBY v. JENKINS* (1898), 23 V. L. R. 648.—AUS.

**556 ii. ———.]—MACKIE v. CROMBIE**, [1926] S. C. (J.) 29.—SCOT.

**o. ——— Length of time.]—R. v. HALL** (1885), 8 O. R. 407.—CAN.

**p. ———.]—The** hearing may be adjourned to a certain time & place, but no such adjournment shall be for

more than a week:—*Held*: the week must be computed as seven days exclusive of the day of adjournment.—*R. v. COLLINS, R. v. GOULAIS* (1887), 14 O. R. 613.—CAN.

**q. ———.]—Where** the magistrate adjourned the hearing of a case under Canada Temperance Act, 1878, for more than a week:—*Held*: the conviction should be quashed.—*R. v. FRENCH, R. v. ROBERTSON* (1887), 13 O. R. 80.—CAN.

**r. ———.]—Where**, at the conclusion of the evidence, on a charge of selling liquor, the magistrate reserves his judgment for the purpose of reaching a decision or of considering the amount of the penalty, he is not restricted to the one week.—*R. v. ALEXANDER* (1889), 17 O. R. 458.—CAN.

**t. ———.]—A** justice has power to make several adjournments of a hearing before him, extending in the aggregate over one week; provided no one adjournment exceeds that period.—*Ex p. WELSH* (1889), 28 N. B. R. 214.—CAN.

**a. ———.]—A** magistrate may adjourn the hearing from time to time without losing his jurisdiction,

but he must adjourn to a day certain.—*R. v. MORSE* (1890), 22 N. S. R. 298.—CAN.

**b. ———.]—Ex p. CARD** (1896), 34 N. B. R. 11.—CAN.

**c. ———.]—R. v. WILSON** (1914), 29 W. L. R. 515; 7 W. W. R. 160; 23 Can. Crim. Cas. 256; 19 D. L. R. 797.—CAN.

**d. ———.]—R. v. MOORE**, [1924] 2 D. L. R. 1225; 42 Can. Crim. Cas. 67; 57 N. S. R. 272.—CAN.

**e. ———.]—McKEERING v. McILROY, Ex p. McILROY**, [1905] S. R. Q. 85.—AUS.

**f. ———.]—R. v. WIPPER** (1901), 34 N. S. R. 202.—CAN.

**g. ———.]—A** magistrate must control his own ct., & regulate the time to which its proceedings will be adjourned as circumstances may warrant.—*R. v. ALLEN, Ex p. GORMAN* (1911), 10 E. L. R. 214; 40 N. B. R. 459.—CAN.

**h. ———.]—R. (REGAN) v. MONAGHAN JJ.** (1910), 45 I. L. T. 10.—IR.

**k. ———.]—LOASBY v. MAIN** (1914), 33 N. Z. L. R. 974.—N.Z.

**aa. ——— To consider proper legal**



*Sect. 4.—The hearing: Sub-sects. 11, 12, 13*

559. ———.]—*R. v. FINCH, ETC. JJ.* (1904), 68 J. P. Jo. 244, D. C.

560. ——— To rehear—Justices equally divided in opinion.]—An information under the Licensing Acts was heard before two justices, who, after hearing the evidence, retired to consider their decision; on their return into ct. they announced that they were divided in opinion, & adjourned the information to a future day, when it was reheard before five justices, including the two who had previously heard it. An objection taken to their power to rehear the information was overruled, in the result they convicted the person charged:—*Held*: the announcement of the justices at the original hearing that they were divided in opinion did not amount to a dismissal of the information so as to deprive them of their power of adjournment under Summary Jurisdiction Act, 1848 (c. 43), s. 16; the power of adjournment was exercised "during such hearing" within the meaning of that sect., & there was consequently jurisdiction to rehear the information.—*BAGG v. COLQUHOUN*, [1904] 1 K. B. 554; 73 L. J. K. B. 272; 90 L. T. 386; 68 J. P. 159; 52 W. R. 494; 20 Cox, C. C. 605, D. C.

*Annotation*:—*Folld. R. v. Hertfordshire JJ., Ex p. Larens*, [1926] 1 K. B. 191.

561. Offer of adjournment refused—No power to compel rehearing.]—*R. v. OLDHAM JJ.* (1887), 51 J. P. 647.

## SUB-SECT. 12.—BAIL.

See CRIMINAL LAW, Vol. XIV., pp. 156 *et seq.*

## SUB-SECT. 13.—WHERE TWO OFFENCES CHARGED.

562. Two informations as to different offences—Power to hear second before adjudication on first.]—Two informations were preferred against applt. under 52 & 53 Vict. c. 18; the first, under sect. 4,

course.]—Justices are not obliged to fix the fine or punishment at the instant of conviction, but may take time either for the purpose of informing themselves as to the legal penalty or the amount proper to be imposed, or taking advice as to the law applicable to the case.—*R. v. HALL* (1887), 12 P. R. 142.—CAN.

m. ———.]—*R. v. GOUGH* (1890), 22 N. S. R. 516.—CAN.

n. ———.]—*R. v. QUINN* (1897), 28 O. R. 224.—CAN.

o. ———.]—*R. v. WARNER*, [1924] 4 D. L. R. 916; [1924] 3 W. W. R. 512; 43 Can. Crim. Cas. 78; 20 Alta. L. R. 545.—CAN.

p. ——— Where defendant in gaol—To bring defendant before him.]—*Ex p. BELYEA* (1891), 31 N. B. R. 76.—CAN.

q. ——— Necessity for presence of parties at adjournment.]—The hearing before a justice trying a person for an offence punishable on summary conviction may be adjourned from time to time although the accused be not present, provided the adjournments are made in the presence & hearing of those parties, solrs. or agents who are in fact present.—*PROCTOR v. PARKER* (1899), 12 Man. L. R. 528.—CAN.

r. ——— For public holiday.]—The jurisdiction of the magistrate is not lost by the adjournment of the case to a public holiday.—*R. v. MANCINI* (1921), 61 D. L. R. 375; 35 Can. Crim. Cas. 388; 54 N. S. R. 455.—CAN.

t. ——— For production of evidence.]—*R. (DOBBYN) v. BELFAST JJ.*, [1917] 2 I. R. 297.—IR.

a. Indorsement of order of adjournment on conviction—Whether imperative.]—Indorsing the order of adjournment on the conviction, is not imperative, but directory merely, & the omission to make the indorsement does not affect the validity of the order to quash.—*R. v. READ* (1889), 17 O. R. 185.—CAN.

b. Whether presence of defendant essential—At resumption of hearing.]—Where the hearing of a complaint has been duly adjourned by the justices, the hearing may take place at the time fixed, notwithstanding the absence of deft.—*DENAULT v. ROBIDA* (1895), Q. R. 10 S. C. 199.—CAN.

c. Refusal of adjournment by magistrate—Where adjournment justified—Loss of jurisdiction by magistrate.]—The refusal by a magistrate to deft. of an adjournment under circumstances justifying an adjournment, prevents the opportunity to make a full answer & defence to the charge, & the magistrate loses jurisdiction.—*R. v. DOMINION DRUG STORES, LTD., R. v. CANADIAN NORTHERN RY. CO. (Alta.)*, [1919] 1 W. W. R. 285; 44 D. L. R. 382.—CAN.

d. Whether power to adjourn—Where evidence for Crown unsatisfactory.]—A magistrate has no power to adjourn the trial of an accused merely because the evidence for the

charging him with delivering to a certain person indecent advertisements, with intent that the same should be delivered or exhibited; & the second, under sect. 3, charging him with aiding, abetting, counselling, & procuring the same person in the commission of the offence of exhibiting the same advertisements. The facts relating to the two charges were the same. After hearing the first information, the justices proceeded with & heard the second; & after the second had been heard, applt. was convicted of the offence charged in the first. He was also convicted on the second information:—*Held*: each case ought to have been decided on the evidence given in relation to the particular charge, & therefore the justices were wrong in hearing the evidence on the second information before deciding on the first, & both convictions were bad.—*HAMILTON v. WALKER*, [1892] 2 Q. B. 25; 61 L. J. M. C. 134; 67 L. T. 200; 56 J. P. 583; 40 W. R. 476; 36 Sol. Jo. 505; 17 Cox, C. C. 539; *sub nom. R. v. HAMILTON*, 8 T. L. R. 531, D. C.

*Annotations*:—*Distd. R. v. Fry, etc., JJ. & Stoker, Ex p. Masters* (1898), 67 L. J. Q. B. 712. *Appld. Parker v. Sutherland* (1917), 86 L. J. K. B. 1052.

563. ———.]—It is contrary to the rules & principles of the criminal law that justices in petty sessions should mix up two criminal charges & convict or acquit in one of them with any reference to the facts appearing in the other. But where deft. has been charged upon two informations relating to distinct offences, it is open to the justices, so long as they apply the evidence in each case to that case alone, to postpone the announcement of their decision in the first case until they have heard & determined the second.—*R. v. FRY, ETC., JJ. & STOKER, Ex p. MASTERS* (1898), 67 L. J. Q. B. 712; 78 L. T. 716; 62 J. P. 457; 46 W. R. 649; 14 T. L. R. 445; 42 Sol. Jo. 555; 19 Cox, C. C. 135, D. C.

*Annotation*:—*Appld. Parker v. Sutherland* (1917), 86 L. J. K. B. 1052.

564. Information charging two offences—Evidence as to both offences taken before decision.]—An information was preferred against applt. licensee of a public-house, that on a particular

Crown is unsatisfactory & inconclusive.—*Re R. v. WHITE* (1915), 11 O. W. N. 10; 34 O. L. R. 370.—CAN.

e. ——— For re-hearing before judge.]—Where two justices have once assumed jurisdiction over a case prosecuted under Inland Revenue Act, 1906 (c. 51), they have no power, even though they are unable to agree on a verdict, to adjourn the case for a re-hearing before a district ct. judge, or to bring in other justices.—*R. (KEMPSTON) v. KOLINCHUK (Sask.)*, [1925] 2 W. W. R. 116.—CAN.

## PART VIII. SECT. 4, SUB-SECT. 13.

562 i. Two informations as to different offences—Power to hear second before adjudication on first.]—*R. v. SING* (1902), 22 C. L. T. 423; 9 B. C. R. 254.—CAN.

562 ii. ———.]—*R. v. REID* (1907), 4 E. L. R. 12.—CAN.

562 iii. ———.]—*R. v. HILLS (Alta.)*, [1924] 1 W. W. R. 636.—CAN.

562 iv. ———.]—*Re RYAN* (1902), 22 N. Z. L. R. 187.—N.Z.

f. Offences of the same nature—Whether necessary to distinguish.]—The police magistrate on a complaint by the revenue inspector for selling liquor without license may decide on the whole accusation without distinguishing between the different offences mentioned in the complaint, when they

date he "unlawfully did supply intoxicating liquor to persons in the licensed premises without the same having been ordered & paid for by the persons so supplied" contrary to an order made by the Central Control Board (Liquor Traffic). At the hearing of the information evidence was given of two separate offences on the same day one at 7.55 & the other at 8.30 p.m. Justices convicted applt. & the words of the conviction followed the words of the information. On appeal to quarter sessions the evidence was the same & quarter sessions affirmed the conviction but stated a case on the question whether the conviction was bad for duplicity or otherwise invalid:—*Held*: as the justices ought not to have heard evidence of two separate offences before arriving at a conclusion as to whether the offence charged had been committed & as it was impossible to ascertain to which offence the conviction referred, it was invalid & must be set aside.—*PARKER v. SUTHERLAND* (1917), 86 L. J. K. B. 1052; 116 L. T. 820; 81 J. P. 197; 33 T. L. R. 350; 15 L. G. R. 535; 25 Cox, C. C. 734, D. C.

#### SUB-SECT. 14.—CERTIFICATE OF DISMISSAL.

*See, now*, Summary Jurisdiction Act, 1848 (c. 43), ss. 14, 18.

*Plea of autrefois acquit.*—*See* CRIMINAL LAW, Vol. XIV., pp. 336 *et seq.*

**565. Discretion of justices—Offences against the Person Act, 1828 (c. 31), s. 27.**—Above sect. after providing for the summary disposal by justices of cases of common assaults & batteries, provides that "if the justices, upon the hearing of any such case of assault or battery, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, & shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands, stating the fact of such dismissal, & shall deliver such certificate to the party against whom the complaint was preferred"; & by sect. 28, "if any person against whom such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid," "he shall be released from all further or other proceedings, civil or criminal, for the same cause":—*Held*: (1) by above sect. the granting a certificate of dismissal of the complaint was, when a case is brought within the sect., a ministerial, not a judicial, act, & a magistrate was therefore bound to grant it; (2) the certificate, if drawn up forthwith & delivered to the party against whom the complaint was preferred, was a good bar, under sect. 28, to a subsequent action for the assault, though it be not drawn up in the presence of the parties, or applied for by the party against whom the complaint was preferred. *Semble*: by "forthwith," in above sect. was meant, forthwith upon the application of the party entitled.—*HANCOCK v. SOMES* (1859), 1 E. & E. 795; 28 L. J. M. C. 196; 33 L. T. O. S. 105;

23 J. P. 662; 5 Jur. N. S. 983; 7 W. R. 422; 8 Cox, C. C. 172; 120 E. R. 1108.

*Annotation*:—*As to* (2) *Refd.* *Costar v. Hetherington* (1859), 1 E. & E. 802.

*See, now*, Offences against the Person Act, 1861 (c. 100), s. 44.

**566. — Summary Jurisdiction Act, 1848 (c. 43), s. 14—Hearing upon merits.**—*H.* preferred an information & complaint before justices in petty session against applt. for indecent behaviour whilst drunk in the streets, contrary to Refreshment Houses Act, 1860 (c. 27), s. 40. *H.*, after being examined in chief, admitted, in cross-examination that he was not a constable or peace officer of the borough, whereupon the information was dismissed, but no certificate of dismissal was given or applied for. An information for the same offence was then preferred against applt. by a constable of the borough, & came on to be heard at the next petty sessions, when an application was made to the justices for a certificate of dismissal of the former information. The justices refused to give the certificate on the ground that the former information & complaint had not been heard upon the merits, & they proceeded to hear & adjudicate upon the second information:—*Held*: the justices were right in the course they had taken.—*FOSTER v. HULL* (1869), 20 L. T. 482; 33 J. P. 629, D. C.

*Annotations*:—*Refd.* *Wood v. Nairn* (1897), 61 J. P. 184; *Davis v. Morton*, [1913] 2 K. B. 479.

**567. — — — — —**—*R. v. STANBURY LEARDLEY*, No. 508, *ante*.

**568. Form of certificate—Grounds of dismissal.**—In an action of trespass for assault & battery where deft. pleaded that he had been discharged by the certificate of two magistrates:—*Held*: bad, if the certificate did not set out the grounds of the dismissal.—*SKUSE v. DAVIS* (1839), 10 Ad. & El. 635; 7 Dowl. 774; 2 Per. & Dav. 550; 8 L. J. M. C. 75; 3 J. P. 675; 3 Jur. 1170; 113 E. R. 241.

**569. Certificate must be obtained forthwith—What is "forthwith."**—Indictment, found Jan. 9, 1839, for an assault: plea, that prosecutor had complained of the same assault to two justices, who deemed it not to be proved & thereupon dismissed the complaint & gave a certificate of dismissal forthwith, under Offences against the Person Act, 1828 (c. 31), s. 27. Replication, that deft. did not obtain such certificate in manner & form, etc. Special verdict, finding a hearing & dismissal of the complaint, Nov. 29, 1838, & certificate obtained Jan. 29, 1839:—*Held*: (1) the replication put in issue the fact of the certificate having been obtained forthwith; (2) such a dismissal not being equivalent to an acquittal at common law, & not constituting a defence, except under the statute, the certificate pleaded must appear to have been obtained forthwith, & the certificate in this case was not obtained forthwith.—*R. v. ROBINSON* (1840), 12 Ad. & El. 672; 4 Per. & Dav. 391; 10 L. J. M. C. 9; 4 J. P. 776; 5 Jur. 244; 113 E. R. 969.

*Annotations*:—*As to* (2) *Consd.* *Hancock v. Somes* (1859), 1 E. & E. 795. *Refd.* *Thompson v. Gibson* (1841), 8 M. & W. 281; *Tennant v. Bell* (1846), 9 Q. B. 684.

are all of the same nature.—*Ex p. MOLINARI* (1883), 6 L. N. 395.—*CAN.*

**g. Conviction on one charge—By reference to facts of other charge.**—The cts. do not countenance justices mixing up two or more charges & convicting or acquitting in one of them with reference to the facts appearing in the others.—*R. v. LIMERICK, Ex p. BURDEN* (N. B.) (1922), 70 D. L. R. 51; 38 Can. Crim. Cas. 384; 50 N. B. R. 46.—*CAN.*

**h. Information charging more than one offence—Election by prosecutor—Power of justices.**—*HAYES v. BUTCHER* (1892), 12 N. Z. L. R. 569.—*N.Z.*

#### PART VIII. SECT. 4, SUB-SECT. 14.

**k. Discretion of justices.**—*CHESLEY v. GRASSIE* (1868), 7 N. S. R. 191.—*CAN.*

**l. Form of certificate.**—An order for dismissal is not invalid because it

does not state whether the dismissal is "without prejudice" or "on the merits."—*R. (WILBOND) v. ARMAGH JJ.*, [1918] 2 I. R. 580.—*IR.*

**m. Whether granted—Where no hearing upon merits.**—*FOREMAN v. MCNAMARA* (1897), 23 V. L. R. 501.—*AUS.*

**n. — — — — —**—*Ex p. PHILLIPS* (1884), 24 N. B. R. 119.—*CAN.*

**o. — — — — —**—Where there has



*Sect. 4.—The hearing: Sub-sect. 14. Sect. 5: sect. 1, A. & B. (a) & (b).]*

570. ———.]—*HANCOCK v. SOMES*, No. 565, *ante*.

571. ———.]—Offences against the Person Act, 1828 (c. 31), s. 27, enacts that justices who, upon any of certain specified grounds, dismiss a complaint for an assault brought before them, "shall forthwith make out a certificate under their hands, stating the fact of such dismissal, & shall deliver such certificate to the party against whom the complaint was preferred":—*Held*: "forthwith" means, forthwith upon demand by the person entitled to the certificate, & not, forthwith upon the dismissal of the complaint.

(2) A certificate was applied for by the person entitled, five days after the complaint had been dismissed, & granted two days after the application, but dated as of the day upon which the complaint was made:—*Held*: to have been made out "forthwith" within the meaning of the statute, & to be a good defence, under sect. 28, to a subsequent action for the same assault.—*COSTAR v. HETHERINGTON* (1859), 1 E. & E. 802; 28 L. J. M. C. 198; 33 L. T. O. S. 105; 23 J. P. 663; 5 Jur. N. S. 985; 7 W. R. 413; 8 Cox, C. C. 175; 120 E. R. 1111.

572. What is "dismissal"—Withdrawal of complaint after plea.]—Where a party, on being summoned to appear before two justices for an assault, appeared, & pleaded "not guilty"; & prosecutor then withdrew his complaint, & deft. was accordingly discharged:—*Held*: this was a hearing & dismissal, which entitled deft. to a certificate that the charge had been dismissed as not proved, under Offences against the Person Act, 1828 (c. 31), s. 27.—*TUNNICLIFFE v. TEDD* (1848), 5 C. B. 553; 17 L. J. M. C. 67; 10 L. T. O. S. 347; 12 J. P. 249; 136 E. R. 995.

*Annotations*:—*Appld.* *Vaughton v. Bradshaw* (1860), 9 C. B. N. S. 103. *Consd.* *Reed v. Nutt* (1890), 24 Q. B. D. 669. *Refd.* *Galliard v. Laxton* (1862), 2 B. & S. 363.

573. ——— Notice by prosecutor of intention not to proceed to hearing.]—Pltf. laid an information for an assault under Offences against the Person Act, 1828 (c. 31), s. 27, took out a summons, which was served on deft. Afterwards, & before the day of hearing, pltf. by his agent, gave notice both to deft. not to attend, & to the magistrates' clerk that he should not attend. Deft. attended & claimed to have the information dismissed, & a certificate of dismissal granted under the statute, notwithstanding pltf.'s absence:—*Held*: upon the authority of *Tunncliffe v. Tedd*, No. 572, *ante*, the magistrates were warranted in granting such certificate, & the certificate was a bar to an action for the same.—*VAUGHTON v. BRADSHAW* (1860), 9 C. B. N. S. 103; 7 Jur. N. S. 468; 142 E. R.

not been a hearing on the merits, justices have no jurisdiction to grant a certificate of dismissal to accused, & certificate granted under such circumstances is not a bar to further proceedings against accused.—*R. v. MANN* (Sask.), [1919] 1 W. W. R. 917.—*CAN.*

*p. Withdrawal of information—Magistrate having no jurisdiction—Whether defendant entitled to certificate.*]—Where a magistrate, having no jurisdiction to hear an information allows it to be withdrawn by prosecutor upon the return of the summons, deft. not being present, deft. is not entitled to a certificate of dismissal.—*Ex p. CASE* (1889), 28 N. B. R. 652.—*CAN.*

#### PART VIII. SECT. 5, SUB-SECT. 1.—A.

578 i. *Statutory form.*]—There is no

excess or want of authority on the part of a stipendiary magistrate in adopting a form of conviction which exactly carries out the sentence which he has the right to impose, notwithstanding such form is not in exact compliance with the statutory forms prescribed for use.—*R. v. GRANT* (1898), 30 N. S. R. (18 R. & G.) 368.—*CAN.*

*q. — Provision as to warrant of distress & imprisonment omitted.*]—*R. v. MCFARLANE* (1891), 24 N. S. R. 51.—*CAN.*

*r. — Substantially followed—Sufficient.*]—*R. v. AMES* (1903), 5 Terr. L. R. 492; 10 Can. Crim. Cas. 52.—*CAN.*

*t. — Absence of—Common law requisites.*]—Where a form of conviction is not sanctioned by any statute, it must be legal according to the

40; *sub nom.* *BRADSHAW v. VAUGHTON*, 30 L. J. C. P. 93; 3 L. T. 373; 25 J. P. 102; 9 W. R. 120.

*Annotations*:—*Consd.* *Reed v. Nutt* (1890), 24 Q. B. D. 669. *Refd.* *Masper v. Brown* (1876), 45 L. J. Q. B. 203.

*See, now, Offences against the Person Act, 1861 (c. 100), s. 44.*

574. ——— Hearing upon merits.]—A certificate under Offences against the Person Act, 1861 (c. 100), s. 44, of the dismissal by a magistrate of a charge of assault, can only be granted where there has been a hearing "upon the merits," & both parties have attended before the magistrate, & there has been a proper inquiry into the facts of the case. Where, therefore, prosecutor gave notice to a person against whom he had obtained a summons for an assault, that he should not attend before the magistrate or offer evidence in support of the summons, & did not in fact attend or offer evidence, but the person charged attended & obtained from the magistrate a certificate of dismissal under the above sect.:—*Held*: there had not been a hearing upon the merits; the magistrate had no jurisdiction to grant the certificate & the certificate was therefore no bar under sect. 45 to a subsequent action in the county ct. to recover damages in respect of the same assault.—*REED v. NUTT* (1890), 24 Q. B. D. 669; 59 L. J. Q. B. 311; 62 L. T. 635; 54 J. P. 599; 38 W. R. 621; 6 T. L. R. 266; 17 Cox, C. C. 86, D. C.

575. Grant of certificate—In absence of both parties.]—*HANCOCK v. SOMES*, No. 565, *ante*.

576. ——— Power of justices to bind over to keep the peace.]—*Ex p. DAVIS*, No. 765, *post*.

#### SECT. 5.—JUDGMENT.

##### SUB-SECT. 1.—CONVICTION.

###### A. Form.

*See Summary Jurisdiction Act, 1848 (c. 43), s. 14; Summary Jurisdiction Rules, 1915, r. 53.*

577. *Precise form—Necessity for.*]—*R. v. GREEN*, No. 613, *post*.

578. *Statutory form.*]—When a form of conviction is prescribed by a statute it is most safe in general to adopt the very words used. . . . Everything necessary to support a conviction should appear on the conviction (*LORD KENYON, C.J.*).—*R. v. PRIEST* (1796), 6 Term Rep. 538; 101 E. R. 690.

*Annotation*:—*Refd.* *R. v. Johnson* (1845), 10 J. P. 72.

579. ———.]—If magistrates are to have power under an Act of Parliament over an offence then, any instrument by which they convict parties under such Act is a conviction (*PATTISON, J.*).—*Re GRAY* (1844), 2 Dow. & L. 539; 1 New Sess. Cas.

principles of the common law; & in that case a conviction, which does not express that the party had been summoned, nor that he appeared, nor that the evidence was given in his presence, cannot be supported.—*MOORE v. JARRON* (1852), 9 U. C. R. 233.—*CAN.*

*a. Alternative form.*]—A conviction by two justices for taking certain timber feloniously or unlawfully:—*Held*: bad, for it should not have been in the alternative.—*R. v. CRAIG* (1862), 21 U. C. R. 552.—*CAN.*

*b. —.*]—*R. v. MURDOCH* (1876), 2 N. Z. Jur. N. S. 175.—*N.Z.*

*c. Specifying costs of commitment & conveyance to gaol.*]—*R. v. HARSHMAN, Ex p. WELDON* (1873), 14 N. B. R. (1 Pug.) 317.—*CAN.*

*d. Variance between minute &*

354; 14 L. J. M. C. 26; *sub nom.* *Ex p.* GRAY, 4 L. T. O. S. 120; 8 Jur. 1049.

*Annotations*:—*Re*ld. *R. v. Buckinghamshire JJ.* (1845), 14 L. J. M. C. 45; *R. v. Rose* (1845), 2 New Sess. Cas. 166; *Ormerod v. Chadwick* (1847), 16 M. & W. 367; *Lindsay v. Leigh* (1848), 11 Q. B. 455; *Ex p.* Purday (1850), 14 Jur. 332; *Re* Bailey, *Re* Collier (1854), 3 E. & B. 607.

**580.** — **Summary Jurisdiction Act, 1848 (c. 43).**—*R. v. HYDE*, No. 621, *post*.

**581.** — *Ex p.* JONES (1858), 31 L. T. O. S. 215; 22 J. P. Jo. 417.

**582. Written separate conviction—Necessity for** —Where warrant of commitment discloses conviction.]—When the warrant of commitment discloses that there has been a conviction, it is not essential under Summary Jurisdiction Act, 1848 (c. 43), s. 24, that there should be a written separate conviction.—*Re* BAILEY, *Re* COLLIER (1854), 3 E. & B. 607; 2 C. L. R. 1645; 18 Jur. 930; 118 E. R. 1269; *sub nom.* *Ex p.* BAILEY, *Ex p.* COLLIER, 23 L. J. M. C. 161; *sub nom.* *R. v. BAILEY*, 2 W. R. 422.

*Annotations*:—*Re*ld. *Re* Authers (1889), 22 Q. B. D. 345. *Mentd.* *R. v. Nunneley* (1858), E. B. & E. 852; *Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221; *Mid. Ry. v. Edmonton Union Grdns.*, [1895] 1 Q. B. 357.

**583. Seal of justices—Omission to seal.**—*R. v. TABRUM*, *Ex p.* DASH, No. 668, *post*.

## B. Contents.

### (a) Jurisdiction of Magistrate.

**584. Must be shown.**—Where a justice is authorised to convict for an offence within the limits of his jurisdiction, the conviction must specify the place where the offence was committed.—*R. v. HIGHMORE* (1705), 2 Ld. Raym. 1220; 92 E. R. 305.

**585.** — *R. v. JOHNSON*, No. 487, *ante*.

**586.** — *A conviction must show before whom committed.*—*R. v. YORK & FIELDING* (1770), 5 Burr. 2684; 98 E. R. 409.

*Annotation*:—*Consd.* *Re* Fletcher (1844), 8 J. P. 168.

**587.** — *R. v. GREEN*, No. 613, *post*.

**588.** — *Re* FULLER, No. 697, *post*.

### (b) The Offence.

**589. Commission of statutory offence must be shown.**—A conviction on a statute, on the face of it not pursuing the provisions of the statute, nor showing that any offence has been committed, is bad; & although it has not been quashed its invalidity may be taken advantage of, on the trial of an action of trespass for a distress taken under a warrant grounded on it.—*GIMBERT v. COYNEY*

(1825), *McCle. & Yo.* 469; 3 Dow. & Ry. M. C. 323; 148 E. R. 497.

**590.** — *A return to a habeas corpus ad subjiciendum set forth a document, being a conviction & committal under 4 Geo. 4, c. 34, s. 3, which recited an information & complaint, by the agent of D., that prisoner had contracted to serve D. for a term, & did, before the contract was completed, "absent himself from his said service, & did thereby then & there neglect to fulfil the same, contrary to the form of the statute," etc.: & the document added: therefore, "it manifestly appearing to me," the justice, that prisoner "is guilty of the said offence charged upon him in the said information & complaint, I do hereby convict him of the offence aforesaid: & I do hereby order & adjudge that" prisoner, "for the offence aforesaid, be imprisoned," etc.:—*Held*: the information showed no offence, as there might be some lawful excuse for the absence, though the statute simply makes the party's absenting himself from service the ground of complaint; & the conviction was therefore bad.—*TURNER'S CASE* (1846), 9 Q. B. 80; 115 E. R. 1206; *sub nom.* *Re* TURNER, 2 New Sess. Cas. 403; 15 L. J. M. C. 140; 7 L. T. O. S. 205; 10 J. P. 570.*

*Annotations*:—*Distd.* *Van Roven's Case* (1846), 9 Q. B. 669. *Consd.* *Lilley v. Elwin* (1848), 11 Q. B. 742; *R. v. Rowlands* (1852), 18 L. T. O. S. 346. *Apld.* *Re* Geswood (1853), 2 E. & B. 952; *Ashmore v. Horton* (1859), 2 E. & E. 360. *Distd.* *Unwin v. Clarke* (1866), L. R. 1 Q. B. 417. *Re*ld. *Lindsay v. Leigh* (1848), 11 Q. B. 455; *R. v. Hicks* (1855), 24 L. J. M. C. 94; *Ex p.* Smith (1858), 27 L. J. M. C. 186; *Ex p.* Perham (1859), 2 E. & E. 383; *Tennant v. Cumberland* (1859), 1 E. & E. 401; *Smart v. Pessoll* (1874), 39 J. P. 6.

**591.** — *A commitment of a servant under 4 Geo. 4, c. 34, must show on the face of it that the prisoner has been convicted of what is an offence within the Act.*—*Re* GESWOOD (1853), 2 E. & B. 952; 23 L. J. M. C. 35; 18 J. P. 216; 17 Jur. 1163; 118 E. R. 1022; *sub nom.* *Ex p.* GESSWOOD, 2 C. L. R. 269; 22 L. T. O. S. 133; 2 W. R. 94.

*Annotations*:—*Consd.* *Re* Smith (1858), 3 H. & N. 227. *Re*ld. *Re* Allison (1854), 10 Exch. 561; *Ex p.* Perham (1859), 2 E. & E. 383; *Hodgins v. Poe* (1867), 16 W. R. 224.

**592.** — *The words of a conviction under a private statute, by which the right to a certiorari was taken away, & by which it was enacted that the burning certain offensive substances should be a nuisance, specifying the substances burnt, were such as might by evidence be shown to include the substances mentioned in the statute, but left it doubtful whether they were within the Act:—Held: (1) the conviction was good on its*

*conviction—Terms of conviction prevail.*—*R. v. BEAGAN* (No. 2) (1903), 36 N. S. R. 208.—CAN.

**e. Particulars as to fine & costs.**—A conviction was held defective in form in omitting the word forfeit & in not stating to whom the costs were to be paid.—*R. v. LONG WING*, [1923] 1 W. W. R. 734; [1923] 1 D. L. R. 942; 39 Can. Crim. Cas. 75.—CAN.

**f. Provision as to fine & costs.**—*R. v. MYERS* [1925] 2 W. W. R. 471; 44 Can. Crim. Cas. 51; 21 Alta. L. R. 352.—CAN.

**g. Absence of formal conviction—Sufficiency of minute.**—*R. v. MANCION* (1904), 24 C. L. T. 288; 8 O. L. R. 24; 3 O. W. R. 756.—CAN.

### PART VIII. SECT. 5, SUB-SECT. 1.—B. (a).

**584 i. Must be shown.**—*R. v. AKERMAN* (1883), 1 B. C. R., pt. 1, 255.—CAN.

**584 ii.** — *A conviction must*

*show the jurisdiction of the magistrates.*—*R. v. BURTRESS*, 20 C. L. T. 368.—CAN.

**584 iii.** — *R. v. SMITH* (B. C.), [1919] 3 W. W. R. 311.—CAN.

**584 iv.** — *The jurisdiction of the magistrate must appear on the face of the proceedings. A defect in this respect is fatal & cannot on the hearing of the appeal be cured by amendment.*—*CHIN TOY v. ARMITAGE* (B. C.), [1922] 2 W. W. R. 1269; 70 D. L. R. 160; 38 Can. Crim. Cas. 382.—CAN.

**584 v.** — *R. (JOHNSTON) v. COUNTY ARMAGH JJ.* (1908), 43 I. L. T. 112.—IR.

**h. When sufficiently shown.**—*Ex p.* DUNLAP (1856), 8 N. B. R. (3 All.) 281.—CAN.

**k. Territorial jurisdiction.**—*R. v. SHAW* (1864), 23 U. C. R. 616.—CAN.

—*R. v. PERRIN* (1888), 16 O. R. 446.—CAN.

*Prosecution before two justices.*

—Where a prosecution is authorised to be brought before any two justices of the peace only one need sign the information, but the conviction should show on its face the facts necessary to give jurisdiction to the one not signing.—*R. v. BROWN* (1890), 23 N. S. R. 21.—CAN.

**n. Substituted magistrate—Statement of qualification.**—*R. v. STEEVES, Ex p. GALLAGHER* (1908), 39 N. B. R. 4.—CAN.

### PART VIII. SECT. 5, SUB-SECT. 1.—B. (b).

**589 i. Commission of statutory offence must be shown.**—*Re* BATES (1876), 40 U. C. R. 284.—CAN.

**589 ii.** — *R. v. FLINT* (1883), 4 O. R. 214.—CAN.

**589 iii.** — *WOODLOCK v. DICKIE* (1885), 6 R. & G. 86; 6 C. L. T. 142.—CAN.

**589 iv.** — *R. v. HUBLEY* (1915), 49 N. S. R. 281.—CAN.



**Sect. 5.—Judgment: Sub-sect. 1, B. (b) & (c), & C.]**

face, & did not show a want of jurisdiction; (2) that a rule to quash such conviction would be granted if it appeared upon the affidavits that the substances specified in the conviction were not within the statute.—*Ex p. STRONG* (1854), 3 C. L. R. 76; 18 J. P. 810; *sub nom. R. v. STRONG*, 3 W. R. 73.

**593.** ———.]—Where a statute or bye-law creates two distinct offences, & provides the same penalty for both, an information & conviction stating the offence in the alternative, as contrary to the statute, or bye-law, are insufficient.

Therefore, where a bye-law provided that “no smoke or steam shall be emitted from the engines so as to constitute any reasonable ground of complaint to the passengers or the public,” & the penalty was the same whichever class of persons had ground of complaint, & an information & conviction stated that deft. permitted smoke to escape contrary to the bye-law, without stating in terms any reasonable ground of complaint to the passengers or the public, or either of them:—*Held*: such statement was insufficient, & the conviction must be quashed.—*COTTERILL v. LEMPRIERE* (1890), 24 Q. B. D. 634; 59 L. J. M. C. 133; 62 L. T. 695; 54 J. P. 583; 6 T. L. R. 262; 17 Cox, C. C. 97.

*Annotations*:—*Consd. R. v. Jones, Ex p. Thomas*, [1921] 1 K. B. 632. *Mentd. Ex p. Norman* (1915), 114 L. T. 232.

**594. Sufficiency of description—Words of statute followed.]**—In a summary conviction by a justice it is sufficient in describing the offence to describe it in the words of the statute.—*R. v. SPEED* (1700), as reported in 1 Ld. Raym. 583; 91 E. R. 1290.

*Annotations*:—*Mentd. Morley v. Stacker* (1703), 6 Mod. Rep. 83; *Fletcher v. Calthorpe* (1845), 4 L. T. O. S. 393; *White v. Fox* (1880), 49 L. J. M. C. 60.

**595.** ———.]—(1) Summary convictions must be construed strictly. In a summary conviction by a justice it is sufficient in describing the offence to describe it in the words of the statute. (2) Where a deft. is liable to several penalties for several offences on one day a conviction that he between two particular days committed ten offences is good, though it does not specify the day on which any of those offences was committed.—*R. v. CHANDLER* (1702), 1 Ld. Raym. 581; 1 Salk. 377; 5 Mod. Rep. 446; 91 E. R. 1288.

*Annotations*:—*As to* (1) *Consd. Wilkins v. Wright* (1833), 2 Cr. & M. 191. *Refd. R. v. Scale* (1807), 8 East, 568. *As to* (2) *Apld. R. v. Simpson* (1714), 10 Mod. Rep. 248. *Refd. R. v. Thompson*, [1914] 3 K. B. 99. *Generally Refd. Gimbert v. Coyney* (1825), 3 Dow. & Ry. M. C. 323. *Mentd. R. v. Layton* (1709), 11 Mod. Rep. 236; *R. v. Barret* (1710), 1 Salk. 383; *R. v. Whitlock* (1720), 1 Stra. 263; *R. v. Hawks* (1729), 1 Barn. K. B. 212; *R. v. Weir* (1823), 1 B. & C. 288.

**596.** ———.]—The general rule is, that where a conviction adapts the state of facts to the words of the statute, that is sufficient; therefore, where a conviction on Frauds by Workmen Act, 1877 (c. 56), stated that A. was convicted before the magistrates upon the oath of T., a credible witness, of having in his possession, in his

dwelling-house, certain materials used in the woollen manufacture, suspected to be embezzled & purloined, to wit, etc., he not producing the party from whom he bought the same, or giving a satisfactory account, & then going on to adjudicate, is good.—*DAVIS v. NEST* (1833), 6 C. & P. 167; 2 Nev. & M. M. C. 161.

*Annotation*:—*Consd. R. v. Wilcock* (1845), 7 Q. B. 317.

**597.** ———.]—A conviction is sufficient if it describes the offence in the words of the statute creating it; & a conviction under Vagrancy Act, 1824 (c. 83), s. 4, was therefore held good, which stated that deft. did play in a certain highway, to wit, the river Thames, with certain instruments, of gaming, to wit, cards, at a certain game of chance.—*Ex p. GRANT* (1857), 28 L. T. O. S. 266; 5 W. R. 289; *sub nom. Re GRANT*, 21 J. P. Jo. 70.

**598.** ———.]—A conviction under 9 Geo. 4, c. 129, s. 3, stated that “W. P. was convicted of having unlawfully by threats endeavoured to force on W. J., who was then & there hired in his capacity & business of a mason to depart from his said hiring.”

The information of C. R., on which the summons was granted, stated, “I live, etc. On Saturday night, Oct. 1, I was in the G. road, with W. J. & fifteen or sixteen other workmen, all engaged by Mr. P. as workmen. W. P. was there; he came in, he said to the men “If you there work, we shall consider you as blacks, & when we go in we shall strike against you, & strike against you all over London”:—*Held*: (1) under Metropolitan Police Court Act, 1830 (c. 71), s. 40, the conviction sufficiently stated the offence, as it followed the words of the statute creating it; (2) the information sufficiently stated facts which constituted an offence under the statute. *Semble*: (3) as the information need not be in writing, if all the parties had appeared before the magistrate without any previous information, & he had then heard the case, the conviction would be supported.—*Re PERHAM* (1859), 5 H. & N. 30; 23 J. P. 793; 5 Jur. N. S. 1221; 157 E. R. 1088; *sub nom. Ex p. PERHAM*, 29 L. J. M. C. 33; *sub nom. R. v. PEARHAM*, 1 L. T. 106; *sub nom. Ex p. PEARHAM*, 8 W. R. 44.

*Annotation*:—*As to* (1) *Consd. Walsby v. Anley* (1861), 3 E. & E. 516.

**599.** ———.]—Substantially not literally.]—*R. v. JEFFERIES*, No. 617, *post*.

**600.** ———.]—Whether particularity required.]—A conviction quashed; because the offence was not therein particularly described.—*R. v. CHAPMAN* (1755), Say. 203; 96 E. R. 853.

*Annotation*:—*Consd. R. v. Jarvis* (1757), 1 Burr. 148.

**601.** ———.]—2 & 3 Vict. c. 12, s. 4, which forbids the instituting any prosecution for offences under that Act except in the name of the Attorney or Solicitor General, applies only to offences created by the Act itself, though, by sect. 6, it is to be construed as one Act with Unlawful Societies Act, 1799 (c. 79), which creates other offences. Where a statute gives a form of conviction, not

**594 i. Sufficiency of Words of statute followed.]**—*STARR v. HEALES* (1882), 4 R. & G. 84.—CAN.

**594 ii.** ———.]—*R. v. HOLLISTER* (1885), 8 O. R. 750.—CAN.

**594 iii.** ———.]—*R. v. REED* (1886), 11 O. R. 242.—CAN.

**594 iv.** ———.]—*R. v. TOWNSEND* (1892), 24 N. S. R. 357.—CAN.

**594 v.** ———.]—Where the description of the offence in the conviction is in the words of the statute, that is sufficient.—*R. v. BRADY* (1913),

23 W. L. R. 333; 3 W. W. R. 914.—CAN.

**594 vi.** ———.]—A conviction should follow the words of the statute creating the offence.—*AH KAN v. COX, AH WING v. COX, TONG v. COX* (1902), 21 N. Z. L. R. 645.—N.Z.

**594 vii.** ———.]—*R. v. CAREW* (1876), 2 N. Z. Jur. N. S. 177, 260.—N.Z.

**594 viii.** ———.]—*R. v. MELLISH, Re REID*, 2 J. R. 127.—N.Z.

**599 i.** ———.]—Substantially not

literally.]—*R. v. MARTIN* (1886), 12 O. R. 800.—CAN.

**599 ii.** ———.]—*R. v. KAY, Ex p. LANDRY* (1907), 38 N. B. R. 332; 4 E. L. R. 221.—CAN.

**599 iii.** ———.]—A conviction which accurately relates the facts is not bad simply because its description of the offence slightly varies from that of the enactment creating it, if the offence as so described is really one within the meaning of the enactment.—*R. v. HARRY* (Alta.), [1919] 3 W. W. R. 298; 48 D. L. R. 265.—CAN.

fully describing the offence, the conviction, nevertheless, must fully describe it; but in the part which awards the penalty it is sufficient to follow the statute form: although the enacting part of the statute gives part of the penalty to the informer, & the form is not so drawn as to show who he is.—*R. v. JOHNSON* (1845), 3 Q. B. 102; 2 New Sess. Cas. 170; 15 L. J. M. C. 7; 6 L. T. O. S. 121; 10 J. P. 72; 9 Jur. 1010; 115 E. R. 812.

**602.** ———.]—Convictions on the Game Acts must particularly & negatively specify that the person convicted had not any of the qualifications required by 22 & 23 Car. 2, c. 25.—*R. v. JARVIS* (1756), 1 Burr. 148; 1 East, 643, n.; 97 E. R. 239.

*Annotations*:—*Consd.* *R. v. Stone* (1801), 1 East, 639. *Refd.* *The Adelaide* (1829), 2 Hag. Adm. 230; *Cooper v. Dodd* (1850), 2 Rob. Eccl. 270; *Re Perham* (1859), 5 Jur. N. S. 1212; *R. v. James*, [1902] 1 K. B. 540; *R. v. Audley*, [1907] 1 K. B. 383.

**603.** ———.]—**Necessary ingredients of particular offence.**—Summary Jurisdiction Act, 1879 (c. 49), s. 39 (1), which provides that in proceedings before cts. of summary jurisdiction "the description of any offence in the words of the Act . . . creating the offence, or in similar words, shall be sufficient in law," does not do away with the necessity of setting out in a conviction facts which are a necessary ingredient of the particular offence in question.—*SMITH v. MOODY*, [1903] 1 K. B. 56; 72 L. J. K. B. 43; 87 L. T. 682; 67 J. P. 69; 51 W. R. 252; 19 T. L. R. 7; 20 Cox, C. C. 369, D. C.

*Annotations*:—*Apld.* *Smart v. Wilkins* (1919), 83 J. P. 181. *Refd.* *R. v. Hankey, etc.* JJ. (1905), 93 L. T. 107; *Ex p. Beecham*, [1913] 3 K. B. 45.

#### (c) The Adjudication.

**604. Must be set out.**—The record of a conviction, without any judgment entered thereon, quashed.—*R. v. HAWKS* (1730), Fitz-G. 124; 1 Barn. K. B. 300; 2 Stra. 858; 94 E. R. 683.

*Annotations*:—*Refd.* *R. v. Vipont* (1761), 2 Burr. 1163; *R. v. Harris* (1797), 7 Term Rep. 238.

**605.** ———.]—*R. v. VIPONT* (1761), 2 Burr. 1163; 97 E. R. 767.

*Annotations*:—*Consd.* *R. v. Harris* (1797), 7 Term Rep. 238. *Refd.* *Re Tordoff* (1844), 13 L. J. M. C. 145; *R. v. Surrey JJ.*, [1892] 2 Q. B. 719. *Mentd.* *R. v. Killett* (1767), 4 Burr. 2063; *R. v. Benwell* (1794), 6 Term Rep. 75; *Re Jaques* (1822), 2 Dow. & Ry. K. B. 64.

**603 i.** ———.]—*Whether particularity required—Necessary ingredients of particular offence.*—*R. v. BRIDGES* (1907), 13 B. C. R. 67.—**CAN.**

**o.** ———.]—*Time & place of offence omitted.*—*R. v. YOUNG* (1884), 5 O. R. 400.—**CAN.**

**p.** ———.]—*Time of offence omitted.*—*R. v. MURPHY* (1891), 24 N. S. R. 21.—**CAN.**

—.]—*CARMAN v. FISHER* (Man.) (1905), 1 W. L. R. 276.—**CAN.**

**r.** ———.]—*Time of offence not specific.*—*R. v. KEEPING*, 21 C. L. T. 508.—**CAN.**

**t.** ———.]—*Nature of offence.*—It was not specified in a conviction whether a sale of liquor was by wholesale or retail, the sale by retail, without license, being the gist of the offence:—*Held*: the conviction was bad.—*R. v. KING* (1893), 25 N. S. R. 488.—**CAN.**

**a.** ———.]—*Facts not set out.*—A conviction is bad where it does not set out the facts constituting the offence.—*R. v. MCCORMACK* (1903), 23 C. L. T. 207; 9 B. C. R. 497.—**CAN.**

**b.** ———.]—*Re LEARY*, 24 C. L. T. 70.—**CAN.**

**c.** ———.]—*Of owner of stolen pro-*

*perty.*—*Ex p. HOLDER* (1866), 11 N. B. R. (6 All.) 338.—**CAN.**

**d.** ———.]—*R. v. PAISCH* (Alta.) (1920), 2 W. W. R. 80; 32 Can. Crim. Cas. 316.—**CAN.**

**e.** *Offence to be shown on face of conviction.*—It is necessary that a conviction should on its face show an offence.—*R. (GOREY) v. COUNTY KILKENNY CHAIRMAN & JJ.*, [1912] 2 I. R. 1.—**IR.**

**f.** *Statutory offence with exception—Exception to be negated.*—It is not sufficient in a summary conviction to record the conviction done where the statute creating the offence creates in the same clause an exception also, the exception must be negated in terms.—*MOBRIEN v. RECORDER'S COURT (Que.)* (1919), 31 Can. Crim. Cas. 352.—**CAN.**

**g.** *Name of informant—Necessity for.*—It is not necessary to state in the conviction the name of the informant.—*R. v. DAVIS, Ex p. VANBUSKIRK* (1907), 38 N. B. R. 335; 4 E. L. R. 224.—**CAN.**

#### PART VIII. SECT. 5, SUB-SECT. 1.—**B. (c).**

**h.** *Necessary contents—Requisites of*

**606.** ———.]—If a conviction do not state an adjudication, it cannot be supported, where the punishment be or be not fixed by statute.—*R. v. HARRIS* (1797), 7 Term Rep. 238; 101 E. R. 952.

*Annotation*:—*Expld.* *Day v. King* (1836), 5 Ad. & El. 359.

**607. Adjudication not in accordance with offence proved.**—A conviction by two justices under Poor Relief Act, 1744 (c. 38), upon complaint of the overseers of a parish against the late overseer, for refusing & neglecting to deliver over to them a certain book belonging to the parish called the Bastardy Ledger, convicting him of the said offence, & adjudging that he should be committed to the common gaol, to be safely kept, until he should have yielded up all & every the books concerning his said office of overseer belonging to the parish, was held void, as to the adjudication respecting the imprisonment, for excess, the same extending beyond what was previously required of the person convicted; & a warrant of commitment founded on this conviction, & directing the gaoler to keep him in the terms of the adjudication, was also held void *in toto*, for which trespass & false imprisonment would lie against the justices, although the conviction had not been quashed.—*GROOME v. FORRESTER* (1816), 5 M. & S. 314; 105 E. R. 1066.

*Annotations*:—*Refd.* *Ex p. Leake* (1829), 9 B. & C. 234; *Daniell v. Philipps* (1835), 1 Cr. M. & R. 662; *Griffith v. Harries* (1837), 2 M. & W. 335; *Howard v. Gosset* (1845), 10 Q. B. 359; *Lindsay v. Leigh* (1848), 12 Jur. 286. *Mentd.* *Douglas v. R.* (1848), 13 Q. B. 74.

#### C. Construction.

**608. Construed strictly.**—*R. v. CHANDLER*, No. 595, *ante*.

**609.** ———.]—*R. v. GREEN*, No. 613, *post*.

**610. Conviction partly valid partly invalid—Whether wholly void.**—Justices having convicted applt., in one penalty for both the alleged offences, & the conviction being bad as to one of them it was bad altogether.—*BETTESWORTH v. ALLINGHAM* (1885), 16 Q. B. D. 44; 50 J. P. 55; 34 W. R. 296; 2 T. L. R. 66, D. C.

**611.** ———.]—**Valid part enforceable.**—*CHEPSTOW ELECTRIC LIGHT & POWER CO. v. CHEPSTOW GAS & COKE CONSUMERS' CO.*, No. 631, *post*.

*offence.*—*Ex p. LITTLE* (1874), 12 N. S. W. S. C. R. (L.) 323.—**AUS.**

**k.** ———.]—*Forfeiture of liquor.*—*Ex p. EISEUMONGER* (1900), 21 N. S. W. L. R. 387; 17 N. S. W. W. N. 160.—**AUS.**

**l.** *Variance between minute of adjudication & conviction.*—*R. v. BRADY* (1886), 12 O. R. 358.—**CAN.**

**m.** ———.]—*R. v. VANTASSEL* (1901), 34 N. S. R. 79.—**CAN.**

**n.** *Absence of adjudication—Substitution of personal order of magistrate.*—Substituting the personal order of the magistrate for a condemnation or adjudication is bad.—*R. v. NEWTON* (1886), 11 P. R. 98.—**CAN.**

**aa.** *Provision for payment of costs—Of conveyance to gaol.*—An adjudication by a convicting magistrate is without authority, when directing that in default of payment by deft. of costs of conveying him to gaol, he is to be imprisoned therefor.—*R. v. GRAVES* (1910), 16 O. W. R. 372; 21 O. L. R. 329; 1 O. W. N. 972.—**CAN.**

**bb.** ———.]—*R. v. ACKERS* (1910), 16 O. W. R. 105; 21 O. L. R. 187.—**CAN.**

**cc.** ———.]—*R. v. BRADY* (Sask.), [1921] 3 W. W. R. 396.—**CAN.**



**Sect. 5.—Judgment: Sub-sect. 1, D. (a), (b) & (c).]****D. Validity.****(a) In General.**

**612. General rule—Compliance with statutory preliminaries necessary.]**—Justices should never convict summarily without all the necessary statutable preliminaries being complied with (COLERIDGE, J.).—*Ex p. JACKLIN* (1844), 2 Dow. & L. 103; 13 L. J. M. C. 139; 3 L. T. O. S. 207; 8 J. P. 539; *sub nom. Re JACKLIN*, 1 New Sess. Cas. 280.

**613. Proper hearing of accused party.]**—The construction ought to be more strict upon convictions than upon indictments; & the reason is because in the first case the jurisdiction is summary. A regular conviction should have charge, evidence, & adjudication (ASHHURST, J.).

The ct. in considering convictions is always strict in two or three points, (a) that a jurisdiction is shown by the person convicting; (b) that the party convicted has been summoned & heard or that it has been his own fault if he has not been heard; (c) that the case is duly made out by evidence. But the ct. has not been strict in the technical wording of them & I know of no case which says that summary convictions shall be drawn in any precise form (BULLER, J.).—*R. v. GREEN* (1784), Cald. Mag. Cas. 391.

*Annotation:—Consd. Wilkins v. Wright* (1833), 2 Cr. & M. 191.

**614. Case for prosecution duly substantiated.]**—*R. v. GREEN*, No. 613, *ante*.

**615. Immaterial defect—Description of statute.]**—The description of an Act in a conviction, as having been passed in the 25th year of the King's reign, when in fact the Parliament in which the Act was passed, was continued by prorogation from the 24th to the 25th year of the reign, is not misdescription.—*R. v. WINDSOR* (1786), 2 Chit. 513.

**616. ———.]**—In an action for false imprisonment against a justice of the peace, who justified under a conviction under Vagrancy Act, 1824 (c. 83):—*Held*: the conviction was not vitiated by the omission of the word part before of Great Britain in the recital of the title of the statute, as directed in the form given by the Acts.—*NIXON v. NANNEY* (1841), 1 Q. B. 747; 1 Gal. & Dav. 370; 10 L. J. M. C. 134; 6 Jur. 389; 113 E. R. 1317.

**617. Surplusage.]**—If a conviction under 31 Geo. 3, c. 21, s. 4, which enacts that all convictions against that Act may be made out in the form, or to the effect following, giving the form, contain all the substantial parts of that prescribed, it is good, though it also contain something more; for surplusage will not vitiate a conviction.—

*R. v. JEFFERIES* (1792), 4 Term Rep. 767; Nolan 106; 100 E. R. 1291.

**618. ———.]**—If the convicting magistrate give a proper date to the time of the conviction upon the face of it, & afterwards add an impossible date to the time when he set his hand & seal to the conviction, being before the offence committed, the latter may be rejected as surplusage. It is enough that the conviction sets forth that the witness was examined on oath, without stating that the magistrate had authority to administer the oath.—*R. v. PICTON* (1802), 2 East, 195; 102 E. R. 343.

**619. Appropriation of penalties—Want of certainty—Whether conviction invalid.]**—Where justices of the peace are required by a penal statute to distribute the penalty on conviction among certain persons according to their discretion, an adjudication that the forfeiture be disposed as the law directs is bad, & the ct. will quash the conviction. The justices ought to have adjudged what the several proportions should be.—*R. v. DIMPSEY*, *R. v. POTTS* (1787), 2 Term Rep. 96; 100 E. R.

*Annotation:—Consd. R. v. Seale* (1807), 8 East, 568.

**620. ———.]**—*R. v. JOHNSON*, No. 601, *ante*.

**621. ———.]**—A conviction for killing a pheasant, contrary to Game Act, 1831 (c. 32), s. 3, following the form given in Summary Jurisdiction Act, 1848 (c. 43), Sched. I. (2), adjudged the offender to forfeit & pay a penalty, to be paid & applied according to law. By Game Act, 1831 (c. 32), s. 37, & 5 & 6 Will 4, c. 20, s. 31 the penalty is directed to be paid, one half to the informer, & one half to some of the overseers of the poor, or to some other officer, as the convicting justice or justices may direct, of the parish, etc., in which the offence shall have been committed:—*Held*: the conviction was sufficient by virtue of Summary Jurisdiction Act, 1848 (c. 43), ss. 17, 32, being in the form given by the schedule to that Act referred to in sect. 17, though it did not in terms distribute the penalty, nor name the informer or the overseer to whom the penalty was to be paid.—*R. v. HYDE* (1852), 7 E. & B. 859, n.; 21 L. J. M. C. 94; 18 L. T. O. S. 223; 16 J. P. 67; 16 Jur. 337; 119 E. R. 1466.

*Annotation:—Mentd. R. v. St. Albans JJ.* (1853), 1 C. L. R. 536.

**622. ——— Erroneous appropriation—At variance with statute.]**—By 9 Geo. 4, c. 31, s. 27, power is given to two justices, in cases of assault, to impose upon the offender a fine, not exceeding £5 to be paid to some one of the overseers of the poor, or to some other officer of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding,

**PART VIII. SECT. 5, SUB-SECT. 1.—D. (a).**

**r. Conviction of several offences—One penalty only imposed.]**—A conviction covering two several & distinct offences under the same bye-law, & imposing only one penalty, is bad.—*R. v. GRAVELLE* (1886), 10 O. R. 735.—**CAN.**

**t. Constitution of court.]**—It is no objection to a conviction at the quarter sessions that neither the judge of the district ct. nor any barrister was present when a conviction was made.—*R. v. CRABBE* (1854), 11 U. C. R. 447.—**CAN.**

**a. Penalty—Provision for payment in accordance with statute.]**—*R. v. MCGOWAN* (1864), 11 N. B. R. (6 All.) 64.—**CAN.**

**b. Variance between information & conviction.]**—*R. v. MUNRO* (1864), 24 U. C. R. 44.—**CAN.**

**c. Variance between summons & conviction.]**—Where there is a material variance between the summons & conviction the conviction cannot be supported.—*DINN v. R., CARVELL v. CHARLOTTETOWN* (1871), 1 P. E. I. 361.—**CAN.**

**d. Conviction not under seal.]**—*MCDONALD v. STUCKEY* (1871), 31 U. C. R. 577.—**CAN.**

**e. ———.]**—A conviction not under seal is void, but on a motion to question the validity of a conviction merely on the ground of its not being under seal, the unsealed conviction may be treated as a minute of adjudication, & the application adjourned to

permit of a sealed conviction being filed.—*R. v. DIOKEY* (1915), 32 W. L. R. 404; 9 W. W. R. 142.—**CAN.**

**f. Variance between memorandum & conviction.]**—The fact that the memorandum of conviction differs from the conviction as returned does not invalidate the conviction.—*R. v. SMITH* (1881), 46 U. C. R. 442.—**CAN.**

**g. Misdescription of accused.]**—*R. v. MORGAN* (1881), 1 B. C. R., pt. 1, 245.—**CAN.**

**h. Want of jurisdiction.]**—*R. v. YOUNG* (1884), 5 O. R. 400.—**CAN.**

**k. ———.]**—*Re LEGGE* (1921), 36 Can. Crim. Cas. 243; 55 N. S. R. 110.—**CAN.**

**l. Failure by magistrate to hold preliminary inquiry.]**—The omission

or division, in which such parish, township, or place shall be situate; & sect. 35 provides that the conviction may be drawn up in a given form, or in any other form of words to the same effect:—*Held*: a conviction, by which the penalty was ordered to be paid to the treasurer of the county of C., in which the said offence was committed, to be by him applied according to the directions of the statute, etc., or the party, in default, to be imprisoned for two months, etc., was bad.—*CHADDOCK v. WILBRAHAM* (1848), 5 C. B. 645; 3 New Sess. Cas. 226; 17 L. J. M. C. 79; 10 L. T. O. S. 442; 12 J. P. 167; 12 Jur. 136; 136 E. R. 1031.

*Annotations*:—*Reid. Ex p. Hyde* (1851), 4 New Sess. Cas. 745. *Mentd. R. v. Hyde* (1852), 21 L. J. M. C. 94.

—.]—*See, generally, Part XVII., post.*

**623. Conviction of several offences—In one conviction.]**—A deft. may be convicted of several offences in the same conviction.—*R. v. SWALLOW* (1799), 8 Term Rep. 284; 101 E. R. 1392.

**624. Statutory provisions not followed.]**—*GIMBERT v. COYNEY*, No. 589, *ante*.

**625. Adjudication as to costs—Absence of.]**—Though the form of conviction given in a statute expressly mentions costs, it is not a valid objection to a conviction that it does not contain an award of costs against deft.—*R. v. PRINGLE* (1842), 8 J. P. 249.

**626. —.]**—An information, under 7 & 8 Geo. 4, c. 29, s. 39, for stealing a growing ash tree, the property of M., was preferred by R. to D., a justice of the peace, who summoned the offender. At the time & place fixed in the summons, he appeared, & was convicted by another magistrate, deft., D., the summoning magistrate, being present, but not taking any part. The conviction ordered pltf. "to forfeit & pay, over & above the value of the tree stolen, the sum of 5s., & for the value of the tree stolen 1s., & also to pay the sum of £1 4s. 6d. for costs, to be paid on or before Mar. 19 next, & in default of payment of the said sums to be imprisoned in the house of correction" at, etc., "& there kept to hard labour for one month, unless the said sums shall be sooner paid." It then ordered the 5s. to be paid to the overseer, the 1s. to M. the party grieved, & the £1 4s. 6d. to be immediately paid to R., complainant. An action of trespass & false imprisonment having been brought against deft.:—*Held*: the conviction was good, notwithstanding it had not proceeded on the information of the party aggrieved, or been made by the magistrate who received the original information, & issued the summons on which deft. appeared; nor was it invalidated by its mode of adjudicating the costs.—*TARRY v. NEWMAN* (1846), 15 M. & W. 645; 2 New Mag. Cas. 7, 2 New Sess. Cas. 449; 15 L. J. M. C. 160;

by the magistrate to hold the preliminary inquiry to enable him to decide whether or not the case should be disposed of summarily, invalidates the conviction.—*R. v. WILLIAMS* (1905), 11 B. C. R. 351; 2 W. L. R. 410.—*CAN.*

**m. Evidence must be taken in writing.]**—The omission of the magistrate upon the summary conviction of a prisoner to have the evidence taken in writing is fatal to the conviction.—*R. v. MCGREGOR* (1905), 11 B. C. R. 350; 2 W. L. R. 378.—*CAN.*

**n. —.]**—*R. v. GOULET* (1907), 3 E. L. R. 9.—*CAN.*

**o. — Waiver by accused—Conviction sustained.]**—*R. v. JANNEAU* (1907), 3 E. L. R. 5.—*CAN.*

**p. — Stenographer not sworn.]**—*R. v. HEUREUX* (Y. T.) (1908), 8 W. L. R. 975; 14 Can. Crim. Cas. 100.—*CAN.*

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10 J. P. 678; 153 E. R. 1009; *previous proceedings*, 7 L. T. O. S. 301, N. P.

*Annotations*:—*Mentd. Caswell v. Morgan* (1859), 1 E. & E. 809; *R. v. Morgan* (1859), 7 W. R. 463; *Mason v. Mitchell* (1865), 11 Jur. N. S. 89; *Re Shropshire JJ.*, *Ex p. Blewitt* (1866), 14 L. T. 598.

**627. Information not made by party aggrieved.]**—*TARRY v. NEWMAN*, No. 626, *ante*.

**628. Conviction not by magistrate issuing summons.]**—*TARRY v. NEWMAN*, No. 626, *ante*.

**629. Separate convictions—Under different parts of statute—For same offence.]**—*Semble*: there cannot be two separate convictions under different parts of an enactment for one & the same act.—*BERRY v. HENDERSON* (1870), L. R. 5 Q. B. 296; 39 L. J. M. C. 77; 22 L. T. 331; 34 J. P. 805, D. C.

*Annotations*:—*Mentd. Pharmaceutical Soc. v. Piper*, [1893] 1 Q. B. 686; *Pharmaceutical Soc. v. Arnson*, [1894] 1 Q. B. 720; *R. v. Wood Green Profiteering Committee, Ex p. Boots Cash Chemists (Southern)* (1919), 89 L. J. K. B. 55.

**630. Conviction on one of several charges—No evidence on other charges—Whether account taken of such charges.]**—Upon sentencing prisoners convicted of some only out of several charges preferred against them, no evidence being offered on the other charges, the ct. of petty or quarter sessions should state whether such other charges have or have not been taken into account.—*R. v. HYSLOP & STEVENSON* (1897), 61 J. P. 377.

**631. Conviction partly invalid—To effect given thereto.]**—The conviction so far as it imposed additional daily penalties was bad; but could be dealt with either by an amendment striking out the part which related to those daily penalties, or by directing that no effect be given to that part in the event of an attempt being made to enforce them; & the other part of the conviction was good, & could be enforced.—*CHEPSTOW ELECTRIC LIGHT & POWER CO. v. CHEPSTOW GAS & COKE CONSUMERS' CO.*, [1905] 1 K. B. 198; 74 L. J. K. B. 28; 92 L. T. 27; 69 J. P. 72; 21 T. L. R. 35; 49 Sol. Jo. 33; 3 L. G. R. 49, D. C.

#### (b) Proper Contents.

*See Sub-sect. 1, B., ante.*

#### (c) Certainty.

**632. Necessity for.]**—A man who is convicted by a justice cannot plead to that conviction when removed into B. R. by *certiorari*. If a statute authorises a justice to convict for the offence of cutting down trees, & to award the party grieved a recompense, the conviction must specify the number of trees cut down.—*R. v. BURNABY* (1703), 1 Com. 131; 2 Ld. Raym. 900; 3 Salk. 217; 92 E. R. 998.

*Annotations*:—*Reid. R. v. Chapman* (1755), Say. 203; *Morrell v. Martin* (1841), 3 Man. & G. 581; *Ex p. Higgins*

**q. — —.]**—Where the evidence is taken in shorthand by a stenographer who is not a duly sworn court stenographer, & who did not before acting make oath that he would truly & faithfully report the evidence is fatal to the conviction.—*R. v. KNIGHT* (Alta.), [1919] 3 W. W. R. 529; 48 D. L. R. 577.—*CAN.*

**r. Sentence—Absence of accused although notified.]**—Where the accused has proper notice of the proceedings, & is aware that judgment may be pronounced against him, & he might have been present, it is no objection to the conviction that judgment was pronounced & sentence of imprisonment imposed in his absence.—*R. v. KAY, Ex p. LANDRY* (1907), 38 N. B. R. 332; 4 E. L. R. 221.—*CAN.*

**t. — Irregularity in delivery—Waiver.]**—*R. v. MCKENZIE* (N. S.) (1910), 9 E. L. R. 214.—*CAN.*

**a. Conviction on one charge—Sentence increased for offence not charged.]**—In sentencing a deft. found guilty of an offence, a magistrate should not increase the severity of the sentence because he considers deft. guilty of some other offence with which he had not been charged.—*R. v. HARRIS* (1918), 41 O. L. R. 366; 13 O. W. N. 312; 40 D. L. R. 684; 30 Can. Crim. Cas. 13.—*CAN.*

**b. Amendment of information.]**—*R. v. VAN FLEET* (Alta.), [1918] 1 W. W. R. 332; 38 D. L. R. 592; 29 Can. Crim. Cas. 218.—*CAN.*

#### PART VIII. SECT. 5, SUB-SECT. 1.—D. (c).

**632i. Necessity for.]**—The charge in a conviction must be certain, & so stated as to be pleadable in the event of a second prosecution for the same



**Sect. 5.—Judgment: Sub-sect. 1, D. (c), (d) & (e), & E.]**

(1843), 10 Jur. 838; *Fletcher v. Calthrop* (1845), 2 Jur. 205; *R. v. Cridland* (1857), 7 E. & B. 853. **Mentd.** Goldswain's Case (1778), 2 Wm. Bl. 1207.

**633.** —.]—The ct. now declared their opinions, that the conviction was bad, & for this reason, because it orders, that deft. shall lay in custody, till he pays, what shall be found due upon the account, & it does not appear, what that sum may be, so that this may be a commitment for life. They said, it was true indeed, the words of the conviction were, that he should be committed, till he accounted & should pay the money, that should be due; but by being bad in part it is bad in the whole.—*R. v. CATTERALL* (1731), *Fitz-G.* 266; 2 *Stra.* 900; 1 *Barn. K. B.* 442; 94 *E. R.* 297.

**Annotation:—***Refd.* *R. v. Hartington Middle Quarter* (1855), 3 *W. R.* 285.

**634.** —.]—Informal conviction being for trading as a hawker, etc.

All the convictions should have precise certainty in them, though the deft. here is convicted of being a hawker, yet it is neither averred, nor proved, that he was one (*WILMOT, J.*).—*R. v. LITTLE* (1758), 1 *Burr.* 609; 2 *Keny.* 317; 97 *E. R.* 472.

**Annotations:—***Mentd.* *Manson v. Hope* (1862), 31 *L. J. M. C.* 191; *Holland v. Hall* (1902), 46 *Sol. Jo.* 319.

**635.** —.]—When the legislature in its language comprehends divers offences under general terms, it is not enough to follow in a conviction the words of the statute, but it is necessary to state what particular Act prohibited has been committed.—*R. v. JAMES* (1784), *Cald. Mag. Cas.* 458.

**Annotation:—***Mentd.* *R. v. Rowlands* (1851), 21 *L. J. M. C.* 81.

**636.** —.]—The costs to be paid by offenders under 50 Geo. 3, c. 48, must be ascertained by the conviction or it is bad.—*Ex p. PAYNE* (1824), 2 *L. J. O. S. K. B.* 120; *sub nom.* *R. v. PAYNE*, 4 *Dow. & Ry. K. B.* 72; 2 *Dow. & Ry. M. C.* 169.

**637.** —.]—The conviction leaves it doubtful whether deft. be proceeded against for being on board the vessel within the port, or within one league of the coast of the United Kingdom. It is true that he might be charged under both clauses at the same time; but a party ought distinctly to know what offence is insisted on against him (*LORD DENMAN, C.J.*).—*R. v. PEREIRA* (1834), 2 *Ad. & El.* 375; 111 *E. R.* 145.

**Annotation:—***Refd.* *Wray v. Toke* (1848), 12 *Jur.* 936.

**638.** —.]—Where a conviction has been filed of record at the sessions in support of a commitment a second conviction filed subsequently for the same offence is admissible in evidence in an

action against the magistrates, if nothing has taken place equivalent to quashing the first conviction.

Where an Act of Parliament gives summary proceedings for various offences, a conviction, though formally drawn, will not support a commitment, if it leaves it uncertain under which sect. of the Act the conviction actually took place.—*CHARTER v. GREAME* (1849), 13 *Q. B.* 216; 3 *New Mag. Cas.* 106; 3 *New Sess. Cas.* 382; 18 *L. J. M. C.* 73; 12 *L. T. O. S.* 471; 13 *J. P.* 232; 13 *Jur.* 208; 116 *E. R.* 1245.

**Annotations:—***Refd.* *Fuller v. Brown* (1849), 3 *New Mag. Cas.* 172; *Ex p. Austin* (1880), 50 *L. J. M. C.* 8.

**639. Sufficiency of—Information under one statute—Conviction under another.]—***Resp.* laid an information before a justice that a house was "kept or used as a common gaming house" within Gaming Act, 1845 (c. 109), & thereupon the justice granted a warrant under which applt. was arrested at the house in question. He was brought before two justices, & charged under Betting Act, 1853 (c. 119), s. 3 as "the person," who "having the management of a room" in the house, used it "for the purpose of betting with persons resorting thereto." No information was laid, nor was any summons issued, under the last-named statute; & applt. did not waive this omission. The charge having been heard he was convicted, & a penalty was imposed:—*Held:* the conviction was wrong, & must be quashed.—*BLAKE v. BEFCH* (1876), 1 *Ex. D.* 320; 45 *L. J. M. C.* 111; 34 *L. T.* 764; 40 *J. P.* 678, *D. C.*; *subsequent proceedings* (1877), 2 *Ex. D.* 335, *C. A.*

**Annotations:—***Refd.* *R. v. Hughes* (1879), 4 *Q. B. D.* 614; *R. v. Paget* (1881), 8 *Q. B. D.* 151; *R. v. D'Eyncourt* (1888), 21 *Q. B. D.* 109; *Scaman v. Burley*, [1896] 2 *Q. B.* 344; *R. v. Garrett-Pegge, Ex p. Brown*, [1911] 1 *K. B.* 880; *Conn v. Turnbull* (1925), 89 *J. P. Jo.* 300.

**(d) Duplicity.**

**640. More than one offence charged—Conviction as for one offence.]—***R. v. SALOMONS*, No. 372, *ante.*

**641. Commission of offence in alternative.]—**A conviction, stating an offence to have been committed in the alternative, is bad.—*R. v. SADLER* (1787), 2 *Chit.* 519.

**Annotations:—***Refd.* *Cotterill v. Lempriere* (1890), 24 *Q. B. D.* 634; *Laxton v. Jefferies* (1893), 58 *J. P.* 318.

**642.** —.]—An alternative charge in a conviction is bad.—*Ex p. PAIN* (1826), 5 *B. & C.* 251; 108 *E. R.* 94; *sub nom.* *R. v. PAIN*, 7 *Dow. & Ry. K. B.* 678; 3 *Dow. & Ry. M. C.* 516.

**Annotations:—***Apld.* *Cotterill v. Lempriere* (1890), 24 *Q. B. D.* 634. *Refd.* *R. v. Morley* (1826), 4 *Dow. & Ry. M. C.* 109; *R. v. Garrett-Pegge, Ex p. Brown*, [1911] 1 *K. B.* 880.

**643. Two offences charged—Arising out of one act.]—***Appct.* was summoned under Motor Car

offence.—*R. v. HOGGARD* (1870), 30 *U. C. R.* 152.—**CAN.**

**c. Several offences charged—General conviction bad for uncertainty.]—***R. v. STEVENS* (1847), 3 *Kerr.* 356.—**CAN.**

**d.** —.]—*R. v. CLENNAN* (1880), 8 *P. R.* 418.—**CAN.**

**e.** —.]—*R. v. ROACH* (1914), 26 *O. W. R.* 564; 6 *O. W. N.* 630; 19 *D. L. R.* 362; 23 *Can. Crim. Cas.* 28.—**CAN.**

**f.** — *General conviction permissible—When offences construed as one under statute creating.]—**R. (PATERSON) v. TYRONE JJ.*, [1915] 2 *I. R.* 162.—**IR.**

**g.** — *When offences are one continuous offence.]—**R. (BROWN) v. COUNTY LONDONDERRY JJ.* (1912), 46 *I. L. T.* 170.—**IR.**

**h.** *Time of offence.]—**R. v. WALLACE* (1883), 4 *O. R.* 127.—**CAN.**

**k.** —.]—*Re KEARY, R. v. BLAIR* (1884), 24 *N. B. R.* 74.—**CAN.**

**l. Place of offence.]—**A conviction is bad on its face for uncertainty if it does not name a place where the offence was committed.—*R. v. CYR* (1887), 12 *P. R.* 24.—**CAN.**

**m. Time & place of offence.]—***R. v. MYERS* (1903), 23 *C. L. T.* 286; 6 *O. L. R.* 120; 2 *O. W. R.* 533.—**CAN.**

**n. Offence not sufficiently described.]—**A conviction is bad for uncertainty, where it does not sufficiently set out the offence of which the accused is convicted.—*Re THOMPSON & PANA* (1894), 13 *N. Z. L. R.* 218.—**N.Z.**

**o. Fine & costs not distinguished.]—**A conviction is bad for uncertainty where it fixes the amount of fine, including costs, without distinguishing their respective amounts.—*R. v.*

*ARTHUR* (1880), 1 *N. Z. L. R.* 154 (*S. C.*).—**N.Z.**

**PART VIII. SECT. 5, SUB-SECT. 1.—D. (d).**

**p. More than one offence charged—One defendant.]—**Any number of charges for offences against Customs' Act may be included in the one proceeding against the same offender.—*JACKMAN v. KASSUP* (1905), 9 *Nfld. L. R.* 151.—**NFLD.**

**641 i. Commission of offence in alternative.]—***R. v. GIBSON* (1898), 29 *O. R.* 660.—**CAN.**

**641 ii.** —.]—*STENHOUSE v. DYKES*, [1908] *S. C. (J.)* 61.—**SCOT.**

**641 iii.** —.]—*VAUGHAN v. SMITH*, [1919] *S. C. (J.)* 9.—**SCOT.**

**q. Time of offence.]—***Ex p. WILLIAMS* (1909), 9 *S. R. N. S. W.* 140; 26 *N. S. W. W. N.* 9.—**AUS.**

**r. Place of offence.]—***LAUGHLIN*

Act, 1908 (c. 36), s. 1, for, & convicted of, driving a motor car on a highway "recklessly & at a speed which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition & use of the highway, & to the amount of traffic which actually was at the time, or might reasonably have been expected to be, on the highway":—*Held*: as the driving of the car was one indivisible act which might constitute both the offences charged, the conviction was not bad for duplicity.—*R. v. JONES, Ex p. THOMAS*, [1921] 1 K. B. 632; 90 L. J. K. B. 543; 124 L. T. 668; 85 J. P. 112; 37 T. L. R. 299; 19 L. G. R. 354; 26 Cox, C. C. 706, D. C.

**Cruelty to animals.**—See ANIMALS, Vol. II., pp. 291, 292, Nos. 621–623.

(e) *Where Joint Defendants.*

**644. Joint trial—Separate convictions.**—Where there are several charges against several defts., but the evidence against them all is the same, & they are all tried at the same time, & each is separately convicted, no objection having been raised at the time by defts. to this course of proceeding, such convictions cannot afterwards be objected to upon the ground that each deft. should have been tried separately.—*R. v. BIGGINS* (1862), 5 L. T. 605; *sub nom. R. v. LIPSCOMBE, Ex p. BIGGINS*, 26 J. P. 244.

*Annotations*:—*Reid. R. v. Glamorganshire JJ.* (1889), 5 T. L. R. 636; *Re Appln. for Mandamus to Brighton* 522.

persons are jointly engaged in an unlawful act they may be severally convicted thereof.—*MAYHEW v. WARDLEY* (1863), 14 C. B. N. S. 550; 2 New Rep. 325; 8 L. T. 504; 143 E. R. 561.

*Annotations*:—*Reid. R. v. Littlechild, R. v. Heslop* (1871), L. R. 6 Q. B. 293. *Mentd. Pratt v. Martin* (1911), 27 T. L. R. 377.

**646. — Joint conviction.**—Justices Protection Act, 1848 (c. 44), s. 5, which prescribes that if a justice shall refuse to do any act relating to his office, he may be directed by rule of ct. to do it, does not authorise the ct. to order justices to draw up one joint conviction instead of two separate convictions against each of two persons against whom a joint information has been laid, & heard & determined by the justices.—*Re CLEE & OSBORNE* (1852), 21 L. J. M. C. 112; *sub nom. Ex p. CLEE & OSBORNE*, Bail Ct. Cas. 31.

*Annotation*:—*Reid. R. v. Littlechild, R. v. Heslop* (1871), 40 L. J. M. C. 137.

**647. — —**—S. managed his father's farm, his father being an invalid, & while working in a field, part of the farm, forbade P. & E. & others, who were out with the T. Foxhounds in pursuit of a fox, from entering that field. P. insisting upon riding into the field, S. turned his horse back. P. & E. then committed an assault upon S. for which they were summoned by S. before the justices & jointly charged in the information. The justices refused to allow P. & E. to sever their defence so that they might give evidence for each other, & convicted them both:—*Held*: such conviction was right.—*PAUL v. SUMMERHAYES* (1878), 4 Q. B. D. 9; 48 L. J. M. C. 33; 39 L. T.

574; 43 J. P. 188; 27 W. R. 215; 14 Cox, C. C. 202, D. C.

*Annotation*:—*Mentd. Calvert v. Gosling* (1884), 5 T. L. R. 185.

**648. Joint conviction—No allocation of penalty.**—Defts. were convicted for selling hides not being tanners, & the conviction set forth that they had neglected to pay the duty, by which default they had forfeited such a sum. Upon consideration of the information aforesaid, the said two justices had convicted said defts. in such a sum; & this conviction was quashed upon motion, because here were two informations, one against A. the other against B., & the conviction was joint, & no distinction made what each was to pay for his several offence.

Conviction quashed being joint against two for a separate offence.—*R. v. SLACK* (1724), Sess. Cas. K. B. 100; 93 E. R. 101.

**649. — —**—A statutory conviction of A. & B. for an offence several in its nature as an assault under 9 Geo. 4, c. 31, adjudging that they, the said A. & B., for their said offence do forfeit the sum of, etc., & in default of payment be imprisoned for the space of, etc., is bad, inasmuch as the penalty ought to be imposed on the parties severally, & not jointly.—*MORGAN v. BROWN* (1836), 4 Ad. & El. 515; 1 Har. & W. 717; 6 Nev. & M. K. B. 57; 3 Nev. & M. M. C. 509; 5 L. J. M. C. 77; 111 E. R. 881.

*E. Alteration and Amendment of Conviction.*

**650. Substitution of regular for irregular conviction—Before filing.**—K. was charged with opening his premises for sale of intoxicating liquors on Sunday within the prohibited hours, & was convicted, & fined £5, & also 13s. 6d. for costs. The conviction when drawn up contained no clause of distress, but ordered imprisonment in default of payment:—*Semle*: justices might draw up a fresh conviction containing the clause of distress any time before filing it with the clerk of the peace.—*Ex p. KENYON* (1881), 45 J. P. 303, D. C.

**651. — After filing—& conviction quashed.**—Although a magistrate may alter a conviction, or even draw up another in a more formal & correct manner, according to the facts of the case, yet that cannot be done after the first conviction has been quashed either upon appeal or by this ct. after removal by *certiorari*, or after the first conviction has been returned to quarter sessions, & the party convicted discharged by this ct., by reason of the insufficiency of the warrant of commitment.—*CHANEY v. PAYNE* (1841), 1 Q. B. 712; 1 Gal. & Dav. 348; 10 L. J. M. C. 114; 6 Jur. 79; 113 E. R. 1304.

*Annotations*:—*Distd. Charter v. Greame* (1849), 13 Q. B. 216. *Reid. Fuller v. Brown* (1849), 3 New Mag. Cas. 172.

**652. — After removal by certiorari.**—*CHANEY v. PAYNE*, No. 651, *ante*.

**653. — After discharge of party convicted—Insufficient warrant of commitment.**—*CHANEY v. PAYNE*, No. 651, *ante*.

**654. Amendment—Where warranted by facts.**—*R. v. BARKER*, No. 172, *ante*.

*v. POWER, Ex p. POWER*, [1925] St. R. Qd. 202; 19 Q. J. P. 85.—AUS.

**t. One act proved—Conviction for two offences.**—*MOORE & Co. v. WILSON* (1903), 5 F. (Ct. of Sess.) 88, J.—SCOT.

PART VIII. SECT. 5, SUB-SECT. 1.—E.

**a. Substitution of regular for irregular conviction.**—An informality in

the drawing up of a conviction may be amended & a substituted conviction returned by the convicting justice.—*R. v. BEAUDRY* (1892), Q. R. 2 S. C. 175.—CAN.

**b. —**—*R. v. O'BRIEN, Ex p. GREY* (1906), 37 N. B. R. 604.—CAN.

**654 i. Amendment—Where warranted by facts.**—The ct. will not exercise its power of amendment unless it be

proved clearly that sufficient grounds were proved before the ct. below, on which that ct. would have been justified in drawing up the order free from defect.—*WATSON v. RYAN* (1892), 18 V. L. R. 198.—AUS.

**654 ii. —**—The uncertainty of the offence in the conviction as to date, & place may be cured by amendment, upon the facts in evidence.—



*Sect. 5.—Judgment: Sub-sect. 1, E. & F.]*

655. ———.]—CHANEY v. PAYNE, No. 651, *ante*.

656. ———.]—A conviction under 5 & 6 Vict. c. 100, ss. 7 & 8, for exposing to sale an article of manufacture to which a registered design had been applied, did not state that deft. had received knowledge that the consent of the proprietor had not been given to such application.

The conviction & depositions taken before the magistrate were removed into this ct. by *certiorari*. The depositions left it uncertain whether it had been proved before the magistrate that deft. had received the notice required by the statute, or only notice that the proprietor had not consented to the exposure of the article for sale; but it was stated in the affidavits that a sufficient notice was, in fact, proved before the magistrate:—*Held*: the conviction was bad; & there were no satisfactory materials to enable the ct. to amend the conviction under Quarter Sessions Act, 1849 (c. 45), s. 7.—R. v. WELCH (1851), 17 L. T. O. S. 105; 15 J. P. 338.

657. ——— Subsequent action against justices.]—Magistrates having convicted a party under the Highway Act, 1835 (c. 50), they drew up a conviction & returned it to the clerk of the peace, & on an action being brought against them, they put in the conviction returned to the clerk of the peace, which was open to some formal objections, & also another conviction drawn up afterwards in a more formal shape:—*Semble*: there was no impropriety in this course of proceeding, provided the latter conviction was according to the truth & supported by the facts of the case.—SELWOOD v. MOUNT (1839), 9 C. & P. 75, N. P.; *subsequent proceedings, sub nom.* SELLWOOD v. MOUNT (1841), 1 Q. B. 726.

*Annotations*:—*Reid*. Chaney v. Payne (1841), 1 Q. B. 712. *Mentd.* Lock v. Sellwood (1841), 1 Q. B. 736; R. v. Long (1841), 1 Q. B. 740; R. v. West Riding, Yorkshire JJ. (1843), 1 L. T. O. S. 317; R. v. Belton (1848), 12 J. P. 232; Leary v. Patrick (1850), 15 Q. B. 266; *Re Tryddyn Surveyors of Highways, Ex p.* Harrison (1854), 23 L. J. M. C. 45; Freeman v. Read (1860), 9 C. B. N. S. 301; R. v. Winder, [1900] 2 Q. B. 666.

658. ——— After conviction quashed.]—CHANEY v. PAYNE, No. 651, *ante*.

659. ——— After removal by *certiorari*.]—CHANEY v. PAYNE, No. 651, *ante*.

660. ———.]—A conviction under the Master & Servants Acts, is a judgment which may be amended under Quarter Sessions Act, 1849 (c. 45), s. 7, on being brought up by *certiorari*; & if so amended, the rule to quash will be discharged without costs, unless there be some real grievance.—R. v. BIGGINS (1862), 6 L. T. 713; 26 J. P. 437; *previous proceedings*, 5 L. T. 605.

*Annotation*:—*Mentd.* R. v. Mackenzie (1892), 36 Sol. Jo. 667.

R. v. MYERS (1903), 23 C. L. T. 286; 6 O. L. R. 120; 2 O. W. R. 533.—CAN.

654 iii. ———.]—A magistrate, assuming that he has a right to amend a conviction, must in order to make the said amendment, have before him evidence which would justify an amendment.—*Re* WATCHMAN (1914), 30 W. L. R. 534; 7 W. W. R. 880; 23 Can. Crim. Cas. 362; 20 D. L. R. 201.—CAN.

654 iv. ———.]—A magistrate cannot without having the parties before him & without the opportunity of their being heard, make a substituted conviction, or amend a defective conviction, without having the evidence on which to do so.—R. v. AIKENS (1915), 48 N. S. R. 509.—CAN.

c. ——— After removal by *certiorari*

—*For uncertainty of place of offence.*]—R. v. SHATFORD (1918), 51 N. S. R. 322; 38 D. L. R. 366; 28 Can. Crim. Cas. 284.—CAN.

d. ——— *For duplicity.*]—R. v. KENNY (1921), 64 D. L. R. 407; 36 Can. Crim. Cas. 333.—CAN.

e. ——— *For excessive sentence.*]—R. v. DAIGNAULT (1916), 34 W. L. R. 221; 10 W. W. R. 374.—CAN.

f. ——— *Striking out invalid part.*]—*Re* COOK (1910), 7 E. L. R. 541.—CAN.

g. ———.]—SALAMAN v. CHESSEON, [1926] N. Z. L. R. 626.—N.Z.

h. ——— Before conviction quashed on appeal or *certiorari*.]—Orders made by justices may be amended at any time before the conviction has been

661. ———.]—Where the justices on showing cause against a rule for a *certiorari* to bring up an informal conviction to be quashed, return a formal conviction drawn up after the rule has been obtained & after the original conviction has been returned to the clerk of the peace & filed, the ct. will, nevertheless, make the rule absolute.

A. was convicted by justices of an offence against the laws of a certain several fishery, but the conviction did not state that the offence was committed by A. knowingly, so as to bring him within the statute. A. obtained a rule *nisi* for a *certiorari* to bring up the conviction to have it quashed, whereupon, although the conviction had been returned to the clerk of the peace & filed by him, the justices drew up a fresh conviction, in which the word knowingly was inserted, & this fresh conviction was returned as an answer to the rule:—*Held*: under these circumstances, the rule for a *certiorari* must be made absolute.—*Ex p.* AUSTIN (1880), 50 L. J. M. C. 8; 44 L. T. 102; 45 J. P. 302, D. C.

*Annotation*:—*Mentd.* *Ex p.* Kenyon (1881), 45 J. P. 303.

662. ———.]—Appct. was charged before justices with selling milk on two different dates above the price fixed by the Food Controller. The justices intended to convict for one offence only, in order to avoid the objection of duplicity of charges in the information. The conviction was drawn up by mistake for the two offences. A rule *nisi* for a writ of *certiorari* to quash the conviction having been obtained:—*Held*: the rule should be made absolute, but on the return to the writ the ct. would have power, under Quarter Sessions Act, 1849 (c. 45), s. 7, to amend the mistake in drawing up the conviction.—R. v. WOOD, *Ex p.* FARWELL (1918), 87 L. J. K. B. 913; 119 L. T. 48; 82 J. P. 268; 62 Sol. Jo. 623; 26 Cox, C. C. 270, D. C.

663. ——— After party convicted discharged—Insufficient warrant of commitment.]—CHANEY v. PAYNE, No. 651, *ante*.

664. ——— On rule for habeas corpus.]—*Ex p.* JONES (1858), 31 L. T. O. S. 215; 22 J. P. Jo. 417.

665. ——— By quarter sessions on appeal.]—W. was convicted by justices for sending a diseased cow by railway, & fined £20, & the clerk in drawing up conviction inserted a clause that in default of conviction W. would be imprisoned for three months. W. appealed to quarter sessions, the grounds of appeal being that the justices had no power to order imprisonment for more than two months, & resps. asked the quarter sessions to amend the conviction, & insert two months, which was done:—*Held*: the quarter sessions under Quarter Sessions Act, 1849 (c. 45), s. 7, if satisfied that the word three had been inserted by

quashed on appeal or *certiorari*, or its invalidity been otherwise ascertained by the decision of a superior ct.—R. v. DAVEY, *Ex p.* JONES (1887), 13 V. L. R. 55.—AUS.

k. ——— Where bad for duplicity.]—*Ex p.* WILLIAMS (1909), 9 S. R. N. S. W. 140; 26 N. S. W. W. N. 9.—AUS.

l. ——— Discretion exclusive to the justice.]—*Semble*: the ct. will not amend a conviction when by so doing it has to exercise a discretion confided to the justice.—R. v. CHAREST, *Ex p.* DAIGLE (1906), 37 N. B. R. 492; 2 E. L. R. 12.—CAN.

m. ——— By permission of trial judge.]—In an appeal from a conviction for selling liquor, the judge who tried the cause has power to allow the



mistake, had power to direct the amendment.—*R. v. WALKER* (1881), 45 J. P. 683, D. C.

*Annotation*:—*Mentd. R. v. Slade, Ex p. Saunders, R. v. London JJ., Ex p. Saunders* (1895), 64 L. J. M. C. 273.

**666.** ———.]—On a conviction for wilfully & knowingly acting contrary to an order to close certain premises as unfit for human habitation the magistrate inflicted a fine of a shilling a day for the whole period during which the offence had continued, 193 days:—*Held*: the conviction could not be amended under Quarter Sessions Act, 1849 (c. 45), s. 7, since the mistake was not one made in drawing up the conviction, but a mistake of law.—*R. v. SLADE, Ex p. SAUNDERS*, [1895] 2 Q. B. 247; 64 L. J. M. C. 232; 73 L. T. 343; 59 J. P. 471; 39 Sol. Jo. 625; 18 Cox, C. C. 176; 15 R. 499, D. C.; *previous proceedings*, 64 L. J. M. C. 273, D. C.

*Annotations*:—*Reid. R. v. Struve, etc. Glamorganshire JJ.* (1895), 59 J. P. 584; *Chepstow Electric Light & Power Co. v. Chepstow Gas & Coke Consumers' Co.*, [1905] 1 K. B. 198.

**667.** ——— *Striking out invalid part.*]—*CHEPSTOW ELECTRIC LIGHT & POWER CO. v. CHEPSTOW GAS & COKE CONSUMERS' CO.*, No. 631, *ante*.

**668.** ——— *Direction to justices to affix seal.*]—Where justices omitted to affix their seals to a conviction, as required by Summary Jurisdiction Act, 1848 (c. 43), s. 14, & an application was made for a writ of *certiorari* to bring up & quash the conviction upon the ground that it was bad in form:—*Held*: the ct. had power under Quarter Sessions Act, 1849 (c. 45), s. 7, to direct the justices to affix their seals to the conviction, notwithstanding that it had been filed with the clerk of the peace.—*R. v. TABRUM, Ex p. DASH* (1907), 97 L. T. 551; 71 J. P. 325; 23 T. L. R. 474; 21 Cox, C. C. 529, D. C.

*Annotation*:—*Mentd. R. v. Hammick, Ex p. Murdock* (1918), 87 L. J. K. B. 846.

conviction to be amended.—*TAYLOR v. MARSHALL* (1856), 2 Thom. 10.—CAN.

**n.** ——— *After adjudication.*]—Justices have no power after their adjudication to add to or vary their judgment.—*Re WHITE, R. v. PERLEY & HARTT* (1885), 25 N. B. R. 43.—CAN.

**o.** ——— *Before return of certiorari.*]—A magistrate may amend his conviction at any time before the return of the *certiorari*.—*R. v. MCCARTHY* (1886), 11 O. R. 657.—CAN.

**p.** ——— *For defect in form.*]—*Ex p. LAUGHEY* (1889), 28 N. B. R. 656.—CAN.

**q.** ——— *To bring sentence into conformity with statute.*]—*R. v. POWER* (1908), 6 E. L. R. 412; 43 N. S. R. 235; 14 Can. Crim. Cas. 264.—CAN.

**r.** ——— *Where bad for want of jurisdiction.*]—In the case of an offence over which a magistrate has not jurisdiction on summary conviction the conviction must be quashed & cannot be amended.—*R. v. DUGAS, Ex p. AYLWARD* (1915), 43 N. B. R. 443.—CAN.

**669 i.** *Reversal—Change of opinion on the bench—Conviction not drawn up.*]—Until a conviction is drawn up formally a justice has a *locus poenitentiae* & may change his opinion of the case.—*Re BISHOP* (1909), 9 Nfld. L. R. 410.—NFLD.

#### PART VIII. SECT. 5, SUB-SECT. 1.—F.

**670 i.** *Duty of justices—To make return to quarter sessions.*]—*SPILLANE v. WILTON* (1853), 4 C. P. 236.—CAN.

**670 ii.** ———.]—If on account of the illegality of the conviction the fine has not been levied a return should be made explaining the circumstances.—*O'REILLY v. ALLAN* (1854), 11 U. C. R. 411.—CAN.

**670 iii.** ———.]—The fact of debt.

having appealed, & the fine not having been collected, forms no excuse for not returning a conviction.—*KELLY v. COWAN* (1859), 18 U. C. R. 104.—CAN.

**670 iv.** ———.]—*KEENAHAN v. EGLESON* (1863), 22 U. C. R. 626.—CAN.

**670 v.** ———.]—*OLLARD v. OWENS* (1870), 29 U. C. R. 515.—CAN.

**670 vi.** ———.]—*LORD v. TURNER* (1870), 2 Han. 13.—CAN.

**t.** ——— *Whether justices jointly liable for default.*]—Justices before whom a conviction is made, are not jointly liable for not returning the same.—*METCALF v. REEVE* (1852), 9 U. C. R. 263.—CAN.

**a.** ——— *Penalty for default.*]—A conviction of two or more justices of the peace being appealed from did not relieve them from the penalty attached to the duty of making immediate return.—*MURPHY v. HARVEY* (1860), 9 C. P. 528.—CAN.

**b.** ———.]—The neglect of a justice to return a conviction made by him as prescribed, renders him liable to a separate penalty for each conviction not returned, & not merely to one penalty for not making a general return of such convictions.—*DARRAGH v. PATERSON* (1875), 25 C. P. 529.—CAN.

**c.** ——— *Police magistrate specially exempt.*]—A police magistrate, acting *ex officio* as justice need not make a return as therein required to the clerk of the peace. He is exempt from this duty whether he is acting as police magistrate or *ex officio* as justice.—*HUNT v. SHAVER* (1895), 22 A. R. 202.—CAN.

**d.** ——— *Default no ground for quashing conviction.*]—*R. v. FEDDER*, [1920] 48 O. L. R. 341; 35 Can. Crim.

**669.** *Reversal—Change of opinion on the bench—Conviction not drawn up.*]—A landlord, who on letting a farm verbally has reserved the game to himself, has thereby a sufficient authority to give leave to a person to kill game on such farm to prevent any such person from being a trespasser thereon in pursuit of game within the meaning of Game Act, 1831 (c. 32), s. 30.

After a conviction by two justices under such sect., & before any formal conviction had been drawn up, one of such justices changed his mind, & together with a third justice who had not heard the case, but without the concurrence of the other justice who had convicted, reversed such conviction:—*Held*: such reversal was irregular, but as no conviction had been drawn up there was no good conviction existing, & the whole proceeding was a miscarriage.—*JONES v. WILLIAMS* (1877), 46 L. J. M. C. 270; 36 L. T. 559; 41 J. P. 614.

*Annotation*:—*Consd. Bagg v. Colquhoun*, [1904] 1 K. B. 554.

#### F. Return of Conviction.

*See Summary Jurisdiction Act, 1848 (c. 43), s. 14; Summary Jurisdiction Act, 1879 (c. 49), s. 27; Summary Jurisdiction Rules 1915, r. 53.*

**670.** *Duty of justices—To make return to quarter sessions.*]—Upon a *certiorari* to remove a conviction by a justice of peace on 16 Geo. 3, c. 30, a return that the record is returned to the sessions, & that a copy is annexed to the writ, is sufficient. Justices ought in all cases to return convictions to the sessions, whether an appeal lies or not.—*R. v. EATON* (1787), 2 Term Rep. 285; 100 E. R. 155.

**671.** ———.]—(1) Justices of the peace are bound by Summary Jurisdiction Act, 1848

Cas. 108.—CAN.

**e.** ——— *To make return to county court.*]—In New Brunswick convictions should be returned to the county ct. of the county in which they are made.—*WARD v. REED* (1882), 22 N. B. R. 279.—CAN.

**f.** *Power to return second conviction—Where first defective.*]—*Semble*: after a first conviction has been returned to quarter sessions & filed, the justice, if he thinks it defective, may file a second.—*WILSON v. GRAYBIEL* (1847), 5 U. C. R. 227.—CAN.

**g.** *Sufficiency of return—Deletion of entry with explanation.*]—*BAIL v. FRASER* (1859), 18 U. C. R. 100.—CAN.

**h.** *Convictions returnable.*]—An order for the payment of money is not a conviction which it is necessary to return to the sessions.—*RANNEY v. JONES* (1862), 21 U. C. R. 370.—CAN.

**k.** ——— *Orders for payment to inland revenue—Because not mere orders for payment of money.*]—*MAY v. MIDDLETON* (1878), 3 A. R. 207.—CAN.

**l.** *Meaning of immediate return.*]—The word "immediate" should be construed to mean within a reasonable time.—*MCLELLAN v. BROWN* (1862), 12 C. P. 542.—CAN.

**m.** ———.]—Where the magistrates withheld the return until fourteen days after the conviction expecting to receive the fine every day, & intending to return it with the conviction, the jury having been directed to find whether this was not "reasonably immediate" returned a verdict for the magistrates, & this was upheld.—*LONGEWAY v. AVISON* (1885), 8 O. R. 357.—CAN.

**aa.** *Time for return.*]—*CORSANT v. TAYLOR* (1874), 23 C. P. 607.—CAN.

— *Must be immediate.*]—



**Sect. 5.—Judgment: Sub-sect. 1, F. & G.; sub-sect. 2, A. & B.; sub-sect. 3, A. (a).]**

(c. 43), s. 14, to lodge with the clerk of the peace all summary convictions which take place before them, in order that the same may be filed among the records of the quarter sessions.—(2) A *mandamus* does not lie to their clerk for this purpose, even though he may have received the fees for drawing up such convictions allowed under Summary Jurisdiction Act, 1848 (c. 43), s. 30.—*Ex p. HAYWARD* (1863), 3 B. & S. 546; 32 L. J. M. C. 89; 27 J. P. 102; 9 Jur. N. S. 820; 122 E. R. 206; *sub nom. Re PRALL, Ex p. HAYWARD*, 11 W. R. 259.

**672. ———.]—Summary convictions before justices should, under the provisions of Summary Jurisdiction Act, 1848 (c. 43), s. 14, be filed, by the clerk to the justices, amongst the records of the ct. of general quarter sessions.—*Ex p. ROCHESTER CLERK OF THE PEACE* (1863), 7 L. T. 622.**

#### *G. Right of Defendant to Copy.*

**673. Defendant entitled to.]—The justice ought to have given deft. a copy of the conviction; for it was a record & deft. was entitled to it (YATES, J.).—*R. v. MIDLAM* (1765), 3 Burr. 1720; 97 E. R. 1064.**

**674. ——— Mandamus to justices refusing copy.]—*Ex p. HUNTLEY* (1869), 33 J. P. Jo. 775.**

### SUB-SECT. 2.—ORDERS OF JUSTICES.

#### *A. In General.*

See Summary Jurisdiction Act, 1848 (c. 43), s. 14; Summary Jurisdiction Rules, 1915, r. 53.

**675. Signature of justices—Necessity for.]—*R. v. FLINTSHIRE JJ.*, No. 1522, *post*.**

**676. ———.]—It is not necessary that an order of justices should be sealed with wax. An impression made in ink with a wooden block, in the usual place of a seal, is sufficient, when the document purports to be given under the hands & seals of the justices, & is in fact signed & delivered by them.—*R. v. ST. PAUL, COVENT GARDEN (INHABITANTS)* (1845), 7 Q. B. 232; 1 New Mag. Cas. 292; 1 New Sess. Cas. 617; 14 L. J. M. C. 109; 9 J. P. 441; 9 Jur. 442; 115 E. R. 476.**

*Annotations:—Reid. R. v. St. Anne, Westminster* (1846), 7 Q. B. 241; *Headington Grdns. v. Ipswich Grdns.* (1890), 25 Q. B. D. 143. *Mentd. In the Goods of Morley* (1864), 3 New Rep. 691.

**677. Seal—Sufficiency of.]—*R. v. ST. PAUL, COVENT GARDEN (INHABITANTS)*, No. 676, *ante*.**

**678. Must show jurisdiction.]—*R. v. HULCOTT (INHABITANTS)* (1796), 6 Term Rep. 583; 101 E. R. 716.**

*Annotations:—Folld. Lowther v. Radnor* (1806), 8 East, 113. *Apld. R. v. All Saints, Southampton* (1828), 7

*ATWOOD v. ROSSER* (1880), 30 C. P. 628.—CAN.

**p. ——— During hearing of appeal.]—A conviction may be returned & proved at any time during the hearing of an appeal therefrom to the general sessions, or, in the discretion of the chairman, even during an adjournment for judgment.—*Re RYER & PLOWS* (1881), 46 U. C. R. 206.—CAN.**

**g. ——— Before hearing of appeal.]—*HARWOOD v. WILLIAMSON* (No. 1) (1908), 1 Sask. L. R. 58.—CAN.**

#### PART VIII. SECT. 5, SUB-SECT. 2.—A.

**678 i. Must show jurisdiction.]—Without an information & warrant thereon showing liquors kept for sale**

within the magistrate's jurisdiction he cannot make an order for destruction.—*R. v. HURLBERT* (1894), 27 N. S. R. 62.—CAN.

**678 ii. ———.]—*R. (M'SWIGGAN) v. COUNTY LONDONDERRY JJ.*, [1905] 2 I. R. 318.—IR.**

**r. Order for delivery of property.]—An order for the delivery of property illegally detained, & an order for the payment of the value & costs on disobedience of such first order, must be made by the same justice.—*R. v. CALL, Ex p. BARBER* (1877), 3 V. L. R. (L.) 346.—AUS.**

**t. Second order—For payment of less sum than first.]—An order of justices for payment of a sum of money is no bar to**

*B. & C. 785. Reid. Ex p. Morgan* (1840), *Mentd. R. v. Downshire* (1836), 4 Ad. & El. 698; *Brook v. Jenney* (1841), 2 Q. B. 265; *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610.

**679. ———.]—We cannot intend anything to give the justices jurisdiction beyond what appears in the order (LORD ELLENBOROUGH, C.J.).—*LOWTHER v. RADNOR (EARL)* (1806), 8 East, 113; 103 E. R. 287.**

*Annotations:—Distd. Branwell v. Penneck* (1827), 7 B. & C. 536. *Reid. Pike v. Carter* (1825), 3 Bing. 78; *Kitchen v. Shaw* (1837), 6 Ad. & El. 729; *Calder v. Halket* (1840), 2 Moo. Ind. App. 293; *Taylor v. Clemson* (1842), 2 Q. B. 978; *R. v. Bidwell* (1847), 2 Car. & Kir. 564; *Houlden v. Smith* (1850), 14 Q. B. 841. *Mentd. Lancaster v. Greaves* (1829), 9 B. & C. 628; *Wiles v. Cooper* (1835), 3 Ad. & El. 524; *Ex p. Ormerod* (1844), 13 L. J. M. C. 73; *Riley v. Warden* (1848), 2 Exch. 59; *Ex p. Gordon* (1855), 25 L. J. M. C. 12; *R. v. Gordon* (1855), 19 J. P. 390; *Pease v. Chaytor* (1863), 3 B. & S. 620; *Re Disney, Ex p. Allsop* (1875), 32 L. T. 433.

**680. ———.]—*Re FULLER*, No. 697, *post*.**

**681. Must contain adjudication.]—*R. v. LUFFINGTON (INHABITANTS)*, No. 1133, *post*.**

**682. Justices may supersede order—Improvidently made.]—Justices may supersede their own order when improvidently made. On Aug. 20 two justices removed a pauper from the parish of A. to the parish of B. On Sept. 5 the churchwardens of B. gave notice of appeal to the sessions, to be holden on Oct. 17; on Oct. 10 the justices made an order, superseding their former order of removal, upon doubts of its validity, which *supersedeas* was served on the parish officers of B., who treated it as a nullity, & went to the sessions, where the justices refused to hear the appeal; & now this ct. refused to grant a *mandamus* to the sessions, to enter, hear, & determine it.—*R. v. NORFOLK JJ.* (1822), 5 B. & Ald. 484; 1 Dow. & Ry. K. B. 69; 1 Dow & Ry. M. C. 17; 108 E. R. 1268.**

*Annotations:—Expld. Barons v. Luscombe* (1835), 3 Ad. & El. 589. *Distd. R. v. Middlesex JJ.* (1840), 11 Ad. & El. 809. *Reid. R. v. Altemun* (1841), 10 Ad. & El. 699; *R. v. West Riding of Yorkshire JJ.* (1842), 2 Q. B. 705.

**683. Two orders made in error—Adoption of correct one.]—(1) Justices signed two orders intended to be duplicates but by mistake the order served upon the father ordered the mother instead of the father to pay one shilling & sixpence a week. Afterwards a correct copy of the order was drawn up & served upon the father:—*Held*: as there was only one order made, the service of an incorrect copy of it could not vitiate the order & a correct copy might afterwards be drawn up, served & enforced.**

**(2) A justice is liable to trespass, if he commit a person for disobedience to an order which turns out to be invalid.—*WILKINS v. HEMSWORTH* (1838), 7 Ad. & El. 807; 3 Nev. & P. K. B. 55; 1 Will. Woll. & H. 10; 7 L. J. M. C. 28; 2 Jur. 94, 301; 112 E. R. 674.**

*Annotations:—As to (1) Consd. R. v. Lanyon* (1872), 27 L. T. 355. *As to (2) Reid. Newbould v. Coltman* (1850), 16 L. T. O. S. 488. *Generally, Mentd. Foster v. Dodd* (1867), L. R. 3 Q. B. 67.

their making a second order for part of that amount, the whole amount mentioned in the first order being unpaid, & that order not having been acted on.—*Re M'NEE, Ex p. ALEXANDRA SHIRE (PRESIDENT)* (1879), 5 V. L. R. (L.) 134.—AUS.

**a. Service—Necessity for.]—An order of justices, like a judgment of the ct., is binding without service upon a deft. in whose presence it has been pronounced.—*R. v. PANTON* (1885), 11 V. L. R. 503.—AUS.**

**b. Validity of order—Where decision on case on same matter reserved.]—An order of justices in petty sessions convicting a deft. is not bad by reason of the fact that at the time the justices heard**

**684. Divisibility of order—Part valid & part invalid.]—***R. v. Fox* (1753), 6 Term Rep. 148, n.; Say. 309; 101 E. R. 482.

**Annotations:—***Reid. R. v. Price* (1795), 6 Term Rep. 147; *R. v. Martyr* (1810), 13 East, 55.

**685. ———.]—**An order of justices made under 5 Geo. 4, c. 70, stated “that the justices, after due examination had on oath, having adjudged the legal place of settlement of a pauper lunatic, confined in a lunatic asylum, to be in M., did thereby require the churchwardens & overseers of M. to pay to the treasurer of the lunatic asylum £10 16s. due for twenty-four weeks’ maintenance, etc., being at the rate of 9s. per week, & to pay the same weekly sum during so long a time as the pauper should remain therein.” The parish of M. appealed against this order, & in their notice of appeal described it as an order of settlement & maintenance:—*Held*: (1) as the parish of M. had treated this as the order of settlement, it must be presumed that there was no other order, & therefore, the words, “having adjudged,” must be understood as words of present adjudication, & the order was good in this respect; (2) so much of the order as was retrospective was bad, but it was good for the residue.—*R. v. MAULDEN (INHABITANTS)* (1828), 8 B. & C. 78; 2 Man. & Ry. K. B. 146; 1 Man. & Ry. M. C. 380; 6 L. J. O S M. C. 76; 108 E. R. 972.

**Annotations:—***As to* (1) *Folld. R. v. St. Nicholas, Leicester* (1835), 3 Ad. & El. 79. *As to* (2) *Folld. R. v. St. Nicholas, Leicester* (1835), 3 Ad. & El. 79. *Apld. R. v. Green* (1851), 20 L. J. M. C. 168. *Consd. Bradford Union v. Wilts Clerk of the Peace* (1868), L. R. 3 Q. B. 604.

**686. S. P. R. v. ST. NICHOLAS, LEICESTER (INHABITANTS)** (1835), 3 Ad. & El. 79; 4 Nev. & M. K. B. 624; 3 Nev. & M. M. C. 60; 4 L. J. M. C. 97; 111 E. R. 343.

**Annotation:—***Apld. R. v. Green* (1851), 20 L. J. M. C. 168.

**687. ———.]—***LISTER v. HEBDEN LOCAL BOARD* (1878), 42 J. P. 119, D. C.

**688. Substitution of valid for invalid order—Not after filing.]—**Although, in general, a magistrate may draw up a conviction in proper form, after he has adjudicated; yet, where he makes an order, & delivers it out, he cannot afterwards draw up another in a more formal shape, & treat that as the order made by him on the occasion upon which he delivered out the first order.—*R. v. CHESHIRE JJ.* (1833), 5 B. & Ad. 439; 2 Nev. & M. M. C. 25; 2 Nev. & M. K. B. 827; 2 L. J. M. C. 95; 110 E. R. 852.

#### B. Particular Orders.

**Order for destruction of dogs.]—***See* ANIMALS, Vol. II., p. 247, Nos. 310, 311.

**Burial expenses—Person found drowned.]—***See* BURIAL, Vol. VII., p. 559, No. 349.

**Order for destruction of indecent publication.]—***See* CRIMINAL LAW, Vol. XV., p. 751, No. 8095.

**Distress—Penalty for fraudulent removal to avoid distress.]—***See* DISTRESS, Vol. XVIII., p. 365, Nos. 1035–1040.

the evidence they had reserved their decision in another case involving the same subject matter.—*FORBES v. NEWBOULD* (1898), 24 V. L. R. 176.—**AUS.**

**c. Order covering more than one complaint.]—**An order is bad if covering more than one matter of complaint.—*LOHDE v. LOHDE, Ex p. LOHDE*, [1916] St. R. Qd. 117.—**AUS.**

**d. Order for discharge of debtor.]—***JONES v. FLETCHER* (1860), 9 N. B. R. (4 All.) 550.—**CAN.**

**e. Effect of.]—**A magistrate’s order under 51 Vict. c. 23, s. 2 (O.), is not equivalent to the final judgment of a ct.—*Re SIMS v. KELLY* (1890), 20 O. R.

291.—**CAN.**

**f. Order for particulars.]—**On a preliminary hearing, a magistrate has power, on the application of the accused, to make an order for particulars.—*R. v. MYERS (Man.)*, [1925] 2 W. W. R. 445.—**CAN.**

#### PART VIII. SECT. 5, SUB-SECT. 3.—A. (a).

**689 i. Form—Statutory form.]—**When a party was committed by virtue of a warrant founded on 3 Geo. III., c. 29:—*Held*: inasmuch as the warrant followed the directions of the statute, it could not be objected to in form.—

— **Payment of friendly societies.]—***See* FRIENDLY SOCIETIES, Vol. XXV., p. 327, No. 283.  
**Public health.]—***See* PUBLIC HEALTH.  
**Other orders.]—***See* Titles *passim*.

#### SUB-SECT. 3.—PUNISHMENT:

##### A. Commitment and Imprisonment.

##### (a) Form and Contents of Warrant.

**689. Form—Statutory form.]—**Where an Act of Parliament gives the form of conviction for any offence prohibited by the Act, that form must be followed: & a warrant granted on a conviction drawn up in any other form is illegal, & the justice & those acting under it are trespassers.—*Goss v. JACKSON* (1800), 3 Esp. 198, N. P.

**690. ———.]—**Warrants of commitment, convictions, & other instruments made by magistrates, are sufficient, if they correspond with the forms given in Summary Jurisdiction Act, 1848 (c. 43), sched.

Criminal Procedure Act, 1853 (c. 30), empowers two justices of the peace to punish, on summary conviction for assaults committed on females, or children under fourteen years, any person charged before them sitting at a place where the petty sessions are usually held:—*Held*: a warrant of commitment for such offence, in the form given by Summary Jurisdiction Act, 1848 (c. 43), was good, although it did not state that the justices before whom the party was charged were sitting at a place where petty sessions are usually held.—*Re ALLISON* (1854), 10 Exch. 561; 18 J. P. 746; 3 W. R. 62; 156 E. R. 561; *sub nom. Ex p. ALLISON*, 3 C. L. R. 319; 24 L. J. M. C. 73.

**691. Contents—Description of justices.]—**A justice need not mention in a warrant of commitment that he is a justice. But it must appear that he is one on the return to an *habeas corpus*. Every act a justice does which he could not properly do otherwise than as justice shall be presumed to have been done by him as justice.—*ELDERTON’S CASE* (1703), 2 Ld. Raym. 978; 6 Mod. Rep. 73; Holt, K. B. 590; 92 E. R. 152.

**Annotations:—***Reid. R. v. Talbot* (1730), 11 Mod. Rep. 415; *R. v. Goodall* (1754), Say. 129. **Mentd.** Privilege of Place (1705), 2 Salk. 546; *Winter v. Miles* (1809), 10 East, 578; *A.-G. v. Dakin* (1870), L. R. 4 H. L. 338.

**692. ——— Commitment by Lord Mayor.]—**A commitment by a Lord Mayor of London, on the view of a forcible detainer, subscribed A. B. mayor, without adding & justice of the peace, is good; for by 8 Hen. 6, c. 26, all mayors are made justices of peace.—*LAYTON’S CASE* (1705), 11 Mod. Rep. 46; 88 E. R. 874; *sub nom. R. v. LAYTON*, 1 Salk. 353.

**Annotations:—***Consd. R. v. Wilson* (1835), 3 Ad. & El. 817. *Reid. R. v. Elwell* (1727), 2 Ld. Raym. 1514; *R. v. Goodhall* (1754), Dunning, 25; *R. v. Oakley* (1832), 4 B. & Ad. 307.

**693. ———.]—**Warrants of commitment are held valid, although the authority under

*R. v. WALL* (1832), Alc. & N. 178.—**IR.**

**689 ii. ———.]—***MOFFAT v. BARNARD* (1865), 24 U. C. R. 498.—**CAN.**

**g. ——— Whether writing necessary.]—**A warrant may be partly written & partly printed.—*R. v. HOLDEN* (1886) 3 Man. L. R. 579.—**CAN.**

**h. ——— Seal.]—**A warrant of commitment upon a conviction under Summary Convictions Act must be authenticated by the seal of the magistrate.—*R. v. HUGER* (1923), 3 B. C. R. 157.—**CAN.**



**Sect. 5.—Judgment: Sub-sect. 3, A. (a) & (b) i. & ii.]**

which they were granted is not therein set forth.—*R. v. GOODALL* (1754), 1 Keny. 122; *Dunning*, 25; *Say*, 129; 96 E. R. 938.

**694. — Must recite conviction.]—**A commitment on Justices Commitment Act, 1743 (c. 5), must be a commitment in execution, & is therefore bad, unless it be preceded by a conviction.

If this were merely a commitment for safe custody I should have thought the commitment good for that purpose; but if it be considered as a commitment in execution it cannot be supported without an adjudication (*ASHHURST, J.*).—*R. v. RHODES* (1791), 4 Term Rep. 220; 100 E. R. 984.

**Annotations:—***Folld. R. v. Cooper* (1796), 6 Term Rep. 509. *Refd. R. v. Staffordshire JJ.* (1810), 12 East, 572; *Lindsay v. Leigh* (1848), 17 L. J. M. C. 50.

**695. — — —.]—**A commitment in execution by a magistrate must state that the party has been convicted: setting forth that he was charged on oath with the offence is insufficient.—*R. v. COOPER* (1796), 6 Term Rep. 509; 101 E. R. 674.

**696. — — — Conviction must be valid.]—**A warrant of commitment reciting a conviction must show a good conviction. It should show on the face of it that the witnesses for the prosecution were *viva voce* examined on oath in presence of prisoner as well as on the making the complaint or information.—*R. v. COTESBY* (1844), 3 L. T. O. S. 74.

**697. — — — Must show jurisdiction.]—**No rule is more inflexible, than that, whether in a commitment, or a conviction, or order, jurisdiction must be made to appear (*COLERIDGE, J.*).—*Re FULLER* (1844), 1 New Sess. Cas. 284; *sub nom. Ex p. FULLER*, 13 L. J. M. C. 141; 3 L. T. O. S. 207; *sub nom. R. v. FULLER*, 9 J. P. 104; 8 Jur. 604.

**698. — — — Place of adjudication—Petty sessions.]—***Re ALLISON*, No. 690, *ante*.

**699. — — — Term of imprisonment.]—**A commitment in execution upon a penal statute ought to say for how long.—*R. v. GREEN* (1714), *Fortes. Rep.* 274; *Gilb.* 231; 92 E. R. 850.

**700. — — — Nature of imprisonment—With or without hard labour.]—**Where by a statute giving

justices a power to commit summarily they are empowered to commit the offender to prison for a certain period, with or without hard labour, & in their warrant of commitment nothing is said about hard labour, it is to be taken that they did not mean to give hard labour, & the warrant is not objectionable for omitting to state whether the imprisonment is to be with or without hard labour.—*Ex p. THOMPSON* (1860), 3 L. T. 318; 24 J. P. 805; 6 Jur. N. S. 1247; *subsequent proceedings, sub nom. Re THOMPSON*, 6 H. & N. 193.

**Annotation:—***Mentd. R. v. Elrington* (1861), 1 B. & S. 688.

**(b) Validity of Warrant.**

**i. In General.**

**Proper contents.]—**See Sub-sect. 3, A. (a), *ante*.

**701. Defective conclusion.]—***NORTHAMPTON (MAYOR & CHURCHWARDENS) CASE* (1690), *Carth.* 152; 90 E. R. 693.

**Annotations:—***Apld. Groome v. Forrester* (1816), 5 M. & S. 314. *Consd. Daniell v. Philipps* (1835), 1 Cr. M. & R. 662. *Refd. Yaxley's Case* (1692), *Carth.* 291.

**702. Number of justices committing—In excess of statutory authority.]—***CRESWICK v. ROOKSBY* (1613), 2 Bulst. 47; 80 E. R. 948.

**Annotations:—***Mentd. R. v. London (Bp.)* (1743), 13 East, 420, n.; *King v. Marsack* (1796), 6 Term Rep. 771.

**703. — — — Below statutory authority.]—**If a statute direct a commitment by two justices, a warrant for such purpose by one justice only is bad.—*FRANKLYN'S CASE* (1670), 1 Mod. Rep. 68; 86 E. R. 737.

**704. Want of certainty.]—**A commitment, stating that that deft., with force & arms made an assault on, etc., with intent feloniously to steal, take & carry away, does not charge him with any felony created by 7 Geo. 2, c. 2. Deft. was therefore bailed, the crime stated, being only, a misdemeanour at common law:—*Semble*: it is not necessary, that there should be the same certainty in a commitment as an indictment, & the assault being stated with a felonious intent to take from the person, it was sufficient (*per CUR.*).—*R. v. REMNANT* (1793), 5 Term Rep. 169; 2 Leach, 583; *Nolan*, 205; 101 E. R. 96.

**705. — — — Nature of offence committed.]—**A commitment in execution under Vagrancy Act,

**694 i Contents—Must recite conviction.]—**A warrant may be quashed for misreciting the conviction on which it issued.—*R. v. BROWNE, Ex p. SANDILANDS* (1878), 4 V. L. R. L. 138.—*AUS.*

**694 ii. — — —.]—**Omitting to state the conviction of a deft. in his warrant of commitment will not subject a justice to an action for false imprisonment, provided the actual conviction is proved upon his defence.—*WHELAN v. STEVENS* (1825), *Tay.* 245.—*CAN.*

**694 iii. — — —.]—**A warrant of commitment not showing any conviction is defective.—*Ex p. ETTAMASS* (1891), 2 B. C. R. 232.—*CAN.*

**694 iv. — — —.]—**Deft. was detained in gaol, under a warrant issued on a conviction of a third offence against Liquor License Act, 1888, & amending Acts. The warrant recited the conviction, & the first conviction, & the fact that, on a day mentioned deft. was "again duly convicted":—*Held*: the warrant was good.—*R. v. MCLEAN* (1893), 25 N. S. R. 449.—*CAN.*

**694 v. — — —.]—***R. v. LALONDE* (1895), 2 Terr. L. R. 281.—*CAN.*

**694 vi. — — —.]—**Warrant of commitment by two justices of the peace for contempt of ct. held bad because the warrant did not show that prisoner had been convicted of an

offence.—*Re REIBEN'S COMMITMENT* (Sask.), [1919] 1 W. W. R. 648.—*CAN.*

**696 i. — — — Conviction must be valid.]—***EASTMAN v. REID* (1849), 6 U. C. R. 611.—*CAN.*

**697 i. — — — Must show jurisdiction.]—**A warrant of commitment signed by an Indian agent, under the provisions of the Indian Act, must clearly show that the agent had jurisdiction at the place where the offence was committed.—*R. v. KENNEDY* (1894), 10 Man. L. R. 338.—*CAN.*

**697 ii. — — —.]—**An Indian agent, acting in a magisterial capacity, in committing to gaol a person convicted of selling liquor to an Indian, contrary to the Indian Act, must show on the warrant of commitment, the district in which he is acting as Indian agent.—*R. v. MCHUGH* (1907), 7 W. L. R. 252; 13 B. C. R. 224.—*CAN.*

**697 iii. — — —.]—**The fact must appear that the committing magistrate was clothed with jurisdiction to execute his office where the offence was committed.—*Re McMURRER* (1907), 2 E. L. R. 436.—*CAN.*

**697 iv. — — —.]—***R. v. HONG LEE* (1909), 10 W. L. R. 376; 14 B. C. R. 248.—*CAN.*

**699 v. — — — Term of imprisonment.]—**A warrant of commitment need not state the time from which the term of imprisonment shall begin to run.—

*Ex p. SMITHEMAN* (1904), 35 S. C. R. 189.—*CAN.*

**k. — — — Costs of commitment.]—***DICKSON v. CRABB* (1865), 24 U. C. R. 494.—*CAN.*

**l. — — —.]—***MECHIAM v. HORNE* (1890), 20 O. R. 267.—*CAN.*

**m. — — —.]—**A warrant of commitment is invalid when the amount of the costs of conveying the deft. to gaol is not fixed in the instrument of endorsed thereon.—*R. v. HINES* (1909), 7 E. L. R. 149.—*CAN.*

**PART VIII. SECT. 5, SUB-SECT. 3.—**  
**A. (b) i.**

**702 i. Number of justices committing—In excess of statutory authority.]—***R. v. LECONTE* (1906), 11 O. L. R. 408; 7 O. W. R. 189; 11 Can. Crim. Cas. 41.—*CAN.*

**703 i. — — — Below statutory authority.]—**A commitment under 31 Vict. c. 16, signed by one qualified justice, & by an alderman who has not taken the necessary oath, is invalid to uphold the detention of a prisoner confined under it.—*R. v. BOYLE* (1868), 4 P. R. 256.—*CAN.*

**704 i. Want of certainty.]—***Re MAVER* (1867), 4 W. W. & A'B. 213.—*AUS.*

**705 i. — — — Nature of offence committed.]—***R. v. STOCKDALE* (1863), 1 Q. S. C. R. 110.—*AUS.*

**705 ii. — — —.]—**The warrant of

1824 (c. 83), which charged that the prisoner did about & endeavour to procure charitable contributions, under a false pretence of being able to abstain from food for the space of five years & six months:—*Held*: bad, as not specifying any offence within the Act; & prisoner was entitled to his discharge under a writ of *habeas corpus*.—*R. v. CAVANAGH* (1842), 1 Dowl. N. S. 546; 11 L. J. M. C. 77; *sub nom. Re CAVANAGH*, 6 J. P. 56; 6 Jur. 220.

**706.** ———.]—A commitment for perjury stated that the prisoner in a certain affidavit made & sworn to by him before C., a competent authority by law to administer the same, did falsely, wickedly, & corruptly commit wilful & corrupt perjury:—*Held*: the commitment was bad, for that it contained no statement that the offence was committed in a judicial proceeding.—*R. v. BARTLETT* (1843), 1 Dow. & L. 95; 12 L. J. M. C. 127; 7 J. P. 578; *sub nom. Ex p. BARTLETT*, 1 L. T. O. S. 317; 7 Jur. 649.

**707.** ———.]—A warrant of commitment being defective, the committing magistrate while prisoner was undergoing his sentence substituted another warrant, which, after reciting that G. had entered into a contract in writing to serve one J. as a handicraftsman, & without any lawful excuse had made default in entering into his service, stated that C., prisoner, did unlawfully aid, abet, counsel, & procure G. the offence in manner & form to commit, that is to say, C. did then & there, at the parish aforesaid aid, abet, counsel, & procure G. so as not to enter into & not to commence his service according to the contract on the same day or at any time, but therein wholly to make default, contrary to the form of the statute:—*Held*: (1) the substituted warrant might be used to support the conviction; (2) the substituted warrant stated the offence with sufficient certainty; it was not open to the objection of stating several offences, aiding, abetting, counselling, & procuring being one act; & it was not defective for not stating that the prisoner knew there was no lawful excuse.—*Re SMITH* (1858), 3 H. & N. 227; 157 E. R. 455; *sub nom. Ex p. SMITH*, 27 L. J. M. C. 186; 31 L. T. O. S. 87; 22 J. P. 450; 6 W. R. 440.

*Annotation*:—*As to* (1) *Reid. Ex p. Phipps* (1863), 27 J. P. 503.

**708.** ——— **Date not stated.**]—A warrant of commitment which omits to state the day of the month on which it was issued is bad.—*Re FLETCHER* (1843), 1 Dow. & L. 726; 13 L. J. M. C. 16; 8 J. P. 168; *sub nom. Ex p. FLETCHER*, 2 L. T. O. S. 127, 155; 8 Jur. 146.

*Annotations*:—*N. F. Bowdler's Case* (1848), 12 Q. B. 612. *Reid. R. v. Reynolds & Hodgson* (1844), 13 L. J. M. C. 65; *Fletcher v. Calthrop* (1845), 1 New Sess. Cas. 529; *R. v. Bidwell* (1847), 2 Car. & Kir. 564; *Henderson v. Preston* (1888), 21 Q. B. D. 362.

**709.** ———.]—The order [of commitment] is sufficiently certain if it directs the party to be imprisoned though it bears no date & does not say from what time imprisonment shall commence.—*BOWDLER'S CASE* (1848), 12 Q. B. 612; 116 E. R. 999; *sub nom. Ex p. BOWDLER*, Cox, M. & H.

commitment stated that deft. "did steal a certain waggon," etc., without alleging the absence of colour of right, & without laying in any person the property in the waggon:—*Held*: the warrant contained a sufficiently definite statement of the alleged crime of theft.—*R. v. LEET*, 20 C. L. T. 46.—*CAN.*

**712 i. Variation from conviction.**]—*R. v. LAVIN* (1888), 12 P. R. 642.—*CAN.*

**n. Delay in issuing.**]—*Re CURLEY*

(1887), Cout. 71.—*CAN.*

**o. Release on bail pending appeal**—*Subsequent arrest on new warrant.*]—*R. v. ARSCOTT* (1885), 9 O. R. 541.—*CAN.*

**p. — Subsequent arrest on original warrant.**]—*R. v. DURLIN* (1912), 21 W. L. R. 837; 17 B. C. R. 207.—*CAN.*

**q. Signature of magistrate—Presumption of jurisdiction.**]—*R. v. NOLAN*

160; *sub nom. Re BOWDLER*, 17 L. J. Q. B. 243; 11 L. T. O. S. 289; 12 J. P. 708.

*Annotations*:—*Reid. Braham v. Joyce* (1849), 4 Exch. 487; *Henderson v. Preston* (1888), 21 Q. B. D. 362.

**710. Warrant founded on invalid conviction.**]—*GROOME v. FORRESTER*, No. 607, *ante*.

**711. Date of commencement of imprisonment not stated.**]—*BOWDLER'S CASE*, No. 709, *ante*.

**712. Variation from conviction.**]—*WOOD v. FENWICK*, No. 732, *post*.

**713. Signature before completion—Blanks left as to costs.**]—Defts., justices of the peace, convicted pltf. in a penalty of £2 & costs, or two months' imprisonment. Against this decision, which was given orally, pltf. gave notice of appeal, & immediately left the ct. A conviction & warrant of commitment were afterwards drawn up, in which blanks were left for the amount of costs to be inserted, & so signed by defts. The blanks were afterwards filled up by the magistrates' clerk, & pltf. was arrested on the warrant, when he, for the first time, became aware of the amount of costs:—*Held*: the signing in blank by defts. was a mere irregularity & not an excess of jurisdiction; & pltf. having brought an action for false imprisonment was rightly nonsuited, under Justices Protection Act, 1878 (c. 44), s. 1.—*BOTT v. ACKROYD* (1859), 28 L. J. M. C. 207; 33 L. T. O. S. 89; 23 J. P. 661; 5 Jur. N. S. 1053; 7 W. R. 420.

## ii. Defective Warrant Supported by Good Conviction.

**714. Whether defect cured.**]—If a warrant of commitment does not show an offence over which the magistrate who issued it has jurisdiction, an action lies against him for the commitment, although there might have been a previous regular conviction.—*WICKES v. CLUTTERBUCK* (1825), 2 Bing. 483; 10 Moore, C. P. 63; 3 Dow. & Ry. M. C. 536; 3 L. J. O. S. C. P. 67; 130 E. R. 393.

*Annotations*:—*Consd. R. v. Chaney* (1838), 6 Dowl. 281. *Folld. R. v. King* (1843), 13 L. J. M. C. 43. *Reid. Wilkins v. Wright* (1833), 2 Cr. & M. 191; *Howard v. Gosset* (1845), 10 Q. B. 359; *Attwood v. Jolliffe* (1848), 3 New Sess. Cas. 116.

**715.** ———.]—If a warrant of commitment in execution manifestly defective on the face of it, shows that there has been a conviction, the ct. will not notice the defect, until the conviction is returned into ct.—*R. v. TAYLOR* (1826), 7 Dow. & Ry. K. B. 622; 3 Dow. & Ry. M. C. 491.

*Annotations*:—*Distd. R. v. Chaney* (1838), 6 Dowl. 281. *Consd. Re Timson* (1870), L. R. 5 Exch. 257. *Appld. R. v. Lewes Prison, Ex p. Doyle*, [1917] 2 K. B. 254.

**716.** ———.]—In trespass for false imprisonment against two magistrates, defts. gave in evidence a conviction under 7 & 8 Geo. 4, c. 30, s. 24, of pltf., for unlawfully & maliciously damaging, etc., a quantity of rushes, for which they adjudged pltf. to pay the sum of 10s. as a reasonable compensation, & 8s. 6d. for costs; & in default of immediate payment, pltf. to be imprisoned for one calendar month, unless the said sums should be sooner paid. The warrant of commitment stated the offence to be, that pltf.

(N. S.) (1917), 28 Can. Crim. Cas. 100.—*CAN.*

## PART VIII. SECT. 5, SUB-SECT. 3.—A. (b) ii.

**714 i. Whether defect cured.**]—*Re NEWTON (OTHERWISE NUGENT)* (1846), 7 L. T. O. S. 8.—*IR.*

**714 ii.** ———.]—*R. v. FRASER* (1912), 11 E. L. R. 580; 45 N. S. R. 218; 20 Can. Crim. Cas. 167.—*CAN.*



**Sect. 5.—Judgment: Sub-sect. 3, A. (b) ii. & iii., (c), (d)**

unlawfully trespassed on land in the occupation of D., & cut down & carried away a quantity of rushes, for which offence he was ordered to pay the sum of 10s. penalty, & the gaoler was ordered to detain him for the space of one month, or until he should be delivered by the due order of law:—*Held*: the conviction sufficiently supported the commitment.—*DANIELL v. PHILIPPS* (1835), 1 Cr. M. & R. 662; 3 Nev. & M. M. C. 112; 5 Tyr. 293; 4 L. J. M. C. 67; 149 E. R. 1246.

*Annotations*:—*Consd.* *Barnes v. White* (1845), 1 C. B. 192; *Howard v. Gosset* (1845), 10 Q. B. 359. *Apld.* *Tarry v. Newman* (1846), 15 M. & W. 645. *Refd.* *Re Hammond* (1846), 9 Q. B. 92; *Attwood v. Jolliffe* (1848), 10 L. T. O. S. 392.

**717. — Conviction drawn up after warrant issued.]—***BACKER v. SMITH*, No. 733, *post*.

**718. — No jurisdiction shown.]—**Where a warrant of commitment recited a conviction under 7 & 8 Geo. 4, c. 29, s. 26, alleging that deft. did unlawfully kill & carry away one fallow deer, the property of Her Majesty Queen Victoria, without any averment that the deer was kept in the uninclosed part of a forest-chase or purlieu:—*Held*: as the warrant did not recite a conviction for any offence over which the convicting magistrate had jurisdiction, it was bad, & deft. was entitled to his discharge.—*R. v. KING* (1843), 1 Dow. & L. 721; 13 L. J. M. C. 43; 8 Jur. 271; *sub nom.* *Ex p. KING*, 2 L. T. O. S. 154; 8 J. P. 474.

*Annotations*:—*Refd.* *Re Fletcher* (1843), 8 J. P. 168; *Attwood v. Jolliffe* (1848), 10 L. T. O. S. 392; *Threlkeld v. Smith*, [1901] 2 K. B. 531.

**719. — Presumption of good conviction.]—**By 1 & 2 Geo. 4, c. 118, s. 40, the penalties imposed by the same are directed to be distributed, one half to the receiver therein mentioned, & the other to such persons as the convicting justices shall direct, & it gives no appeal to the sessions. Where a prisoner was committed under a warrant of execution, which recited that he had been convicted, for two months, or until he paid a penalty of £5 for an offence under sect. 33 of the Act, without stating how the penalty was to be distributed & to whom paid; the ct. refused to discharge him out of custody for this objection, holding, that the warrant did not require the same certainty as a conviction, & that they were bound to presume there had been a legal conviction to found the warrant.—*R. v. ROGERS* (1822), 1 Dow. & Ry. K. B. 156; 1 Dow. & Ry. M. C. 59.

*Annotations*:—*Distd.* *R. v. King* (1843), 13 L. J. M. C. 43. *Refd.* *Re Fletcher* (1843), 8 J. P. 168.

**720. — —.]—**(1) A commitment under 6 Geo. 4, c. 125, s. 70 (the Pilot Act), is defective, if it does not allege the offer by a licensed pilot to have been made to deft., or in his presence; stating the offer in the words of the Act is insufficient.

(2) The writ of *certiorari* is taken away by that Act, & therefore, unless the Crown remove the conviction, the ct. will consider the commitment, although defective, as a true recital of the conviction.—*R. v. CHANEY* (1838), 6 Dowl. 281; 1 Will. Woll. & H. 54; 7 L. J. M. C. 65; *sub nom.* *Re CHANEY*, 2 Jur. 80.

*Annotations*:—*As to* (1) *Folld.* *R. v. King* (1843), 13 L. J. M. C. 43. *Refd.* *Chaney v. Payne* (1841), 1 Q. B. 712; *Re Peerless* (1841), 10 L. J. M. C. 67; *Re Cavanah* (1842),

6 Jur. 220; *Re Fletcher* (1843), 8 J. P. 168; *Re Reynolds* (1844), 1 New Sess. Cas. 51; *Charter v. Greame* (1849) 13 Q. B. 216; *Re Timson* (1870), L. R. 5 Exch. 257.

**721. — —.]—**By 9 Geo. 4, c. 69, s. 7, the *certiorari* is taken away & it is also enacted, that no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted & there be a good & valid conviction to sustain the same:—*Held*: where the conviction was bad on the face of it, as appeared by its recital in the warrant of commitment, it lay on the party seeking to support the commitment, by producing the conviction to show that there was a good & valid conviction, to sustain the same.—*Re REYNOLDS* (1844), 1 Dow. & L. 846; 1 New Sess. Cas. 51; 8 J. P. 199; *sub nom.* *R. v. REYNOLDS & HODGSON*, 13 L. J. M. C. 65; *sub nom.* *Ex p. REYNOLDS*, 2 L. T. O. S. 353; 8 Jur. 192.

*Annotation*:—*Refd.* *Re Dunn* (1847), 5 C. B. 215.

**722. — —.]—**The ct. will not intend a good conviction to support a bad commitment.—*R. v. TORDOFF* (1844), 5 Q. B. 933; 1 Dav. & Mer. 693; 8 J. P. 312; 114 E. R. 1500; *sub nom.* *Re TORDOFF*, 1 New Sess. Cas. 171; 13 L. J. M. C. 145; 8 Jur. 772.

*Annotations*:—*Refd.* *Re Gray* (1844), 2 Dow. & L. 539; *Lindsay v. Leigh* (1848), 11 Q. B. 455. *Mentd.* *R. v. Buckinghamshire JJ.* (1845), 9 J. P. 70; *R. v. Wroth* (1845), 1 New Sess. Cas. 494; *Ormerod v. Chadwick* (1847), 16 M. & W. 367; *Re Baker* (1857), 2 H. & N. 219.

**723. — Conviction not before court.]—**Where prisoner is brought up on a writ of *habeas corpus* & the return shows a commitment bad on the face of it, the ct. will not, on the suggestion that the conviction is good, adjourn the case for the purpose of having the conviction brought up & amending the commitment by it.—*Re TIMSON* (1870), L. R. 5 Exch. 257; *sub nom.* *Ex p. TIMSON*, 39 L. J. M. C. 129; 22 L. T. 614; 18 W. R. 840.

*Annotation*:—*Mentd.* *Clark v. R.* (1884), 14 Q. B. D. 92.

iii. *Substitution of Valid for Invalid Warrant.*

**724. Validity of substituted warrant.]—**By 3 & 4 Will. 4, c. 53, s. 90, magistrates are enabled to amend convictions, warrants of commitment, etc., for offences against acts relating to smuggling. If an amendment be made by drawing up a new warrant, & of substituting that for the former, on the return to a *habeas corpus*, it must appear that at the time the new warrant was drawn up, the justices had the former one before them, or that the substituted warrant was substituted by the authority of the same justices who signed & sealed the former one; & it is not sufficient that the second warrant left in lieu of the first, purports upon the face of it to be signed & sealed by the same justices.—*Re ELMY* (1834), 1 Ad. & El. 843; 3 L. J. K. B. 199; 110 E. R. 1430; *sub nom.* *R. v. ELMY*, 3 Nev. & M. K. B. 733; 2 Nev. & M. M. C. 378.

*Annotations*:—*Consd.* *R. v. Chaney* (1838), 6 Dowl. 281; *Re Smith* (1858), 3 H. & N. 227. *Refd.* *Ex p. Phipps* (1863), 27 J. P. 503.

**725. — —.]—**Where an Act of Parliament authorises magistrates to commit, if a good warrant of commitment be shown, the ct. will not inquire into the validity of a previous document under which prisoner was in fact committed; since a conviction, if such were necessary at all, might be at any time drawn up to sustain a commitment valid in form.—*R. v. RICHARDS* (1844), 5 Q. B. 926; Dav. & Mer. 777; 114 E. R. 1497; *sub nom.*

**PART VIII. SECT. 5, SUB-SECT. 3.—**  
A. (b) iii.

**724 i. Validity of substituted warrant.]—**Prisoner had been committed under

a warrant which was defective. Subsequently to the service on the gaoler of a writ of *habeas corpus* he received another warrant of commitment which was regular:—*Held*: the second

warrant of commitment was valid, & sufficient to detain prisoner in custody.—*R. v. HOUSE* (1885), 2 Man. L. R. 58.—*CAN.*



*Re WALKER*, 1 New Sess. Cas. 182; 1 New. Mag. Cas. 14; *sub nom. Re RICHARDS, BIRD, ETC.*, 13 L. J. M. C. 147; 8 Jur. 752; *sub nom. R. v. WALKER*, 8 J. P. 534.

*Annotations*:—*Reid. Ex p. Cross* (1857), 2 H. & N. 354; *Re Terraz & Extradition Acts 1870 & 1873* (1878), 39 L. T. 502. *Mentd. Re Bailey, Re Collier* (1854), 3 E. & B. 607; *Re Baker* (1857), 2 H. & N. 219.

726. —[Where a prisoner has been lodged in gaol under a bad warrant of commitment, even in the nature of a conviction, as, where the commitment is under Vagrancy Act, 1824 (c. 83), s. 4, a good warrant of commitment, subsequently delivered to the gaoler, but before a rule for a *habeas corpus* has been obtained, is a good answer to that rule.

Where a writ of *habeas corpus* was granted to bring up a prisoner convicted under Vagrancy Act, 1824 (c. 83), the commitment stating that he had frequented, etc., a public highway, not stating it to be a place of public resort or adjacent thereto, & the writ proved abortive, & then a new warrant was delivered to the gaoler, & subsequently a rule *nisi* was granted for another writ of *habeas corpus*:—*Held*: the fact of the second warrant, disclosed upon affidavit, as that warrant would have been a good return to the writ, was an answer to the rule, & the rule was accordingly discharged.—*Ex p. Cross* (1857), 2 H. & N. 354; 26 L. J. M. C. 201; 21 J. P. 407; 157 E. R. 147.

*Annotation*:—*Reid. Re Terraz & Extradition Acts 1870 & 1873* (1878), 39 L. T. 502.

727. —[*Re SMITH*, No. 707, *ante*.

728. —[Where a warrant of commitment was not under the seal of the committing justices, & a rule *nisi* for a *habeas corpus* was obtained on that ground:—*Held*: a sufficient answer to the rule that another warrant properly sealed had been substituted after service of the rule.—*Ex p. PHIPPS* (1863), 27 J. P. 503; *sub nom. Re PHIPPS*, 11 W. R. 730.

*Annotation*:—*Reid. Re Terraz & Extradition Acts 1870 & 1873* (1878), 39 L. T. 502.

#### (c) Execution of Warrant.

729. Warrant directed to parish constable—Execution by county police—Stationed in parish.]—A magistrate's warrant of commitment upon a conviction for a penalty, following the form given in Summary Jurisdiction Act, 1848 (c. 43), sched. O. 1, & addressed to the constable of A., can only be executed by the parish constable, & not by a county police-constable stationed at A.—*R. v. SANDERS* (1867), L. R. 1 C. O. R. 75; 36 L. J. M. C. 87; 16 L. T. 331; 15 W. R. 752; 10 Cox, C. C. 445, C. C. R.

*Annotations*:—*Mentd. Codd v. Cabe* (1876), 1 Ex. D. 352; *Betts v. Stevens* (1909), 79 L. J. K. B. 17.

#### (d) Parol Commitment.

730. Parol commitment pending making out warrant—Validity.]—Where a justice is authorised to commit, he may, by parol, order the party to be kept in custody while a warrant is making out.

But, in general, a parol commitment is illegal. Accordingly, where a justice had authority by statute to commit a party by warrant under his hand & seal; & committed him verbally to prison, where he was taken without a written warrant:—*Held*: the justice was liable to an action of trespass; & a warrant, properly dated, drawn up afterwards, was no protection to him against such action.—*HUTCHINSON v. LOWNDES* (1832), 4 B. & Ad. 118; 1 Nev. & M. K. B. 674; 1 Nev. & M. M. C. 476; 2 L. J. M. C. 3; 110 E. R. 400.

*Annotations*:—*Consd. Kemp v. Neville* (1861), 10 C. B. N. S. 523. *Reid. Wiles v. Cooper* (1835), 8 Ad. & El. 524.

#### (e) Imprisonment.

See Summary Jurisdiction Act, 1848 (c. 43), ss. 23, 24, 25; Summary Jurisdiction Act, 1879 (c. 49), ss. 4, 18; Criminal Justice Administration Act, 1914 (c. 58), ss. 10, 12, 13, 16; Criminal Justice Act, 1925 (c. 86), ss. 27, 46; Summary Jurisdiction Rules, 1915, rr. 23, 55, 56.

731. Imprisonment without hearing charge—Breach of the peace.]—*EDWARDS v. FERRIS* (1836), 7 C. & P. 542.

732. Must be warranted by statute.]—Upon a complaint against a servant for absenting himself from his service, made under 4 Geo. 4, c. 34, s. 3, the conviction adjudged that he should be imprisoned in the house of correction, there to remain & be held to hard labour for one month. The commitment required the keeper to receive him into custody, there to remain & be corrected, & held to hard labour for one month, following the words of 20 Geo. 2, c. 19, s. 2:—*Held*: the "correction" therein mentioned must be understood to mean something beyond the hard labour, & therefore the commitment was bad, as varying in this respect from the conviction, & authorising a punishment not warranted by the statute.—*WOOD v. FENWICK* (1842), 10 M. & W. 195; 11 L. J. M. C. 127; 152 E. R. 439.

*Annotations*:—*Mentd. Re Hammond* (1846), 9 Q. B. 92; *Roberts v. Gray*, [1913] 1 K. B. 520.

733. Joint defendants—Imprisonment until payment of all fines & costs—Each defendant assessed severally.]—Three parties being informed against under 7 & 8 Geo. 4, c. 30, they were all convicted & ordered to pay 2*d.* each, that being the amount of injury done, & 3*s.* for costs, or be imprisoned for fourteen days, until the several sums should be paid:—*Held*: a warrant in such terms was bad, for making the imprisonment of each party depend on the payment of the fines & costs imposed on the others as well as on himself.

*Qu.*: whether a defective warrant can be cured by a conviction drawn up after the issue of such warrant.

A bad warrant & a good conviction may be read together as one instrument, & the good conviction will cure the defective warrant.—*BACKER v. SMITH* (1848), 12 L. T. O. S. 477; *sub nom. BARKER v. SMITH*, 12 J. P. 600, N. P.

#### PART VIII. SECT. 5, SUB-SECT. 3.—A. (c).

r. Suspension while appeal pending.]—Execution of a sentence of imprisonment by justices is suspended upon the due completion of the requirements of Justices Act, 1902, upon appeal, & the release of prisoner upon recognisance pending the hearing of the appeal.—*Ex p. GRAY* (1906), 8 W. A. L. R. 193.—AUS.

t. Conviction under Act subsequently disallowed—Warrant executed after disallowance.]—*CLAPP v. LAURASON* (1841), 6 O. S. 319.—CAN.

a. Powers of constable—Warrant apparently valid.]—*R. v. KING* (1889), 18 O. R. 566.—CAN.

b. —.]—*VANTASSEL v. TRASK* (1894), 27 N. S. R. 329.—CAN.

c. To whom directed.]—A warrant of commitment must be directed to a bailiff of the county & to the gaoler of the county in which the proceedings are taken.—*Re HENDRY* (1896), 27 O. R. 297.—CAN.

d. Stay of execution—To permit prisoner to leave jurisdiction.]—*R. v. FITZPATRICK* (1915), 32 W. L. R. 441; 9 W. W. R. 191; 25 D. L. R. 727; 25

Man. L. R. 627.—CAN.

#### PART VIII. SECT. 5, SUB-SECT. 3.—A. (d).

730 i. Parol commitment pending making out warrant—Validity.]—*Re DEVANEY* (1866), 3 W. W. & A'B. 103.—AUS.

730 ii. —.]—*R. v. MORGAN* (1901), 21 C. L. T. 533; 2 O. L. R. 413; *affd.*, 21 C. L. T. 583.—CAN.

e. Parol commitment to wrong gaol.]—*CAMPBELL v. FLEWELLING* (1874), 15 N. B. R. (2 Pug.) 403.—CAN.



**Sect. 5.—Judgment: Sub-sect. 3, A. (e), B. & C.; sub-sect. 4. Sects. 6 & 7: Sub-sect. 1.]**

**734. ———.]—R. v. CRIDLAND, No. 497, ante.**

**735. Imprisonment without option of fine—In first instance.]—Under 40 Geo. 3, c. 89, ss. 18, 19, 20, a party may be subjected to a fine or imprisonment, at the discretion of the convicting magistrate for having unlawful possession of Govt. stores.—R. v. WILLMOTT (1861), 1 B. & S. 27; 4 L. T. 208; 25 J. P. 596; 121 E. R. 625; sub nom. *Ex p. WILLMOTT*, 30 L. J. M. C. 161; 7 Jur. N. S. 1053; 9 W. R. 633.**

**736. Conviction on several offences—Consecutive terms of imprisonment.]—Summary Jurisdiction Act, 1848 (c. 43), s. 23, enacts that when justices shall, upon complaint for any offence punishable upon summary conviction, adjudge deft. to be imprisoned, & such deft. shall then be in prison undergoing imprisonment upon a conviction for any other offence . . . the justices may, if they think fit, award that the imprisonment for such subsequent offence shall commence at the expiration of the imprisonment to which such deft. shall have been previously sentenced:—*Held*: where deft. is summarily convicted at one time of several distinct offences, the justices have power, under the above sect., to award that the imprisonment under one or more of the convictions shall commence at the expiration of the sentences previously pronounced.—R. v. CUTBUSH (1867), L. R. 2 Q. B. 379; 36 L. J. M. C. 70; 10 Cox, C. C. 489; sub nom. *Re PAINE*, 8 B. & S. 319; 15 W. R. 742; sub nom. *R. v. PAINE*, 16 L. T. 282; sub nom. *R. v. MAIDSTONE JJ., Ex p. PAINE*, 31 J. P. 454.**

**Annotations:—Consd. Castro v. R. (1881), 6 App. Cas. 229; R. v. Martin, [1911] 2 K. B. 450.**

**737. ——— Limited to two terms.]—Although, upon the authority of *R. v. Cutbush*, No. 736, ante, justices, before whom a deft. is at one & the same time convicted of several distinct offences, have jurisdiction under Summary Jurisdiction Act, 1848 (c. 43), s. 25, to pass two sentences to run consecutively, they have no jurisdiction to pass more than two consecutive sentences.—R. v. MARTIN, [1911] 2 K. B. 450; 80 L. J. K. B. 876; 105 L. T. 220; 75 J. P. 425; 27 T. L. R. 460; 22 Cox, C. C. 560, D. C.**

**In default of payment of fine.]—See Part XVII., Sect. 2, post.**

**In default of sufficient distress.]—See DISTRESS, Vol. XVIII., pp. 433 et seq.**

#### PART VIII. SECT. 5, SUB-SECT. A. (e).

**735 i. Imprisonment without option of fine—In first instance.]—*Held*: the warrant to imprison being for an absolute time, without any reference to the earlier payment of fine & costs, was illegal & void.—TRIGERSON v. BOARD OF POLICE OF COBOURG (1841), 6 O. S. 405.—CAN.**

**735 ii. ———.]—Under Summary Punishment Act magistrates cannot issue their warrant to imprison absolutely for so many days, but only to imprison for so many days unless the fine & costs be sooner paid.—FERGUSON v. ADAMS (1847), 5 U. C. R. 194.—CAN.**

**1. Imprisonment with hard labour—Not warranted by conviction.]—On a motion to set aside a conviction & warrant of commitment on the ground that the conviction only warranted the imprisonment without hard labour, whereas prisoner had been committed with hard labour:—*Held*: prisoner must be discharged, but on the last ground only.—R. v. YEOMANS (1873), 6 P. R. 66.—CAN.**

**g. ——— In default of distress.]—R. v. MATHEWSON (1889), 1 Terr. L. R. 168.—CAN.**

**h. ———.]—R. v. HAMILTON (1889), 1 Terr. L. R. 172.—CAN.**

**k. ———.]—R. v. FARRAR (1890), 11 C. L. T. 25; 1 Terr. L. R. 306.—CAN.**

**l. ——— Hard labour must be warranted by statute.]—R. v. MARTIN (1852), 4 Ir. Jur. 322.—IR.**

**m. ——— General power to inflict.]—Though no power is given to justices by Vagrant Act Amendment Act, 1869, s. 2, on a summary conviction for using words calculated to provoke a breach of the peace, to inflict hard labour in addition to imprisonment as provided by that sect., yet justices have power to do so by Justices of the Peace Act, 1866, s. 42.—*Re R. v. GANNON, R. v. PRICE* (1880), 2 N. Z. L. R. 62 (S. C.).—N.Z.**

**n. Place of imprisonment.]—*Re BURKE* (1894), 27 N. S. R. 286.—CAN.**

**o. For non-payment of costs—No conviction.]—R. v. MORNINGSTAR (1906), 11 O. L. R. 318; 7 O. W. R. 167.—CAN.**

**B. Fine.**

**See Part XVII., post.**

#### C. Discharge of Summons.

**See Summary Jurisdiction Act, 1848 (c. 43), s. 14; Summary Jurisdiction Act, 1879 (c. 49), s. 16; Probation of Offenders Act, 1907 (c. 17); Criminal Justice Act, 1926 (c. 86).**

**738. Offence trivial—Consideration of absence of fraud.]—In determining whether the act under Summary Jurisdiction Act, 1879 (c. 49), s. 16, justices could take the fact of absence of fraud into their consideration.—R. v. FIELD, ETC., JJ., *Ex p. WHITE* (1895), 64 L. J. M. C. 158; 11 T. L. R. 240, D. C.**

**Annotations.—Mentd. Shortt v. Robinson (1899), 68 L. J. Q. B. 352; Preston v. Rodfern (1912), 107 L. T. 410; Hunt v. Richardson, [1916] 2 K. B. 446.**

**739. ——— Though not first offence.]—The powers of a justice of the peace, under Summary Jurisdiction Act, 1879 (c. 49), s. 16, to dismiss an information for an offence punishable on summary conviction, where in his opinion the charge though proved is in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, is not limited to a first offence, but may be exercised, notwithstanding proof of previous conviction be tendered.—VINTERS v. FREEDMAN (1901), 71 L. J. K. B. 48; 66 J. P. 135; 18 T. L. R. 77; sub nom. VINTERS v. FREEDMAN, 85 L. T. 628; 20 Cox, C. C. 98, D. C.**

**Particular offences.]—See Titles passim.**

**740. Extenuating circumstances—Same offence by other persons.]—Where a person is charged with the offence of causing an obstruction on the footway by placing in front of his shop a stall which projects some distance over the footway, the fact that other shopkeepers in the same street are causing an even greater obstruction by putting stalls in front of their shops is an extenuating circumstance within Probation of Offenders Act, 1907 (c. 17), s. 1 (1), which entitles the justices to dismiss the summons under that sub-sect.—DUNNING v. TRAINER (1909), 101 L. T. 421; 73 J. P. 400; 25 T. L. R. 658; 7 L. G. R. 919; 22 Cox, C. C. 170, D. C.**

#### SUB-SECT. 4.—COSTS.

**See Summary Jurisdiction Act, 1848 (c. 43), ss. 18, 24, 26; Summary Jurisdiction Act, 1879 (c. 49), ss. 8, 35, 47, 49; Criminal Justice Administration Act, 1914 (c. 58), s. 5.**

**p. Two months—Meaning of.]—*Re NEILLY* (1911), 9 E. L. R. 345.—CAN.**

**q. Regulations as to whipping.]—R. v. BOARDMAN (1914), 29 W. L. R. 176; 6 W. W. R. 1304; 18 D. L. R. 6; 23 Can. Crim. Cas. 191.—CAN.**

**r. Prisoner irregularly convicted—Power of court to impose further imprisonment.]—Where a prisoner is serving a sentence under a conviction by a magistrate who tried the case with irregularity, the ct. has power, nevertheless, under Criminal Code, s. 1120, to order his further detention, but only when the interests of justice render such action necessary.—*Ex p. CARROLL* (N. B.) (1918), 41 D. L. R. 196.—CAN.**

#### PART VIII. SECT. 5, SUB-SECT. 4.

**t. Discretion of magistrate—Complaint withdrawn.]—Where complainant claimed an amount in excess of that over which a course of petty sessions has jurisdiction, & the complaint is, upon the ct.'s refusal to hear it upon the ground of want of jurisdiction, withdrawn, deft. is not entitled as of**

**741. Proceedings relating to revenue—Power of court of summary jurisdiction—To give costs for or against crown.]—**By virtue of Summary Jurisdiction Acts, 1848 (c. 43), s. 18, & 1879 (c. 49), s. 53, a ct. of summary jurisdiction has power to give costs for or against the Crown in taken by the Crown under any of the statutes relating to His Majesty's revenue under the control of the Commrs. of Inland Revenue.—**THOMAS v. PRITCHARD**, [1903] 1 K. B. 209; 72 L. J. K. B. 23; 87 L. T. 688; 67 J. P. 71; 51 W. R. 58; 19 T. L. R. 10; 47 Sol. Jo. 32; 20 Cox, C. C. 376, D. C.

*Annotation:—Reid. Re Letters Patent No. 139,207, Re Carbonit Akt.*, [1924] 2 Ch. 53.

**742. — Costs paid to clerk to justices—Recovery from clerk as debt due to Crown.]—**On informations laid by an officer of Inland Revenue under Dog Licences Act, 1867 (c. 5), s. 8, against three defts. respectively for keeping a dog without a licence the justices dismissed the informations & ordered defts. to pay certain sums as costs under Summary Jurisdiction Act, 1879 (c. 49), s. 16. Defts. paid the costs to the clerk to the justices.

On an information filed by the A.-G. claiming from the clerk to the justices as a debt due to the Crown the residue of the sums so received by him after deducting the amount of certain fees authorised to be taken by him by an authorised table of fees & allowances:—*Held*: the Crown was entitled to recover.—**A.-G. v. CLARK**, [1909] 2 K. B. 7; 78 L. J. K. B. 371; 100 L. T. 606; 73 J. P. 243; 25 T. L. R. 318.

**Recovery of costs—By distress or imprisonment in default.]—**See DISTRESS, Vol. XVIII., p. 436, Nos. 1721–1729.

right to costs.—**KITCHEN & SONS v. MILLER** (1896), 22 V. L. R. 265.—**AUS.**

**a. — As to scale of costs.]—**In cases where the proceedings ought to be summary, pltf. will only be entitled to summary costs.—**O'CONNOR v. NEW BRUNSWICK & NOVA SCOTIA LAND CO.** (1841), 3 N. B. R. (1 Kerr) 276.—**CAN.**

**b. — —.]—***Ex p.* **RAYWORTH** (1896), 34 N. B. R. 74.—**CAN.**

**c. — —.]—**A magistrate has a discretion to award lower costs than those prescribed in the rules, but he cannot award higher costs, & if he does, prohibition will go in respect of the excess.—**REID v. PEARCE & STANFORD** (1907), 26 N. Z. L. R. 1025.—**N.Z.**

**d. — As to costs of conveying to gaol.]—****R. v. GRANT** (1889), 18 O. R. 169.—**CAN.**

**e. — —.]—****R. v. GOOD** (1889), 17 O. R. 725.—**CAN.**

**f. — —.]—****R. v. ROWLIN** (1890), 19 O. R. 199.—**CAN.**

**g. — —.]—****R. v. McDONALD** (1893), 26 N. S. R. 94.—**CAN.**

**h. — —.]—***Ex p.* **ROSS** (1878), 2 P. & B. 337.—**CAN.**

**k. — —.]—**It is not an excess of jurisdiction in a conviction under C. T. Act to award costs other than those provided for by 52 Vict. c. 45, s. 2.—*Ex p.* **HOWARD** (1893), 32 N. B. R. 237.—**CAN.**

**l. Jurisdiction to award.]—**Where justices acting under Health Act, 1890, s. 236, have no jurisdiction to deal with a complaint they have no jurisdiction to award costs.—**DOWD v. VIOLET TOWN SHIRE (PRESIDENT)** (1899), 25 V. L. R. 251.—**AUS.**

**m. Against whom awarded—Person not party to proceedings.]—**In proceedings before justices there is no jurisdiction to award costs against a person not a party to the proceedings.—**KAVANNAGH**

**v. HERBIG** (1907), 9 W. A. L. R. 121.—**AUS.**

**n. — When summons dismissed.]—***Ex p.* **BEATTIE** (1862), 10 N. B. R. (5 All.) 377.—**CAN.**

**o. — —.]—**Magistrates have no jurisdiction to award costs against either party when adjourning the hearing of a summons or when dismissing a summons without prejudice.—**R. (ROCHE) v. COUNTY CLARE JJ.** (1912), 46 I. L. T. 80.—**IR.**

**p. — Police constable.]—**Where a police constable prosecutes as a common informer there is jurisdiction to give costs against him, but in most cases the ct. ought not to take this course.—**R. v. ARMAGH JJ.**, [1918] 2 I. R. 347.—**IR.**

**q. To whom awarded.]—****R. v. MURRAY** (1875), 10 N. S. R. (1 R. & C.) 58.—**CAN.**

**r. — Whether stated in conviction.]—****R. v. AKERMAN** (1883), 1 B. C. R. pt. 1, 255.—**CAN.**

**t. Power to award—Must be given by statute.]—**There is no general power to award costs upon a conviction under an Ontario statute, where such power is not given by the statute itself.—**R. v. LENNON** (1879), 44 U. C. R. 456.—**CAN.**

**aa. — Conviction must be good.]—****R. v. CLARK** (1883), 2 O. R. 523.—**CAN.**

**bb. No necessity to state amount on minute of conviction.]—**If costs are awarded on a conviction under Summary Convictions Act, it is not necessary to state the amount of the costs in the minute of conviction made under sect. 53, unless deft. requires it.—*Ex p.* **PORTER** (1889), 28 N. B. R. 587.—**CAN.**

**cc. — —.]—**It is not necessary that the minute of conviction fix the amount of the costs.—**R. v. FRASER, R. v. ROSENOFF (Alta.)**, [1923] 2 W. W. R. 395; 39 Can. Crim. Cas. 366.—**CAN.**

## SECT. 6.—RESTITUTION OF PROPERTY.

*See, generally*, CRIMINAL LAW, Vol. XV., pp. 617 *et seq.*

**Powers of metropolitan police magistrate.]—***See* Part VI., Sect. 4, *ante*.

## SECT. 7.—RECOGNISANCES TO KEEP THE PEACE.

### SUB-SECT. 1.—IN GENERAL.

*See* Summary Jurisdiction Act, 1879 (c. 49), ss. 4, 7, 9, 23, 25, 26, 31, 42; Probation of Offenders Act, 1907 (c. 17); Criminal Justice Administration Act, 1914 (c. 58), s. 24; Criminal Justice Act, 1925 (c. 86), s. 26; Summary Jurisdiction Rules, 1886, r. 17; Summary Jurisdiction Rules, 1915, rr. 28–31, 33–35.

**743. Power of justice to take recognisance—Discretion—Interference by High Court.]—****R. v. TREGARTHEN**, No. 757, *post*.

**744. — — — Reduction of amount of security.]—**The Ct. of K. B. cannot interfere to reduce the amount of security which the magistrates require a deft. to give for the preservation of the peace.—**R. v. HOLLOWAY** (1834), 2 Dowl. 525.

**745. Period of recognisance.]—****R. v. FRANKLYN** (1731), 2 Barn. K. B. 85; 94 E. R. 372.

**746. — —.]—**A justice of the peace is authorised to require surety of the peace for a limited time, according to his discretion, & need not bind the party over to the next sessions only.—**WILLES v. BRIDGER** (1819), 2 B. & Ald. 278; 106 E. R. 368.

*Annotations:—***Consd.** **Prickett v. Gratex** (1846), 8 Q. B. 1020; **Lansbury v. Riley**, [1914] 3 K. B. 229.

**dd. What costs awarded.]—****R. v. LAIRD** (1889), 1 Terr. L. R. 179.—**CAN.**

**ee. — —.]—****R. v. CODE** (1908), 1 Sask. L. R. 295; 7 W. L. R. 814.—**CAN.**

**ff. Execution for costs—Form.]—****R. v. ROBERTS** (1895), 27 N. S. R. 381.—**CAN.**

**gg. Costs excessive—No ground for interference with conviction.]—**The ct. will not interfere with a conviction on the ground that the costs are excessive, where it is not shown in what particular they are excessive.—**R. v. DAVIS, Ex p. VANBUSKIRK** (1907), 38 N. B. R. 335; 4 E. L. R. 224.—**CAN.**

**hh. Illegal costs—Conviction amended.]—****R. v. GAGE** (2) (Ont.) (1917), 27 Can. Crim. Cas. 330.—**CAN.**

**kk. To whom payable—Whether stated on conviction.]—**When costs are imposed the conviction should state to whom the costs are to be paid.—**BOWMAN v. BARCLAY** (1885), 3 N. Z. L. R. 463 (S. C.).—**N.Z.**

**ll. — — —.]—**Where costs are imposed on a conviction obtained under Licensing Act, 1881, the conviction should state to whom the costs are to be paid.—**WALKER v. PURCELL** (1898), 16 N. Z. L. R. 691.—**N.Z.**

**mm. — — —.]—****TOOMAN v. TREANOR** (1899), 17 N. Z. L. R. 467.—**N.Z.**

### PART VIII. SECT. 7, SUB-SECT. 1.

**nn. Power of justice to take recognisance.]—**The taking of a recognisance, being a merely ministerial act, may be done by a justice outside of the county in which he has jurisdiction.—**FLOOD v. DUBLIN COUNTY COUNCIL** (1907), 41 I. L. T. 120.—**IR.**

**oo. — Not ousted by claim of right.]—**The fact that threats, or an assault, which would authorise justices in requiring sureties for the peace & good behaviour, arose by reason of a *bond fide* dispute as to title, does not oust the jurisdiction of the justices to



**Sect. 7.—Recognisances to keep the peace: Sub-sects. 1 & 2.]**

**747. — Should be definite.]**—A recognisance to be of good behaviour should bind for a definite period.—*R. v. EDGAR* (1913), 109 L. T. 416; 77 J. P. 356; 29 T. L. R. 512; 57 Sol. Jo. 519; 23 Cox, C. C. 558; 9 Cr. App. Rep. 13, C. C. A.

**748. Extent of recognisance—Not confined to complainant.]**—*Ex p. ASTON*, No. 778, *post*.

**749. Nature of recognisance—Substitution for punishment.]**—*Semble*: the giving of security to be of good behaviour was intended by Summary Jurisdiction Act, 1879 (c. 49), s. 16, as a substitution for punishment, & by giving such security a deft. is placed in precisely the same position as if punishment had been inflicted upon & suffered by him.—*R. v. MILES* (1890), 24 Q. B. D. 423; 59 L. J. M. C. 56; 62 L. T. 572; 54 J. P. 549; 38 W. R. 334; 6 T. L. R. 186; 17 Cox, C. C. 9, C. C. R.

*Annotations*:—*Mentd. R. v. Friel* (1890), 17 Cox, C. C. 325; *Reed v. Nutt* (1890), 59 L. J. Q. B. 311; *Ryley v. Brown* (1890), 62 L. T. 458; *Haynes v. Davis*, [1915] 1 K. B. 332.

**750. Copy of depositions—Defendant not entitled to.]**—An information was laid against A by C. that the latter apprehended some bodily harm from the former; & upon the hearing of the case the justices required A. to enter into a recognisance with sureties to do what should be then & there enjoined him by the ct., & in the meantime to keep the peace, & in default to be committed.

Upon A.'s applying for a copy of the deposition the justices refused them, & upon afterwards applying to this ct. for a rule requiring the justices to furnish him with a copy:—*Held*: as he was not committed to take his trial for any offence, Indictable Offences Act, 1848 (c. 42), s. 27, did not apply, & he was not entitled to such a copy.—*R. v. DAVIES, ETC., HEREFORDSHIRE JJ.* (1850), 1 L. M. & P. 323; *sub nom. Ex p. HUMPHRYS*, 4 New Mag. Cas. 86; 4 New Sess. Cas. 179; 19 L. J. M. C. 189; 15 L. T. O. S. 142; 14 J. P. 340; 15 Jur. 608.

**751. Conviction for assault—On application for recognisances—Jurisdiction of justices.]**—When an application is made to justices to compel a party to enter into recognisances to keep the peace towards another, they have no jurisdiction upon such application to convict the party of an assault, even though an assault was given in evidence of complainant:

A. struck B. & threatened to do so again, whereupon B. preferred articles of the peace against A. Upon the hearing B. gave evidence of the assault, & at the termination of the evidence, the justices convicted A. of a common assault & fined him; B. however, protested against their proceeding as upon an information for an assault, wishing only to have sureties to keep the peace. intending to seek some other tribunal for the charge of assault; the justices however, persisted in their conviction:—*Held*: the justices were wrong, & the conviction was made without jurisdiction.—*R. v. DENY, ETC., JJ.* (1851), 2 L. M. & P. 230; 4 New Sess. Cas. 635; 20 L. J. M. C. 189; 15 O. S. 818; *sub nom. R. v. DEVON JJ.*, 16 L. T.

require such sureties.—*R. (MULHOLLAND) v. MONAGHAN JJ.*, [1914] 2 L. R. 156.—*IR.*

**749 i. Nature of recognisance—Substitution for punishment.]**—*R. v. MITCHELL* (Y. T.) (1908), 8 W. L. R. 357.—*CAN.*

*p. Contents.]*—A recognisance to be

valid under the statute must state the offence with which the accused is charged, or at least show the recognisance was for his appearance to answer some charge of a criminal nature made against him.—*R. v. CRICKSHANK & THOMPSON* (1864), 5 Nfld. L. R. 50.—*NFLD.*

O. S. 419; *sub nom. R. v. TOTNESS JJ.*, 15 Jur. 227.

*Annotations*:—*Distd. Re Hawkins & Seymour*, Wiltshire JJ. (1863), 11 W. R. 594. *Consd. Nicholson v. Booth & Naylor* (1888), 57 L. J. M. C. 43. *Refd. Re Murphy, Ex p. London School Board* (1877), 46 L. J. M. C. 193; *R. v. Gaunt* (1895), 12 T. L. R. 62.

**Removal of certiorari.]**—See CROWN PRACTICE, Vol. XVI., p. 434, Nos. 2958–2960.

**752. Discharge of recognisance—Death of defendant.]**—*R. v. FARWELL* (1728), 1 Barn. K. B. 111; 94 E. R. 77.

**SUB-SECT. 2.—GROUNDS FOR REQUIRING RECOGNISANCES.**

**753. Necessity for bodily fear—By particular individual.]**—The surety of the good behaviour extends to any breach of the peace & an affray by matter of dread or fear to the subject; but not to chiding words; there should be an assault or lying in wait.—*ANON.* (1486), Jenk. 173; 145 E. R. 113.

**754. — — —.]**—*PHILLIPS v. GATESHEAD JJ.* (1879), *Times*, July 15.

**755. — — —.]**—Where a ct. of summary jurisdiction is satisfied that a person who is brought before it has been guilty of inciting others to commit breaches of the peace & intends to persevere in such incitement the ct. may order him to enter into recognisances & to find sureties for his good behaviour or to be imprisoned in default of so doing.

Whatever the origin of that jurisdiction may be, whether it be derived from the common law, from the commission of conservators of the peace, or from 34 Edw. 3, c. 1, or otherwise, the practice of making such orders for the purpose of preventing apprehended breaches of the peace has been too well established for a long period of years to allow of its propriety being questioned at the present day.

It is not essential to the exercise of that jurisdiction that the conduct of deft. should have caused any individual person to go in bodily fear.—*LANSBURY v. RILEY*, [1914] 3 K. B. 229; 83 L. J. K. B. 1226; 109 L. T. 546; 77 J. P. 440; 29 T. L. R. 733; 23 Cox, C. C. 582, D. C.

**756. Threatened breach of the peace.]**—Applt., a Protestant lecturer, had held meetings in public places in the town of Liverpool, causing large crowds to assemble & obstruct the thoroughfares. In addressing those meetings he used gestures & languages which were highly insulting to the religion of the Roman Catholic inhabitants, of whom there is a large body in Liverpool. The natural consequence of his words & conduct on those occasions was to cause, & his words & conduct had in fact caused, breaches of the peace to be committed by his opponents & supporters, & he threatened & intended to hold similar meetings in the town, & to act & speak in a similar way, in the future. At one of the meetings he told his supporters that he had been informed that the Catholics were going to bring sticks; & on some of his supporters saying that they would bring sticks too, he said that he looked to them for protection. A local Act in force in Liverpool prohibits, under a penalty, the use of threatening,

**PART VIII. SECT. 7, SUB-SECT. 2.**

**756 i. Threatened breach of the peace.]**—*R. v. BRIJNANDAN PRASAD* (1914), 1 L. R. 37 All. 33.—*IND.*

**756 ii. — — —.]**—*R. (LANYON) v. BARRY* (1890), 26 L. R. Ir. 40.—*IR.*

**756 iii. — — —.]**—*R. (ORR) v. LONDON.*

abusive & insulting words & behaviour in the streets whereby a breach of the peace may be occasioned:—*Held*: on proof of those facts before the Liverpool stipendiary magistrate, he had jurisdiction to bind over applt. in recognisances to be of good behaviour.

*Semble*: justices have jurisdiction to bind over to be of good behaviour a person who, in addressing meetings in public places, although he does not directly incite to the commission of breaches of the peace, uses language the natural consequence of which is that breaches of the peace will be committed by others & who intends to hold similar meetings & use similar language in the future.—*WISE v. DUNNING*, [1902] 1 K. B. 167; 71 L. J. K. B. 165; 85 L. T. 721; 66 J. P. 212; 50 W. R. 317; 18 T. L. R. 85; 46 Sol. Jo. 152; 20 Cox, C. C. 121, D. C.

*Annotations*:—*Apld.* *R. v. Little & Dunning, Ex p. Wise* (1909), 101 L. T. 859. *Refd.* *Lansbury v. Riley*, [1914] 3 K. B. 229; *R. v. Halliday*, [1917] A. C. 260; *Everett v. Griffiths*, [1921] 1 A. C. 631.

**757. — Abusive language.**—A party gave information on oath before a magistrate, that from certain language used towards him he was in bodily fear from another; & the magistrate, upon hearing the complaint, required the latter to enter into recognisances to keep the peace. On motion to discharge the recognisances, on the ground that the language was used in a metaphorical sense only, the ct. refused to interfere, because it was for the magistrate to judge in what sense the language was used.—*R. v. TREGARTHEN* (1833), 5 B. & Ad. 678; 2 Nev. & M. K. B. 379; 1 Nev. & M. M. C. 431; 110 E. R. 941.

*Annotations*:—*Consd.* *R. v. Dunn* (1840), 12 Ad. & El. 599. *Refd.* *Lort v. Hutton* (1876), 45 L. J. M. C. 95.

**758. — No averment as to going in bodily fear.**—On the hearing by justices of a summons against a deft. for threatening to assault complainant, deft. alleged that complainant had used threatening language towards him, but he made no formal charge against complainant. The justices, after hearing the evidence of complainant & deft., found as a fact that there was a real danger of a breach of the peace on the part of both parties, & they ordered both of them to be bound over to be of good behaviour. The order made against complainant, as drawn up, contained no averment that deft. went in bodily fear of complainant:—*Held*: the justices had, in the circumstances, power to order complainant to be bound over, & the absence from the order of an averment that deft. went in bodily fear of complainant did not render it bad on its face.—*R. v. WILKINS*, [1907] 2 K. B. 380; *sub nom.* *R. v. WILKINS, Ex p. JOHN*, 76 L. J. K. B. 722; 96 L. T. 721; 71 J. P. 327; 21 Cox, C. C. 443, D. C.

*Annotation*:—*Refd.* *Lansbury v. Riley*, [1914] 3 K. B. 229.

**759. — Date of apprehended breach passed.**—*R. v. LITTLE & DUNNING, Ex p. WISE*, No. 1187, *post*.

**760. — By complainant.**—*PHILLIPS v. GATESHEAD JJ.* (1879), *Times*, July 15.

**761. Incitement to breach of the peace.**—Applts., with a considerable number of other persons, forming a body called the Salvation

Army, assembled together in the streets of a town for a lawful object, & with no intention of carrying out their object unlawfully, or by the use of physical force, but knowing that their assembly would be opposed & resisted by other persons in such a way as would in all probability tend to the committing of a breach of the peace on the part of such opposing persons. A disturbance of the peace having been created by the forcible opposition of a number of persons to the assembly & procession through the streets of applts. & the Salvation Army, who themselves used no force or violence:—*Held*: applts. had not been guilty of “unlawfully & tumultuously assembling,” etc., & could not therefore be convicted of that offence, nor be bound over to keep the peace.—*BEATTY v. GILLBANKS* (1882), 9 Q. B. D. 308; 51 L. J. M. C. 117; 47 L. T. 194; 46 J. P. 789; 31 W. R. 275; 15 Cox, C. C. 138, D. C.

*Annotations*:—*Refd.* *O’Kelly v. Harvey* (1882), 15 Cox, C. C. 435; *R. v. Graham & Burns* (1888), 4 T. L. R. 212; *R. v. Clarkson* (1892), 8 T. L. R. 248; *Wise v. Dunning*, [1902] 1 K. B. 167.

**762. —**—*LANSBURY v. RILEY*, No. 755, *ante*.

**763. Publication of libel.**—A justice of peace has authority to issue his warrant for the arrest of a party charged [on oath] with having published a libel; &, upon the neglect of the party so arrested to find sureties, may commit him to prison, there to remain till he be delivered by due course of law.—*BUTT v. CONANT* (1820), 1 Brod. & Bing. 548; 4 Moore, C. P. 195; 129 E. R. 834.

*Annotations*:—*Consd.* *Lansbury v. Riley*, [1914] 3 K. B. 229. *Refd.* *Caudle v. Seymour* (1841), 1 Q. B. 889; *R. v. Bartlett* (1843), 12 L. J. M. C. 127; *Haylock v. Sparke* (1853), 1 E. & B. 471. *Mentd.* *R. v. Casement*, [1917] 1 K. B. 98.

**764. — Tendency to breach of the peace.**—A justice of the peace has jurisdiction to require sureties for good behaviour of a person charged before him upon information with having published a libel calculated to produce a breach of the peace; &, in default of such sureties, to commit the party so charged to prison.—*HAYLOCK v. SPARKE* (1853), 1 E. & B. 471; 22 L. J. M. C. 67; 20 L. T. O. S. 276; 17 J. P. 262; 17 Jur. 731; 118 E. R. 512.

*Annotations*:—*Consd.* *Lansbury v. Riley*, [1914] 3 K. B. 229. *Mentd.* *Kirby v. Simpson* (1854), 2 C. L. R. 1286; *R. v. Shepherd* (1854), 18 J. P. 310; *M’Mahon v. Lennard* (1858), 6 H. L. Cas. 970; *West Riding of Yorkshire Rivers Board v. Robinson*, [1907] 1 K. B. 431.

**765. On dismissal of charge of assault.**—An information was laid against A. for an assault & battery, & a summons issued against him for that offence. At the hearing, the justices dismissed the information & gave him a certificate, but they ordered him in respect of the charge to enter into his own recognisance in £50 to keep the peace for six months:—*Held*: notwithstanding the justices dismissed the information, they were legally justified in requiring a recognisance to keep the peace.—*Ex p. DAVIS* (1871), 24 L. T. 547; 35 J. P. 551.

**766. Abusive words — To magistrate.**—A magistrate may bind to good behaviour a person who abuses him, but he cannot imprison except while in the duties of his office.—*SIMMONS v. SWEETE* (1587), Cro. Eliz. 78; 78 E. R. 338.

*DERRY JJ.* (1891), 28 L. R. Ir. 440.—IR.

**756 iv. —**—*R. v. JELLETT*, [1919] 2 I. R. 79.—IR.

**756 v. —**—*GOODALL v. TE KOOTI* (1890), 9 N. Z. L. R. 26.—N.Z.

**q. — Does not include threat of malicious prosecution.**—*R. v. RAG-*

*HUBAR* (1879), 1 L. R. 2 All. 351.—IND.

**r. On dismissal of charge of trespass.**—*R. v. CHOWDHRY* (1869), 2 B. L. R. App. 28.—IND.

**t. Recognisance in addition to imprisonment.**—Offence must be one involving breach of peace.—*KANNOOKARAN KUN-*

*HAMAD v. R.* (1902), 1 L. R. 26 Mad. 469.—IND.

**a. Incitement to breach of duty.**—*R. v. CORK JJ.* (1882), 15 Cox, C. C. 149.—IR.

**b. —**—*R. (REYNOLDS) v. COUNTY CORK JJ.* (1882), 10 L. R. Ir. 1.—IR.

**c. —**—*R. (FEEHAN) v. QUEENS,*



**Sect. 7.—Recognisances to keep the peace: Sub-sects. 2, 3 & 4. Sect. 8.]**

**767. — — —.] — BILL v. NEAL (1661), 1 Lev. 52; 83 E. R. 292.**

**Annotations:—Mentd.** Coxeter v. Parsons (1697), 1 Ld. Raym. 423; How v. Prinne (1702), 2 Ld. Raym. 812; Alexander v. Jenkins (1892), 66 L. T. 391.

**768. — — —.] — A contemptuous carriage to a magistrate is a breach of good behaviour, & he to whom such affront is offered may bind the party offending to his good behaviour; or if he has no sureties commit him till he find some.—R. v. ROGERS (1702), Holt, K. B. 331; 2 Ld. Raym. 777; 7 Mod. Rep. 28; 2 Salk. 425; 90 E. R. 1083.**

**769. — — —.] — R. v. SCARBOROUGH (BAILIFF) (1728), 1 Barn. K. B. 73; 94 E. R. 51.**

**Frequenting gaming-houses.] — See GAMING & WAGERING, Vol. XXV., p. 429, Nos. 292, 293.**

### SUB-SECT. 3.—ESTREAT OF RECOGNISANCES.

*See Summary Jurisdiction Act, 1879 (c. 49), s. 9; Probation of Offenders Act, 1907 (c. 17), s. 6; Criminal Justice Act, 1925 (c. 86), s. 26.*

**770. What amounts to breach — Procuring another to break the peace.] — A man is bound to the peace, & procures another to break the peace, this is a forfeiture of his bond, as it was said.—ANON. (circa 1520), Bro. N. C. 148; 73 E. R. 911.**

**Annotation:—Refd.** Stampe v. Hyde (1621), 2 Roll. Rep. 199.

**771. — — — Escape from arrest.] — ANON. (1584), Godb. 22; 78 E. R. 14.**

**772. — — — No bodily violence threatened.] — KING'S CASE (1588), Cro. Eliz. 86; 78 E. R. 345; sub nom. ANON., Moore, K. B. 249.**

**Annotations:—Refd.** Stampe v. Hyde (1621), 2 Roll. Rep. 199. **Mentd.** Marshall v. Jennison (1680), Freem. K. B. 532; R. v. Wrightson (1708), Holt, K. B. 354; Haylock v. Sparke (1853), 1 E. & B. 471.

**773. — — — Abusive words.] — STAMPE v. HYDE (1621), 2 Roll. Rep. 199, 227; Palm. 126; 81 E. R. 748, 767.**

**Annotation:—Refd.** Haylock v. Sparke (1853), 1 E. & B. 471.

**774. — — — Not tending to breach of the peace.] — A recognisance for good behaviour is not forfeited by rash, quarrelsome, or unmannerly words, unless they directly tend to a breach of the peace, to terrify others, or to promote sedition.—R. v. HEYWARD (1638), Cro. Car. 498; 79 E. R. 1030.**

**Annotation:—Refd.** R. v. Ely JJ. (1855), 20 J. P. 116.

**775. — — — Breach must be forcible.] — The vi et armis is material in an assignment of a breach of a recognisance for good behaviour.—R. v. HUTCHINGS (1616), Cro. Jac. 412; 79 E. R. 352; sub nom. HUTCHINS v. PERIAM, 3 Bulst. 220.**

**Annotations:—Refd.** R. v. West Riding of Yorkshire JJ., Re Thornton (1837), 7 Ad. & El. 583; R. v. Ely JJ. (1855), 20 J. P. 116.

COUNTY JJ. (1882), 10 L. R. Ir. 294.—IR.

**d. Threat of malicious damage.] — GORMAN v. GORMAN (1891), 10 N. Z. L. R. 223.—N.Z.**

### PART VIII. SECT. 7, SUB-SECT. 3.

**e. Proceedings for.] — In order to estreat a recognisance taken under Dominion Act, 1869, c. 30, all that is required is a certificate from the proper officer under sect. 45 of the Act that it is forfeited.—R. v. HICKMAN (1878), 12 N. S. R. (3 R. & C.) 255.—CAN.**

**f. — — —.] — R. v. BROWN (1879), 13 N. S. R. (1 R. & G.) 51.—CAN.**

**g. — — — Who may estreat.] — Justices**

**at petty sessions have no jurisdiction to estreat a recognisance to be of good behaviour.—SHORE v. CUNNINGHAM, [1917] 2 I. R. 360.—IR.**

### PART VIII. SECT. 7, SUB-SECT. 4.

**h. Forms of commitment—Writing unnecessary.] — LYNDEN v. KING (1843), 6 O. S. 566.—CAN.**

**778 i. Warrant of commitment—Contents—Particulars of offence.] — A commitment in default of sureties to keep the peace should show the date on which the words were alleged to have been spoken, & contain a statement to the effect that complainant is apprehensive of the bodily injury.—Re**

**776. — — — Assault on any person.] — A recognisance for keeping the peace is forfeited by an assault upon any person.—R. v. STANLEY (1754), Say. 139; 96 E. R. 830.**

### SUB-SECT. 4.—COMMITMENT IN DEFAULT OF SURETIES.

**777. Form of commitment—Commitment for “misbehaviour.”] — Commitment for misbehaviour is ill; it ought to be for want of sureties for good behaviour.—ANON. (1700), Fortes. Rep. 242; 92 E. R. 836.**

**778. Warrant of commitment—Contents—Particulars of offence.] — The effect of 6 Geo. 1, c. 19, is to make all houses of correction public gaols or King's prisons. Parties may therefore be committed to them for want of sureties to keep the peace.**

A warrant of commitment for want of sureties to keep the peace need not set forth the words in which the threats complained of were conveyed, nor the time or place when & where they were spoken.

It is no excess of jurisdiction in such a case to require sureties to keep the peace not only towards complainant for one month, but also all Her Majesty's subjects.

It is not necessary to state in the warrant that the justices of the peace have found the complaint to be true. It is enough to aver that having heard it & having made due examination thereon, they direct the party to find sureties.—*Ex p.* ASTON (1844), 12 M. & W. 456; 1 New Sess. Cas. 73; 13 L. J. M. C. 52; 2 L. T. O. S. 329; 8 J. P. 663; 8 Jur. 293; 152 E. R. 1276.

**779. — — — Truth of allegation.] — Ex p. ASTON, No. 778, ante.**

**780. — — — Validity—Commitment for indefinite time.] — A justice's warrant, committing a party in default of his finding sureties to keep the peace, is bad if the commitment be for no definite time, but until he shall find such sureties or be discharged by due course of law. An action lies against the justice for committing on such warrant; & bona fides is no defence. It is not necessary that such warrant should fix the amount in which sureties are to be given. Notice of action, for a commitment under such warrant, stated that the justice had caused complainant to be unlawfully committed to a certain common gaol or prison in the borough of Monmouth, & there imprisoned & kept, etc., without reasonable or probable cause, from, etc. to, etc., naming the days; & the notice went on to state that complainant would, at the expiration of one calendar month, cause a writ of summons to be sued out of the Ct. of Q. B. against the justice, at complainant's suit, for the said imprisonment, & proceed against him therefore according to law:—*Held*: a sufficient notice under**

ROSS (1864), 3 P. R. 301.—CAN.

**k. — — — Statement of information laid.] — In a commitment for want of finding sureties for the peace, it is necessary to state that the justice had information on oath which would justify him in binding prisoner to keep the peace.—DAWSON v. FRASER (1849), 7 U. C. R. 391.—CAN.**

**l. — — — Issue of—Liability for.] — FULLERTON v. SWITZER & FIGG (1856), 13 U. C. R. 575.—CAN.**

**780 i. — — — Validity—Commitment for indefinite time.] — A warrant of commitment for indefinite time, or which directs prisoner to be kept in custody till the costs are paid, without stating**

Constables Protection Act, 1850 (c. 44), s. 1, as to the place where the cause of action arose, the subject of complaint generally, & the intended course of proceeding.—*PRICKETT v. GRATREX* (1846), 8 Q. B. 1020; 1 Car. & Kir. 651; 1 New Mag. Cas. 541; 2 New Sess. Cas. 429; 15 L. J. M. C. 145; 7 L. T. O. S. 139; 10 J. P. 646; 10 Jur. 566; 115 E. R. 1158.

*Annotation*:—*Mentd.* *Lindford v. Fitzroy* (1848), 13 J. P. 474.

#### SECT. 8.—RECOVERY OF CIVIL DEBTS.

See Summary Jurisdiction Act, 1879 (c. 49), ss. 6, 35; Summary Jurisdiction Rules, 1886, rr. 19–26, 29; Summary Jurisdiction Rules, 1915, rr. 36–41, 44.

**781. What recoverable as civil debt—Money certified due under statute.**—A poor law auditor, on April 14, 1868, certified, under Poor Law Amendment Act, 1884 (c. 101), s. 32, that a sum of money was due from J. an overseer of the poor. J. did not pay over the money within seven days, & proceedings were taken, under Poor Law Amendment Act, 1834 (c. 76), s. 99, to recover the money so certified to be due. At the hearing before the justices, on May 18, J. set up as a defence, that he had been discharged, on May 11, by the Ct. of Bkpcy. on an adjudication dated Jan. 4:—*Held*: the debt being extinguished by the bkpcy., the justices had no jurisdiction under sect. 99 to order that J. should be committed to the gaol or house of correction. *Semble*: the non-payment of the money certified to be due created a debt, & was not an offence in respect of which the power of commitment was given by the sect.—*R. v. MASTER, ETC., GLOUCESTERSHIRE JJ.* (1869), L. R. 4 Q. B. 285; 10 B. & S. 42; 38 L. J. M. C. 73; 17 W. R. 442; *sub nom.* *R. v. MARTIN, ETC., GLOUCESTERSHIRE JJ., Re JAMES*, 19 L. T. 733; *sub nom.* *R. v. GLOUCESTERSHIRE JJ.*, 33 J. P. 436.

*Annotations*:—*Refd.* *R. v. Kerswill*, [1895] 1 Q. B. 1. *Mentd.* *Seaman v. Burley*, [1896] 2 Q. B. 344; *Marginson v. Tildsley* (1903), 67 J. P. 226.

**782. — Poor rate.**—The Summary Jurisdiction Act, 1879 (c. 49), does not affect or apply to proceedings for the recovery of poor rates & other rates recoverable in the same manner as poor rates.—*R. v. PRICE* (1880), 5 Q. B. D. 300; 49 L. J. M. C. 49; 42 L. T. 439; 44 J. P. 248; 28 W. R. 615, D. C.

*Annotations*:—*Consd.* *Sandgate L. B. v. Pledge* (1885), 49 J. P. 342. *Expld.* *R. v. London (Lord Mayor) & Brown* (1887), 57 L. T. 491; *Re Allen*, [1894] 2 Q. B. 924. *Refd.* *Southwark & Vauxhall Water Co. v. Hampton U. C.* (1898), 68 L. J. Q. B. 207; *Atkins v. Hutton* (1909), 103 L. T. 514. *Mentd.* *R. v. Lincolnshire JJ.*, [1912] 2 K. B. 413.

**783. — — —**—Summary Jurisdiction Act, 1879 (c. 49), does not apply to proceedings for the recovery of poor rates or rates recoverable in the same way as poor rates.—*ATKINS v. HUTTON* (1909), 103 L. T. 514; 74 J. P. 329; 8 L. G. R. 513, C. A.

the amount, is bad.—*DAWSON v. FRASER* (1849), 7 U. C. R. 391.—*CAN.*

**m. — — — Order to find sureties.**—A warrant of commitment for refusing to enter into recognisance of the peace is not bad because it recites that deft. had been ordered to find two sureties.—*Ex p. DUKE* (1876), 2 N. Z. Jur. N. S. 181.—*N.Z.*

#### PART VIII. SECT. 8.

**n. What recoverable as civil debt—Sum under £5.**—A justice of the peace has no jurisdiction, under 4 Will. V. c. 45, in cases of debt where the amount exceeds £5, unless reduced to

that sum by actual payments.—*WHITE v. MACKLIN* (1840), 1 Kerr, 94.—*CAN.*

**o. — — —**—*DRAPER v. MUNROE* (1847), 5 N. B. R. (3 Kerr) 438.—*CAN.*

**p. — Sum under \$20.**—*Ex p. LINTON* (1874), 15 N. B. R. (2 Pug.) 412.—*CAN.*

**q. — — —**—In an action of debt in the Portland civil ct., pltf. lived in the city of St. John & deft. in the parish of Lancaster, the amount claimed being under \$20:—*Held*: the magistrate had jurisdiction.—*PURCHASE v. SEELY* (1880), 19 N. B. R. (3 P. & B.) 549.—*CAN.*

**784. — Penalty for non-payment of railway fare—Railway Clauses Consolidation Act, 1845 (c. 20).**—The penalty imposed by sect. 103 of above Act, for travelling in a railway carriage without having paid the fare & with intent to avoid the payment of it, is not a sum of money claimed to be due & recoverable on complaint to a ct. of summary jurisdiction within the meaning of Summary Jurisdiction Act, 1879 (c. 49), s. 6, & is not subject to the procedure for the recovery of civil debts in a ct. of summary jurisdiction prescribed by Summary Jurisdiction Act, 1879 (c. 49), s. 35.—*R. v. PAGET* (1881), 8 Q. B. D. 151; 51 L. J. M. C. 9; 45 L. T. 794; 46 J. P. 151; 30 W. R. 336, D. C.

*Annotations*:—*Expld.* *R. v. Lewis, Stipendiary Magistrate & Moss* (1896), 74 L. T. 551; *R. v. Burrows, etc. JJ., Ex p. Wilson* (1897), 77 L. T. 338. *Refd.* *Kennard v. Simmons* (1884), 48 J. P. 551; *R. v. Daly, Ex p. Newson* (1911), 104 L. T. 892.

**785. — Penalty for non-payment of cab fare—Town Police Clauses Act, 1847 (c. 89), s. 66.**—By above sect., if any person refuse to pay on demand to any driver of any hackney carriage the fare allowed by the Act, or any bye-law made thereunder, such fare may, together with costs, be recovered before a justice as a penalty:—*Held*: a person refusing to pay a fare could not, upon information, be summarily convicted for such refusal, & be ordered, in case payment were not made, & in default of distress, to be imprisoned, as the fare was a sum of money claimed to be due & recoverable on complaint to a ct. of summary jurisdiction within the meaning of Summary Jurisdiction Act, 1879 (c. 49), s. 6, & was therefore only recoverable in the manner provided by Summary Jurisdiction Act, 1879 (c. 49), s. 35.

It is clear that the mere statement in an Act of Parliament that a sum is recoverable as a penalty does not turn the non-payment of what is merely a debt into an offence. . . . The words, & not upon information, were inserted to emphasise the exclusion of criminal matters from the operation of sect. 6 [Summary Jurisdiction Act, 1879 (c. 49)] (*CHARLES, J.*).—*R. v. KERSWILL*, [1895] 1 Q. B. 1; 64 L. J. M. C. 70; 71 L. T. 574; 59 J. P. 342; 39 Sol. Jo. 62; 18 Cox, C. C. 49; 10 R. 476; *sub nom.* *R. v. TORQUAY JJ.*, 43 W. R. 59; *sub nom.* *R. v. KERSWELL, ETC., DEVON JJ., Re DE CASTRO*, 11 T. L. R. 8, D. C.

*Annotations*:—*Expld.* *R. v. Lewis, Stipendiary Magistrate & Moss* (1896), 74 L. T. 551. *Refd.* *Re Gamble*, [1899] 1 Q. B. 305; *Fishwick v. Gyanl*, [1925] 1 K. B. 617. *Mentd.* *R. v. Slade, Ex p. Saunders, R. v. London JJ., Ex p. Saunders* (1895), 64 L. J. M. C. 273.

**786. — Apportionment of paving expenses by arbitrator—Public Health Act, 1875 (c. 55).**—An award of an arbitrator under above Act, s. 150, apportioning paving expenses can only be enforced by summary proceedings before justices, & not under Arbitration Act, 1889 (c. 49), s. 12.—*Re WILLESDEN LOCAL BOARD & WRIGHT*, [1896] 2 Q. B. 412; 65 L. J. Q. B. 567; *sub nom.* *WILLESDEN*

**r. — Money obtained by false pretences.**—*FRASER v. MCLANDERS* (1893), 25 N. S. R. 542.—*CAN.*

**t. — Sum up to limit of jurisdiction—If claim for excess abandoned.**—Where a pltf. abandons the excess of his claim over the limit of a magistrate's jurisdiction, he is at liberty to recover up to the amount of the limit of the jurisdiction.—*WAIKOU HOSPITAL & CHARITABLE AID BOARD v. PICTON HOSPITAL & CHARITABLE AID BOARD* (1904), 24 N. Z. L. R. 45.—*N.Z.*

**a. Plea of Statute of Frauds.**—Above Stat. is equally applicable to cases brought in the justice's ct., as to



**Sect. 8.—Recovery of civil debts. Parts IX. & X. Sects. 1 & 2.]**

**LOCAL BOARD v. WRIGHT**, 75 L. T. 13; 60 J. P. 708; 44 W. R. 676; 12 T. L. R. 539, C. A.

**Annotation:—Mentd.** *Re Stoker & Morpeth Corpn.* (1914), 84 L. J. K. B. 1169.

**787. — Fine or contravention of Merchant Shipping Act, 1894 (c. 60).]**—A person acts in contravention of above Act, s. 111, who, not being qualified as therein mentioned, engages or supplies a seaman to be entered on board a foreign ship in the United Kingdom.

The fine imposed by above Act, s. 111 (4) for such contravention is a punishment for an offence, & is not a civil debt. Therefore a conviction which imposes imprisonment in default of sufficient distress for an offence committed under the sect. is good, proof of means to pay being unnecessary.—*R. v. STEWART*, [1899] 1 Q. B. 964; 80 L. T. 660; 63 J. P. 547; 47 W. R. 445; 8 Asp. M. L. C. 534; *sub nom.* *R. v. STEWART, Ex p. OLSEN*, 68 L. J. Q. B. 582; 15 T. L. R. 308, D. C.

**Annotations:—Refd.** *Poll v. Dambo*, [1901] 2 K. B. 579. **Mentd.** *The Tagus*, [1903] P. 44.

**788. — Maintenance of relative—Poor Relief Act, 1601 (c. 2).]**—Money due under an order of justices made upon a person for the maintenance of his father under above Act, s. 6, is recoverable before a ct. of summary jurisdiction as a civil debt & not as a penalty; & an order of justices for the payment of the money so due cannot be enforced by imprisonment in default of distress, unless it be proved that the person in default has since the date of the latter order had the means to pay the sum in respect of which he had made default.—*Re GAMBLE*, [1899] 1 Q. B. 305; 68 L. J. Q. B. 195; 79 L. T. 642; 63 J. P. 101; 15 T. L. R. 123; 43 Sol. Jo. 128; 19 Cox, C. C. 225, D. C.

**Annotations:—Refd.** *R. v. Webber & St. Thomas' Union, Ex p. Wheaton* (1899), 43 Sol. Jo. 826; *R. v. Richardson, Ex p. Sherry* (1909), 79 L. J. K. B. 13.

**789. — Health Insurance contribution.]**—Resp. was convicted on July 20, 1924, of failing to pay a contribution which he was liable to pay under the National Health Insurance Acts, 1911 to 1922, in respect of an employed contributor. Due notice having been served upon him in accordance with the Act, it was proved that he had failed to pay other contributions in respect of the same employed contributor during the year preceding the date when the information was laid. Resp. was fined £5 & £2 2s. costs, & in default of payment—it appearing that resp. had not sufficient goods to satisfy the amount of the said fine & costs—was ordered to be imprisoned for one month. The magistrate further ordered that resp. should pay to the Insurance Comrs. the sum of 9d. in respect of the contribution for which the information was laid & also the sum of 18s., being a sum equal to the amount of the contributions unpaid during the preceding year, & he directed that in default of payment each of such amounts should be recovered as a civil debt. A similar fine was imposed & similar orders for payment made on a second information charging a similar offence under

the Unemployment Insurance Act, 1920 (c. 30):—**Held:** in both cases, the magistrate was right. The order for payment of contributions were not part of the penalty, & could only be enforced as a civil debt. Resp. in other words, could only be imprisoned in default of payment on proof of means.—*FISHWICK v. GYANI*, [1925] 1 K. B. 617; 94 L. J. K. B. 392; 132 L. T. 761; 89 J. P. 48; 41 T. L. R. 253; 23 L. G. R. 185; 27 Cox, C. C. 753, D. C.

**790. Procedure to recover—Civil not criminal.]**—*R. v. KERSWILL*, No. 785, *ante*.

**791. — — —.]**—An application to a ct. of summary jurisdiction for an order to enforce payment of a general district rate under Public Health Act, 1875 (c. 55), s. 256, is not a criminal cause or matter, & therefore an appeal lies to the Ct. of Appeal from the judgment of a Div. Ct. upon a case stated on such application.—*SOUTHWARK & VAUXHALL WATER CO. v. HAMPTON URBAN DISTRICT COUNCIL*, [1899] 1 Q. B. 273; 68 L. J. Q. B. 207; 79 L. T. 512; 80 L. T. 1; 63 J. P. 100; 47 W. R. 177; 15 T. L. R. 95; 43 Sol. Jo. 124, C. A.; *affd. sub nom.* *HAMPTON URBAN DISTRICT COUNCIL v. SOUTHWARK & VAUXHALL WATER CO.*, [1900] A. C. 3, H. L.

**Annotations:—Refd.** *R. v. Shuttleworth, Ex p. Tickle* (1908), 72 J. P. 329; *Atkins v. Hutton* (1909), 103 L. T. 514.

**792. — — — Complaint, not information.]**—*R. v. LEWIS*, [1896] 1 Q. B. 665; 65 L. J. M. C. 126; 74 L. T. 551; 60 J. P. 376; 12 T. L. R. 367; 40 Sol. Jo. 481; 18 Cox, C. C. 328, D. C.

**793. — Limited to summary procedure.]**—Where a statute gives a right to recover expenses in a ct. of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Ct. for a declaration that the expenses may be recovered in a court of summary jurisdiction.—*BARRACLOUGH v. BROWN*, [1897] A. C. 615; 66 L. J. Q. B. 672; 76 L. T. 797; 62 J. P. 275; 13 T. L. R. 527; 8 Asp. M. L. C. 290; 2 Com. Cas. 249, H. L.; *affg.* (1896), 65 L. J. Q. B. 333, C. A.

**Annotations:—Consd.** *Barwick v. S. E. & C. Ry.*, [1921] 1 K. B. 187. **Refd.** *The Veritas*, [1901] P. 304; *Simmonds v. Newport Abercarn Black Vein Steam Coal Co.*, [1921] 1 K. B. 616; *Everett v. Griffiths*, [1924] 1 K. B. 941. **Mentd.** *Howard Smith v. Wilson*, [1896] A. C. 579; *A.-G. v. Merthyr Tydfil Union*, [1900] 1 Ch. 516; *Devonport Corpn. v. Tozer* (1903), 67 J. P. 269; *Lucy v. Dorling* (1905), 49 Sol. Jo. 582; *R. v. Philbrick* (County Court Judge), *Ex p. Edwards* (1905), 53 W. R. 527; *The Wallsend*, [1907] P. 302; *De Gasquet James v. Mecklenburg Schwerin*, [1914] P. 53; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536; *Boston Corpn. v. Fenwick* (1923), 129 L. T. 766; *Whitney v. I. R. Comrs.*, [1926] A. C. 37; *Sheppy Glue & Chemical Works v. Medway River Conservators* (1926), 24 L. G. R. 457.

**794. — When power of commitment arises.]**—*Re GAMBLE*, No. 788, *ante*.

**795. — — —.]**—Summonses were issued against two officers of local branches of a certain trade union under the Trade Union Act, 1871 (c. 31), s. 12, charging them with wilfully withholding certain sums of money belonging to the union. Both defts. admitted the charges against them, & orders, headed civil debt, were made upon them for payment of the amounts due or in default distress & sale. Both defts. defaulted,

actions brought in other cts.—*McKEEN v. BROWN* (1831), N. B. Dig. 389.—**CAN.**

**b. Procedure to recover—Not limited to summary procedure.]**—The action of debt given by 15 Vict. c. 51, is a cumulative remedy, & does not take away the mode of proceedings prescribed by Summary Convictions Act.—*Ex p. HARTT* (1854), 8 N. B. R. (3 All.) 122.—**CAN.**

**c. Sum paid to justice—Duty to pay over to successful plaintiff.]**—A jus-

tice of the peace, to whom money is paid on a judgment recovered before him, is bound to pay it over to pltf. in the suit.—*WILSON v. BOYD* (1853), 7 N. B. R. (2 All.) 537.—**CAN.**

**d. Costs—Where court has no jurisdiction.]**—*RIDEOUT v. STEVENS* (1867), 1 Han. 28.—**CAN.**

**e. Commencement of action—What is.]**—In a suit brought in a justice's ct., the filing of the particulars of pltf.'s claim with the justice is not the com-

mencement of the action.—*McPHERSON v. MCKINNON* (1879), 19 N. B. R. (3 P. & B.) 3.—**CAN.**

**f. Filing defence—Effect of.]**—*McKEEN v. CAMERON* (1906), 1 E. L. R. 315.—**CAN.**

**g. Set-off.]**—*ABRAMS v. REFUSE* (1909), 7 E. L. R. 283.—**CAN.**

**h. No jurisdiction in action for damages.]**—Under Small Debts Act the magistrate's jurisdiction is limited

& application was then made for their committal to prison under the sect. The magistrate refused the application on the ground that the sect. was modified by the Summary Jurisdiction Act, 1879 (c. 49), s. 6, & that, the proceedings being civil & not criminal, in order to obtain committal a judgment summons must be issued & the prosecution must prove possession of means by defts. An order *nisi* was then obtained, addressed to the

magistrate & the two defts., calling on them to show cause why the orders should not be removed & quashed on the ground that the moneys ordered to be paid were not civil debts:—*Held*: as the orders were regular on the face the rule must be discharged.—*R. v. TRUSCOTT* (1899), 81 L. T. 188; 15 T. L. R. 405; 19 Cox, C. C. 379, D. C.

796. ———.]—*FISHWICK v. GYANI*, No. 789, *ante*.

## Part IX.—Procedure Not Under Summary Jurisdiction.

Proceedings preliminary to indictment.]—*See* CRIMINAL LAW, Vol. XIV., pp. 166 *et seq.*

In extradition proceedings.]—*See* EXTRADITION, Vol. XXIV., pp. 878–885, Nos. 59–124.

Orders for reception of lunatics.]—*See* LUNATICS, pp. 267 *et seq.*, *ante*.

Orders for removal of paupers.]—*See* POOR LAW. Application proceedings in bastardy.]—*See* BASTARDY, Vol. III., pp. 387 *et seq.*

## Part X.—Clerks to Justices.

### SECT. 1.—APPOINTMENT.

*See, now*, Criminal Justice Administration Act, 1914 (c. 58), s. 34.

797. By whom appointed—Justices of petty sessional division—For places appointed for holding petty sessions in the division.]—(1) Cts. of petty sessions cannot be held for a borough without a separate commission of the peace except as cts. for the petty sessional division in which the borough is situate.

(2) A separate clerk cannot be appointed by the justices usually acting in a borough in which petty sessions are so held, but the justices of the petty sessional division may appoint a separate clerk in respect of each place appointed for holding petty sessions in the division, under Justices Clerks Act, 1877 (c. 43), s. 5.

(3) The salary of every clerk so appointed is payable by the county council, & the unappropriated fines & fees must be paid to the county treasurer.—*HUNTINGDON CORPN. v. HUNTINGDON COUNTY COUNCIL*, [1901] 2 K. B. 257; 70 L. J. K. B. 755; 85 L. T. 26; 65 J. P. 675; 17 T. L. R. 521, D. C.

798. Whether subject to certiorari.]—An appointment by justices of a clerk is not an act of justices which is subject to a writ of *certiorari*.—*R. v. DRUMMOND, Ex p. SAUNDERS* (1903), 88 L. T. 833; 67 J. P. 300; *sub nom. R. v. DRUMMOND, Ex p. SAUNDERS, R. v. YELVERTON, Ex p. LAURENCE, R. v. PROTHEROE, Ex p. THOMAS*, 1 L. G. R. 567, D. C.

to actions for debt.—*SIMPSON v. WIDRIG* (1910), 15 B. C. R. 5.—*CAN.*

k. No evidence to support action.]—*LANGILLE v. ZINOK* (N. S.) (1910), 9 E. L. R. 113.—*CAN.*

l. Payment into court.]—*WHITE v. McDUGALL* (1913), 13 E. L. R. 465; 14 D. L. R. 718; 47 N. S. R. 423.—*CAN.*

### PART X. SECT. 1.

m. By whom appointed—Justices

of petty sessional division.]—*R. v. CARLOW JJ.*, [1911] 2 I. R. 382.—*IR.*

n. ——— Vote by justice outside division—Appointment invalid.]—*R. v. SCHULL JJ. & WHITLEY*, [1910] 2 I. R. 601.—*IR.*

o. Interim appointment—By the court.]—*LORD ADVOCATE* (1890), 17 R. (Ct. of Sess.) 293.—*SCOT.*

p. Dual effect—*Ex officio* county

### SECT. 2.—TENURE OF OFFICE.

*See* Justices Clerks Act, 1877 (c. 43), s. 5; Municipal Corporation Act, 1882 (c. 50), s. 159 (1).

799. Liability to summary dismissal—Without cause assigned.]—A clerk to justices in petty sessions, appointed by order of such sessions, has no legal hold upon his office, nor will this ct. interfere if he is dismissed summarily, & without cause assigned.—*Ex p. SANDYS* (1833), 4 B. & Ad. 863; 1 Nev. & M. K. B. 591; 1 Nev. & M. M. C. 130; 110 E. R. 680.

Annotations:—*Refd. R. v. Bridgewater Corpn.* (1837), 6 Ad. & El. 339; *R. v. Fox* (1858), 8 E. & B. 939.

800. Office held at pleasure of justices.]—A clerk to borough justices appointed under 5 & 6 Will. 4, c. 76, s. 102, is appointed & holds his office at the pleasure of the justices, & *quo warranto* will not lie for usurping such an office.—*R. v. Fox* (1858), 8 E. & B. 939; 30 L. T. O. S. 285; 120 E. R. 350; *sub nom. Re Fox*, 27 L. J. Q. B. 151; 22 J. P. 656; 4 Jur. N. S. 410; *sub nom. R. v. Cox*, 6 W. R. 282.

Annotations:—*Refd. R. v. Hampton* (1865), 6 B. & S. 923; *Bradley v. Sylvester* (1871), 25 L. T. 459. *Mentd. R. v. Fox* (1859), 5 Jur. N. S. 1248; *The Leda* (1862), 32 L. J. P. M. & A. 58; *Ex p. Parry* (1887), 3 T. L. R. 649; *R. v. Speyer, R. v. Cassel*, [1916] 1 K. B. 595.

—The justices can dismiss their clerk at pleasure (*DAY, J.*).—*R. v. BODMIN (MAYOR & JJ.)*, [1892] 2 Q. B. 21; 61 L. J. M. C. 151; 66 L. T. 562; 56 J. P. 504; 40 W. R. 606; 8 T. L. R. 553; 36 Sol. Jo. 489, D. C.

Annotation:—*Mentd. R. v. Kensington Income Tax Comrs. Ex p. Edmond de Pelignac*, [1917] 1 K. B. 486.

attorney.]—*ROBERTSON v. FREEMAN* (1863), 22 U. C. R. 298.—*CAN.*

### PART X. SECT. 2.

800 l. Office held at pleasure of justices.—*CORK*



### SECT. 3.—QUALIFICATION AND DISQUALIFICATIONS.

See Justices Clerks Act, 1877 (c. 43), s. 7; Municipal Corporations Act, 1882 (c. 50), s. 159.

**802. Concurrent appointment to other office—Clerk of peace for county.]—**Under 24 & 25 Vict. c. 75, s. 5, one who then held the office of a clerk of the borough justices was not prevented from afterwards being appointed clerk of the peace for the county & he might lawfully continue to hold both offices.—*BROWN v. EVANS* (1876), 35 L. T. 877; 41 J. P. 675; 24 W. R. 937, C. A.

**803. — Justice of peace.]—***R. v. DOUGLAS*, No. 42, *ante*.

**804. Practising as solicitor—Penalty under 22 Geo. 2, c. 46—Necessity for proof of appointment.]—**Where the town clerks of a borough always exercised the office of clerk of the peace by themselves or deputy, without any formal appointment thereto:—*Held*: the deputy town clerk was not liable to penalties under above Act, for practising as an attorney at the borough sessions, without proof of his having acted as deputy clerk of the peace.—*FAULKNER v. CHEVELL* (1839), 10 Ad. & El. 76; 2 Per. & Dav. 262; 8 L. J. Q. B. 186; 3 J. P. 384; 3 Jur. 1148; 113 E. R. 30.

**805. — Prosecuting offender committed for trial by justices—Penalty under 5 & 6 Will. 4, c. 76, s. 102.]—**A clerk to the justices of a borough, who is employed in the prosecution of a person committed by such justices, is not liable to the penalty of £100 under above sect.—*COE v. LAWRENCE* (1853), 1 E. & B. 516; 22 L. J. Q. B. 140; 20 L. T. O. S. 222; 17 J. P. 342; 17 Jur. 1115; 1 W. R. 146; 118 E. R. 529.

**806. — Partnership with solicitor in practice.]—**By above sect., it is provided that it shall not be lawful for the clerk to borough justices, by himself or his partner, to be directly or indirectly interested or employed in the prosecution of any offender committed for trial by the justices of whom he shall be such clerk as aforesaid, or any of them, at any ct. of gaol delivery or general or quarter sessions. F. was appointed clerk to the justices of the borough of N. He was in partnership with P. who was clerk of the peace for the county in which N. was situate, & who was entitled to receive certain fees upon the arraignment & trial of all prisoners at quarter sessions. Certain offenders were committed by the justices of N. for trial at the general quarter sessions for the county, & upon their arraignment & trial P. received fees. By arrangement between E. & P., the former was entitled to receive, & did receive, one-half of the fees so taken by P.:—*Held*: F. was liable to be convicted upon an indictment preferred against him under above sect., as being interested in the prosecution of the offenders committed by the justices of N. for trial at the county sessions & the clause imposing the penalty did not apply to him.—*R. v. FOX* (1859), 1 E. & E. 729; 1 L. T. 216; 5 Jur. N. S. 1248; 8 W. R. 93; 120 E. R. 1083; *sub nom.* *FOX v. R.*, 29 L. J. M. C. 54; 24 J. P. 132, Ex. Ch.

**807. — In own court.]—***Semble*: the clerk of the justices should not act as solr. for one of the parties on a prosecution before his own bench of

justices.—*R. v. BRAKENRIDGE* (1884), 48 J. P. 293, D. C.

**808. — Falling to bind over real prosecutor on committal—Acting as solicitor on prosecution by indictment.]—***R. v. BUSHELL* (1888), 52 J. P. 136; 16 Cox, C. C. 367.

**Disqualification under Licensing Consolidation Act, 1910 (c. 24).]**—See Licensing Consolidation Act, 1910 (c. 24), s. 49.

### SECT. 4.—DUTIES AND LIABILITIES.

**Duty to make & keep records.]—**See Justices Clerks Act, 1877 (c. 43), ss. 5, 6; Summary Jurisdiction Act, 1879 (c. 49), s. 22; Summary Jurisdiction Rules, 1915.

**— Admissibility of records in evidence.]—**See EVIDENCE, Vol. XXII., pp. 298, 347, Nos. 2864, 3511.

**809. Private records kept in books containing court records—Delivery by executor to successor of clerk.]—**The clerk to the justices of a petty sessional division was accustomed to make private entries in the books in which he entered the magisterial business of the division. Upon his decease these books were taken possession of by his exor., who refused to deliver them up to the successor of the deceased, upon the grounds that they were purchased by deceased, contained items of his private business, & because he had a lien upon them for fees due & unpaid. Upon a rule for a *mandamus* to compel him to deliver them up:—*Held*: he was bound to do so.—*R. v. RASTRICK* (1858), 31 L. T. O. S. 220; 22 J. P. 386; 6 W. R. 654.

**810. Liability—For failure to carry out orders of justices—Return of convictions.]—***Ex p. HAYWARD*, No. 671, *ante*.

**811. — Information for alleged misconduct in office.]—***R. v. AYRE* (1851), 15 J. P. Jo. 322.

As to informations generally, see CRIMINAL LAW, Vol. XIV., pp. 349 *et seq.*

### SECT. 5.—REMUNERATION.

#### SUB-SECT. 1.—FEES.

See Justices Clerks Act, 1877 (c. 43), s. 9; Criminal Justice Administration Act, 1914 (c. 58), s. 6, sched. I.

**812. Table of fees—Recovery of unpaid but regular fees.]—**Fees which a justices' clerk, in a borough, is authorised to take by a table regularly allowed & confirmed under 5 & 6 Will. 4, c. 76, s. 124, in respect of charges against persons apprehended & brought before the borough justices by constables appointed by the watch committee, disposed of by such justices, & which fees the clerk to the justices cannot recover from such persons, or other parties, either on account of their not being specifically imposed on them by Acts of Parliament, or from their inability to pay, are "expenses necessarily incurred in carrying into effect the provisions of the Act" under s. 92, & a *mandamus* will go to direct their payment out of the borough fund.—*R. v. GLOUCESTER CORPN.*

—*Ex p. CARTER* (1895), 33 N. B. R. 6.—CAN.

#### PART X. SECT. 3.

**q. Sex.]—**A woman by reason of her sex is disqualified under the statutes regulating the matter from being appointed or acting as clerk of petty sessions, but she is not debarred either by the common law or any ground of public policy from occupying that position.—*FROST v. R.*, [1919] 1 I. R.

#### 81.—IR.

#### PART X. SECT. 4.

**r. To assist justices at preliminary examinations.]—**Assisting justices on preliminary examinations, & the Crown officer on criminal prosecutions, are not within the duties of the clerk of the peace as described by legislation.

#### PART X. SECT. 5, SUB-SECT. 1.

**t. Table of fees—Contents of.]—**The table of fees established & promulgated by the cts. contains all the services for which clerks are entitled to charge, in addition to such as are

(1844), 5 Q. B. 862; 1 Dav. & Mer. 677; 13 L. J. Q. B. 333; 3 L. T. O. S. 54; 8 J. P. 855; 8 Jur. 573; 114 E. R. 1474.

*Annotation*:—*Reid*. *Reddish v. Hitchinor* (1878), 43 J. P. 41.

**813. — When justices may make fresh table.]**

—(1) Declaration that a table of fees to be taken by the clerks of justices for M. directing that the fee to be taken for every recognisance to prosecute, etc., should be 4s., was pursuant to 26 Geo. 2, c. 14, made & settled by the justices at quarter sessions, approved at the quarter sessions next succeeding, & afterwards laid before the judges at the next assizes, who, on Nov. 15, 1842, approved & ratified the same; & that three months afterwards deft., as clerk to the justices, demanded & received of pltf. 8s., as the fee for taking & acknowledging a recognisance, whereby, & by force of the statute, deft. became liable to pay pltf. £20:—*Held*: on demurrer; the declaration was bad, as 26 Geo. 2, c. 14, s. 2, in imposing a penalty of £20 for demanding a greater fee than that established, enabled any person to sue as informer, & pltf. sued as informer, though he happened also to be the person grieved. (2) By 26 Geo. 2, c. 14, s. 1, “the justices of the peace throughout England, at their respective general quarter sessions of the peace, to be held next after June 24, 1753, shall & they are required to make & settle a table of fees, etc.; & it shall & may be lawful for the said justices in their respective quarter sessions assembled from time to time to make any other table of fees to be taken instead of the fees contained in the table.” *Semble*: the power to make a fresh table of fees does not depend upon a previous table having been made at the session next after June, 1753.—*LEWIS v. DAVIS* (1875), L. R. 10 Exch. 86; 44 L. J. Ex. 86; 39 J. P. 148; 23 W. R. 635, Ex. Ch.

*Annotation*:—*Generally*, *Mentd.* *Caldow v. Pixell* (1877), 2 C. P. D. 562.

**814. — Ratification at next assizes—Necessity for.]**—(1) If a clerk to justices demands & receives a fee for the taking of recognisances, as for a principal & two sureties, there being in fact only one surety, he is not guilty of an offence or liable to a forfeiture under 26 Geo. 2, c. 14, s. 2, if he actually believed there were two sureties.

(2) A table of fees to be taken by the clerks of justices was made at the June quarter sessions, & submitted for approval to the next October quarter sessions; when the further consideration thereof was adjourned to the next Epiphany sessions; & at these last-mentioned sessions the table, with some alterations, was approved of; & the same was afterwards ratified & confirmed by the judges at the next following assizes:—*Held*: the table was not duly approved, ratified & confirmed, under 26 Geo. 2, c. 14, s. 1, as the approval ought to have been given at the October sessions, & such sessions had no power to adjourn the consideration thereof.—*BOWMAN v. BLYTH* (1857), 7 E. & B. 26; 27 L. J. M. C. 21; 29 L. T. O. S. 312; 22 J. P. 5; 3 Jur. N. S. 886; 119 E. R. 1158, Ex. Ch.

*Annotations*:—*As to* (2) *Distd.* *Lewis v. Davis* (1875), L. R. 10 Exch. 86. *Reid.* *R. v. Lancashire JJ.* (1857), 8 E. & B. 563; *R. v. Cambridge Union* (1861), 1 B. & S. 61. *Generally*, *Mentd.* *Rochester Corpn. v. R.* (1858), E. B. & E. 1024; *Caldow v. Pixell* (1877), 2 C. P. D. 562; *R. v. Tolson* (1889), 23 Q. B. D. 168; *Redheugh Colliery v. Gateshead Assmt. Com.* (1923), 130 L. T. 366.

**815. Payment of fees—Liability for—Private prosecutor.]**—A railway stationmaster gave a person into the custody of a police constable on the charge of picking pockets at the railway station,

& he afterwards appeared & gave evidence before two justices, who convicted prisoner of frequenting a place of public resort with intent to commit a felony:—*Held*: the stationmaster was not liable for the fees payable to the clerk of the justices in respect of such conviction.—*REDDISH v. HITCHINOR* (1878), 48 L. J. M. C. 31; 40 L. T. 65; 43 J. P. 41.

**816. — In advance—Right of clerk to demand.]**—The clerks of magistrates within any part of the metropolitan police district, for which no police ct. has been established, are entitled to demand & receive from police constables, as well as other persons, the fees authorised to be taken by magistrates’ clerks, pursuant to 26 Geo. 2, c. 14; but they are not entitled to retain any fines or penalties received by them, & for which they are bound to account to the receiver of the metropolitan police district, under Metropolitan Police Courts Act, 1830 (c. 71), s. 46, on account of their fees; nor have they any remedy whatever against the receiver for the recovery of their fees. *Semble*: they might insist upon payment at the time of the application, & refuse to do the act required until payment of the fee.—*WRAY v. CHAPMAN* (1850), 14 Q. B. 742; 4 New Mag. Cas. 55; 19 L. J. M. C. 155; 14 L. T. O. S. 439; 14 J. P. 95; 14 Jur. 687; 117 E. R. 286.

*Annotations*:—*Distd.* *Reddish v. Hitchinor* (1878), 48 L. J. M. C. 31. *Reid.* *George v. Thomas*, [1910] 2 K. B. 951.

**817. — As condition of liberation on bail.]**—*Ex p.* *REDDISH* (1856), 20 J. P. Jo. 101.

**818. — Fee for administration of oath to witness—Alehouse Act, 1828 (c. 61), s. 15.]**—Above sect. is exhaustive as to the fees which may be taken by a clerk to the justices on an application for the grant of a license at a general licensing meeting or at any special sessions held under the Act, & therefore a clerk to the justices is not entitled to demand a fee for administering the oath to a person who appears & objects to the grant of a license.—*WHITTUCK v. WITHY*, [1907] 2 K. B. 526; 76 L. J. K. B. 773; 96 L. T. 912; 71 J. P. 317; 23 T. L. R. 458, D. C.

**819. — Order on overseers—Payment must be to clerk.]**—An order under Parish Constables Act, 1842 (c. 109), s. 17, & 13 & 14 Vict. c. 20, s. 2 on overseers, requiring them to pay a sum of money to W., the superintendent of police, “for fees due to him,” is not supported by evidence that the fees were those really due to the clerk of the justices in vagrant cases, & had been paid in the first instance to him by the superintendent, who sought the order in question as a means of reimbursing himself, & therefore justices are not authorised to enforce such an order.—*NEITHROP OVERSEERS v. WHIDCOAT* (1863), 9 L. T. 383.

**820. — — Payment disallowed by poor law auditor.]**—The quarter sessions, under Summary Jurisdiction Act, 1848 (c. 43), s. 30, duly made a table of fees to be taken by the clerks to the justices within the county of C., & amongst others, a fee of 2s. 6d. for notice to parish officers to return & verify jury lists, & 2s. for allowance of list, & stated that these fees were payable by the overseers. These fees were sanctioned by the Secretary of State. The overseers of the parish of H. paid such fees to the clerk to the justices of the petty sessional division in which H. was situate, & claimed before the poor law auditor to have them allowed to them out of the poor rates, under Poor Law Amendment Act, 1844 (c. 101), s. 60. The poor law auditor disallowed the payment:—*Held*:

specially authorised & provided for by any statute.—*Re DARTNELL* (1867), 26 U. C. R. 430.—*CAN.*

a. *Payment of fees—To be connected with administration of justice.]*—*Re CLERK OF THE PEACE v. WESTERN*

DISTRICT MUNICIPAL COUNCIL (1843), 1 U. C. R. 162.—*CAN.*



**Sect. 5.—Remuneration: Sub-sects. 1 & 2. Part XI.**  
**Sect. 1.]**

the overseers had no authority for making the payment to the justices' clerk, & the poor law auditor had rightly disallowed the payment.—*R. v. HASLINGFIELD OVERSEERS* (1874), *L. R.* 9 Q. B. 203; 43 *L. J. Q. B.* 38; 29 *L. T.* 801; 38 *J. P.* 581; 22 *W. R.* 260, *D. C.*

**821. Penalty for demand of excessive fees.]—***BOWMAN v. BLYTH*, No. 814, *ante*.

**822. —.]—***LEWIS v. DAVIS*, No. 813, *ante*.

**SUB-SECT. 2.—SALARY.**

See Justices Clerks Act, 1877 (c. 43), s. 9; Criminal Justice Administration Act, 1851, c. 55, s. 11.

**823. By whom payable — Quarter session borough—Population under ten thousand.]—***THERFORD CORPN. v. NORFOLK COUNTY COUNCIL*, No. 896, *post*.

**824. — Non-quarter sessions borough — Separate commission of peace—Population over ten thousand.]—**A county council claiming the fines levied by justices of a non-quarter sessions borough, having a separate commission of the peace, is liable to pay the salary of the clerk to the borough justices.—*CORNWALL COUNTY COUNCIL v. TRURO TOWN COUNCIL* (1894), 63 *L. J. M. C.* 60; 70 *L. T.* 354; 58 *J. P.* 299; 10 *R.* 595, *D. C.*

*Annotations:—***Refd.** *Re Herefordshire County Council & Leominster Town Council, Re Local Government Act, 1888*, [1895] 1 *Q. B.* 43; *Thetford Corpn. v. Norfolk County Council*, [1898] 2 *Q. B.* 468.

**825. — — — Population under ten thousand.]—**Local Government Act, 1888 (c. 41), s. 84, has imposed upon a county council the duty of paying the salary of the clerk to the justices of a borough which is within the administrative county, & has a population under ten thousand & a separate commission of the peace; & all fees & costs payable to such clerk, which are not excluded in the fixing of his salary, should be paid into the county fund.—*Re HEREFORDSHIRE COUNTY COUNCIL & LEOMINSTER TOWN COUNCIL*, [1895] 1 *Q. B.* 43; 64 *L. J. M. C.* 26; 71 *L. T.* 576; 15 *R.* 77; *sub nom.* *HEREFORDSHIRE COUNTY COUNCIL v. LEOMINSTER TOWN COUNCIL*, 59 *J. P.* 38, *D. C.*

*Annotation:—***Overd.** *Thetford Corpn. v. Norfolk County Council*, [1898] 2 *Q. B.* 468.

**826. — — — No separate commission of peace.]—***HUNTINGDON CORPN. v. HUNTINGDON COUNTY COUNCIL*, No. 797, *ante*.

**827. Increase of salary—Application to standing joint committee—Appeal to Home Secretary.]—**Where a clerk to the justices makes to the standing joint committee an application for an increase of salary, such application being endorsed by the justices for whom he acts, & where the committee decline to make any variation, there is a "decision" of the joint committee from which an appeal lies to the Secretary of State [under Criminal Justice Administration Act, 1914 (c. 58), s. 34 (2)].—*R. v. HOME SECRETARY, Ex p. ESSEX STANDING JOINT COMMITTEE* (1921), 91 *L. J. K. B.* 579; 126 *L. T.* 510; 86 *J. P.* 49; 38 *T. L. R.* 250; 66 *Sol. Jo.* 285; 20 *L. G. R.* 169, *D. C.*

*Annotation:—***Mentd.** *R. v. Yorkshire West Riding County Council, Ex p. Hemsworth Poor Law Union*, [1922] 2 *K. B.* 368.

## Part XI.—Quarter or General Sessions.

### SECT. 1.—IN GENERAL.

Jurisdiction of quarter or general sessions, see Part XII., *post*.

**828. Power to regulate own practice.]—***Ex p. EVANS*, No. 983, *post*.

**829. —.]—**The discretion of justices in enforcing a rule of sessions, which is not invalid or unreasonable, will not be interfered with.—*R. v. DERBYSHIRE JJ.* (1852), *Bail Ct. Cas.* 113; 22 *L. J. M. C.* 31; 17 *J. P.* 86; 16 *Jur.* 1071; *sub nom.* *R. v. DERBYSHIRE JJ., Ex p. GREEN*, 20 *L. T. O. S.* 116.

**830. Quarter & general sessions distinguished.]—***TAYLOR'S CASE* (1619), *Palm.* 44; 81 *E. R.* 970.

*Annotations:—***Consd.** *R. v. Middlesex JJ.* (1843), 4 *Q. B.* 807. **Mentd.** *Jones v. Givin* (1713), *Gillb.* 185.

**831. —.]—**An order on Poor Relief Act, 1601 (c. 2), s. 7, for the maintenance of a poor relation must be made at a general quarter sessions.—

**821 i. Penalty for demand of excessive fees.]—**A clerk of petty sessions taking a fee higher than is allowed is not liable to be convicted without proof that the taking was wilful & for an improper purpose.—*R. v. LLOYD, Ex p. MANCE* (1872), 3 *V. L. R.* 64.—**AUS.**

**b. When chargeable.]—**A clerk of the peace cannot charge fees for any service for which no fee is given by 43 Geo. 3, c. 11, or otherwise, & if he accept a salary in lieu of all fees, he is entitled only to such salary.—*ASKIN*

**c. Salary in lieu of fees—Right to**

**claim fees for preparing jury books.]—***PRINGLE v. McDONALD* (1853), 10 *U. C. R.* 254.—**CAN.**

**d. — Validity of.]—***PETERBOROUGH TOWN v. HATTON* (1879), 30 *O. P.* 455.—**CAN.**

**e. Payment of non-statutory fees —Whether recoverable.]—**Where the clerk, at the request of the justice or municipality, or of the county auditors, renders services which he is not bound to render, & for which no fee is allowed, though he might be unable to sue for his charges, yet, when they have been duly audited & paid under no misunderstanding, the municipality cannot

recover them back.—*LAMBTON COUNTY v. POUSSETT* (1862), 21 *U. C. R.* 472.—**CAN.**

### PART X. SECT. 5, SUB-SECT. 2.

**f. In lieu of fees.]—**If a clerk of the peace accept a salary in lieu of all fees, he is entitled only to such salary.—*ASKIN v. LONDON DISTRICT COUNCIL* (1844), 1 *U. C. R.* 292.—**CAN.**

### PART XI. SECT. 1.

**g. Chairman of sessions —Power to make orders of the court.]—***Semble*: the chairman of the quarter sessions

additional sessions was valid in point of law. The King has power to issue commissions requiring the justices to hold sessions for the trial of offences; & if he does so, they may meet for the purpose at as many different times as they think proper (PATTESON, J.).

(2) The distinction between the two sorts of sessions, general & quarter, is plainly pointed out in *Hawkins Pleas of the Crown* . . . "that the quarter sessions are a species only of general sessions, & that such sessions are properly called general quarter sessions, which are holden in the four quarters of the year in pursuance of 2 Hen. 5, c. 4." This last part however is erroneous. I should say, not held by statute, but authorised by the King's commission (PATTESON, J.).

(3) The practice in Middlesex as to discharging prisoners would render it inconvenient to hold sessions by adjournment, because the grand jury being adjourned, parties in custody have, against whom no bills had been found, could not be discharged as they are when the grand jury are discharged (PATTESON, J.).—*R. v. MULLANEY* (1833), 6 C. & P. 96; 2 Nev. & M. M. C. 142.

**834. — London or Middlesex counties.]—**An appeal against a poor rate in London or Middlesex must be made, as in all other counties, to the next, *i.e.* next practicable, general quarter sessions; though Poor Relief Act, 1743 (c. 38), s. 4, in its terms gives the appeal to the next general or quarter sessions; it appearing from other parts of the Act, as well as from other Acts *in pari materia*, that these terms are used synonymously; & though in the two counties named there are four general as well as four general quarter sessions.—*R. v. LONDON JJ.* (1812), 15 East, 632; 104 E. R. 982.

*Annotation:—***Appld.** *R. v. Middlesex JJ.* (1843), 4 Q. B. 807.

**835. — —.]—**In the county of Middlesex, which has four general & four quarter sessions, the appeal against an order of removal [under 8 & 9 Will. 3, c. 30, s. 6] must be to quarter sessions (*per Cur.*).—*R. v. MIDDLESEX JJ.* (1843), 4 Q. B. 807; Dav. & Mer. 289; 12 L. J. M. C. 134; 1 L. T. O. S. 229; 7 J. P. 494; 7 Jur. 669; 114 E. R. 1101.

**836. — —.]—**7 & 8 Vict. c. 71, s. 2, which empowers the justices of Middlesex to try appeals at general sessions in the same manner as at the general quarter sessions only confers an optional jurisdiction, & applt. may proceed therefore as before to quarter sessions, & is not bound to go to the general sessions.—*R. v. MIDDLESEX JJ.* (1848), 5 Dow. & L. 580; 3 New Mag. Cas. 1; 3 New Sess. Cas. 152; 2 Saund. & C. 271; 17 L. J. M. C. 111; 11 L. T. O. S. 132; 12 Jur. 434.

*Annotations:—***Refd.** *R. v. Lancashire JJ.* (1849), 13 J. P. 519. **Mentd.** *Mumford v. Hitchcocks* (1863), 14 C. B. N. S. 361; *Milch v. Frankau*, [1909] 2 K. B. 100.

**837. Holding intermediate sessions.]—***R. v. MULLANEY*, No. 833, *ante*.

**838. Time of holding quarter sessions.]—**54 Geo. 3, c. 84, which enacted, that Michaelmas quarter sessions shall be holden in the week next after Oct. 11, is merely directory, & those sessions may notwithstanding that enactment be legally holden at another time.—*R. v. LEICESTER JJ.* (1827), 7 B. & C. 6; 9 Dow. & Ry. K. B. 772; 4 Dow. & Ry. M. C. 518; 5 L. J. O. S. M. C. 95; 108 E. R. 627.

*Annotations:—***Consd.** *Bowman v. Blyth* (1857), 27 L. J. M. C. 21. **Refd.** *Gwynne v. Burnell* (1835), 2 Scott, 16; *Montreal Street Ry. v. Normandin*, [1917] A. C. 170.

**Mentd.** *Cole v. Green* (1843), 6 Man. & G. 872; *Catterall v. Sweetman* (1845), 1 Rob. Ecol. 304; *R. v. Worksope Board of Health* (1864), 10 L. T. 297.

*See, now*, Criminal Justice Act, 1925 (c. 86), s. 22.

**839. Only one original sessions in a quarter.]—**A quarter sessions once dropped cannot be resumed.—*R. v. POLSTEAD (INHABITANTS)* (1747), 2 Stra. 1263; 93 E. R. 1170.

*Annotations:—***Consd.** *R. v. Mullaney* (1833), 6 C. & P. 96. **Refd.** *R. v. Suffolk JJ.* (1847), 2 New Sess. Cas. 554; *R. v. Sussex JJ.* (1865), 4 B. & S. 966. **Mentd.** *R. v. Yarpole* (1790), 4 Term Rep. 71.

**840. Convening meeting—Subsequent session by other justices void.]—***R. v. SAINSBURY*, No. 24, *ante*.

**841. — Necessity for warrant.]—**(1) Unless a commission of the peace nominates a quorum, all the justices appointed by it must attend at a sessions.

(2) Justices need not issue a warrant for holding a sessions. An allegation that justices appointed a sessions implies that everything necessary to make the appointment legal was done.—*R. v. IPSWICH CORPN.* (1706), 2 Ld. Raym. 1232; 2 Salk. 434; 92 E. R. 313; *sub nom.* *R. v. WHITACRE*, Holt, K. B. 445; *sub nom.* *WHITACRE'S CASE*, 11 Mod. Rep. 67.

*Annotations:—***As to** (1) **Consd.** *R. v. Leeds JJ., Ex p. Binns* (1906), 95 L. T. 916. **Refd.** *R. v. Wells* (1767), 4 Burr. 1999; *R. v. Corry* (1804), 5 East, 372; *Blacket v. Blizard* (1829), 9 B. & C. 851; *Freeman v. Meynott, Blackett & Blizard*, (1829), 8 L. J. O. S. K. B. 85. **Generally, Mentd.** *R. v. Cambridge University, Bentley's Case* (1724), Fortes. Rep. 202; *R. v. Ward* (1729), 1 Barn. K. B. 294; *R. v. Halford* (1734), 7 Mod. Rep. 193; *R. v. London Corpn.* (1785), 4 Doug. K. B. 360; *R. v. Joint Stock Cos. Registrar* (1847), 10 Q. B. 839; *Sheffield, Rotherham & Chesterfield Fire & Life Insee.* (1847), 16 L. J. Q. B. 407; *Southampton & Itchin Bridge Co. v. Southampton L. B.* (1858), 8 E. & B. 801; *R. v. Hayward* (1862), 2 B. & S. 585; *Hayman v. Rugby School* (1874), L. R. 18 Eq. 28; *Cassel v. Inglis*, [1916] 2 Ch. 211.

**842. Attendance of justices—Nomination of quorum.]—***R. v. IPSWICH CORPN.*, No. 841, *ante*.

**843. Quarter sessions held concurrently with assizes.]—**Where quarter sessions of a county occur while the judge of assize is proceeding with the trial of prisoners in that county after the grand jury at the assizes have been discharged, the better course is for quarter sessions not to proceed with the trial of any prisoners, but to dispose of all their other business, & then to adjourn to a future day.—*ANON.* (1840), 9 C. & P. 790.

**844. —.]—**The authority of cts. of quarter session, whether for a county or a borough, is not in law either determined or suspended by the coming of the judges into the county under their commission of assize, oyer & terminer & general gaol delivery; although, generally speaking, it would be inconvenient & improper that cts. of quarter session for counties should be held concurrently with the assizes for the same counties.—*SMITH v. R.* (1849), 13 Q. B. 738; 3 New Mag. Cas. 223; 3 New Sess. Cas. 564; 18 L. J. M. C. 207; 14 L. T. O. S. 84; 13 Jur. 850; 3 Cox, C. C. 586; 116 E. R. 1446; *sub nom.* *R. v. SMITH*, 13 J. P. 681.

**845. — Alteration of date of quarter sessions—Effect on notice of appeal.]—**Although the form of notice of intended application to quarter sessions for the diversion of a highway under Highway Act, 1835 (c. 50), s. 85, contains a blank for the insertion of the date on which the application is proposed to be made, it is not necessary to state the date in the notice; it is enough that the notice makes it clear that the application will be made to

cannot make any order of the ct. except during the sessions, either regular or adjourned.—*Re COLEMAN*

(1864), 23 U. C. R. 615.—**CAN.**

**h. Courts of record.]—**The cts. of general & quarter sessions in New-

foundland are cts. of record.—*FINLEY v. KEILLY* (1849), 3 Nfld. L. R. 141. —**NFLD.**



*Sect. 1.—In general. Sects. 2 & 3: Sub-sects. 1 2, A.]*

quarter sessions held next after the expiration of four weeks from the day on which the justices' certificate is lodged with the clerk of the peace.

A certificate of justices for the diversion of a highway was lodged with the clerk of the peace on May 21. In the notice of intended application to quarter sessions it was stated that the application would be made on July 4, that being the date on which the summer sessions would in the ordinary course be held. Subsequently, the county assizes having been fixed for July 3, it became necessary to alter the date of holding quarter sessions. The justices accordingly altered it to June 20, & on that day the application for enrolment of the certificate was made. The four weeks from the lodging of the certificate with the clerk of the peace expired on June 18:—*Held*: notwithstanding the alteration of the date, the notice was a good notice, & quarter sessions had jurisdiction to entertain the application.—*R. v. DERBY JJ.*, [1917] 2 K. B. 802; 86 L. J. K. B. 1534; 117 L. T. 538; 33 T. L. R. 539; 61 Sol. Jo. 695; 15 L. G. R. 720; *sub nom.* *R. v. DERBYSHIRE JJ.*, *Ex p. GLOSSOP CORPN.*, 81 J. P. 292, D. C.

**846. Provision of sessions house—County of London.]**—The London County Council & not the standing joint committee of the County of London have, subject to the approval by a Secretary of State of any scheme made in that behalf, the power & duty of determining the place or places where the cts. of quarter sessions for the county of London are to be held. Subject to such approval, the London County Council has the power & duty of determining whether any & what new site shall be acquired for the accommodation of the cts. of quarter sessions for the County of London, but the power & duty of determining the accommodation to be afforded at such places & on such sites is vested in the standing joint committee of the County of London, & such accommodation is to be provided by the London County Council.

A question having arisen as to which of the above mentioned bodies had the power or duty of determining the place at which the sessions should be held:—*Held*: a question had arisen as to whether any power or duty was transferred to a county council or joint committee under Local Government Act, 1888 (c. 41), & therefore the High Ct. had jurisdiction under sect. 29 of that Act to determine the question.—*LONDON COUNTY STANDING JOINT COMMITTEE v. LONDON COUNTY COUNCIL* (1911), 104 L. T. 923; 75 J. P. 455; 27 T. L. R. 473; 55 Sol. Jo. 716; 9 L. G. R. 1239, D. C.

**847. Maintenance of sessions house.]**—A difference of opinion having arisen between the S. county council & the standing joint committee as to maintaining & repairing buildings for assize & sessions purposes:—*Held*: (1) though the property is vested in the county council, the joint committee have complete control over & can direct the expenditure of funds which it is the duty of the county council to find the means of supplying; (2) both bodies can issue regulations for managing the buildings so long as these do not conflict.—*Re LOCAL GOVERNMENT ACT, 1888, Ex p. SOMERSET COUNTY COUNCIL* (1889), 58 L. J. Q. B. 513; 61 L. T. 510; *nom.* *Re SOMERSET COUNTY COUNCIL*, 54 J. P. 182; 5 T. L. R. 712, D. C.

*Annotations*:—*As to* (1) *Distd. London County Standin. Joint Committee v. L. C. C.* (1911), 104 L. T. 923, *supra*. *Avon. Co. v. Glamorganshire Standing Joint Committee*, *Powell Duffryn Steam Coal Co. v. Same*, [1916] 2 K. B. 206.

**848. Books of quarter sessions—Right to inspect.]**—Every body has a right to inspect books of the sessions.—*HERBERT v. ASHBURNER* (1751), 1 Wils. 297; 95 E. R. 628.

**849. ———.]**—County ratepayers have no right, either at common law or by statute, to inspect & take copies of the bills of charges of county officers, after they have been deposited by the clerk of the peace among the records of the county, in pursuance of County Rates Act, 1739 (c. 29), s. 8. The justices of the peace for the county are alone entitled to such an inspection.—*R. v. STAFFORDSHIRE JJ.* (1837), 6 Ad. & El. 84; 1 Nev. & P. K. B. 260; Nev. & P. M. C. 71; Will. Woll. & Dav. 98; 6 L. J. M. C. 65; 1 J. P. 136; 112 E. R. 33.

*Annotations*:—*Reid. Ex p. Briggs* (1859), 1 E. & E. 881. *Mentd. Mutter v. Eastern & Midlands Ry.* (1888), 38 Ch. D. 92.

As to adjournment of sessions, see Part XII, Sect. 4, sub-sect. 2, *post*.

## SECT. 2.—THE CAPTION.

**850. Nature of—Remains same throughout sessions.]**—The caption of an indictment on which deft. had been convicted, was drawn up by the clerk of the peace from the minutes of sessions, & returned with the indictment to the Crown office. It stated the presentment to be made by the oaths of A. B., C. D., etc., naming twelve grand jurors, & others, good & lawful men, etc. A rule was obtained, with a view to a writ of error, calling on the clerk of the peace to show cause why the caption should not be amended by inserting the true names & number of the grand jury sworn. Proof was given by affidavit that the real number exceeded twenty-three. The clerk did not deny this, but stated that he had no minute or recollection of the names or number:—*Held*: the caption was not incorrect in omitting to state the number & all the names of the grand jury; &, under the circumstances, no alteration could be made in it; & deft. received judgment.

At sessions the original general caption is for the whole proceedings (*COLERIDGE, J.*).—*R. v. MARSH* (1837), 6 Ad. & El. 236; Will. Woll. & Dav. 150; 6 L. J. M. C. 153; 1 J. P. 245; 1 Jur. 38; 112 E. R. 89.

*Annotations*:—*Reid. O'Brien v. R.* (1849), 3 Cox, C. C. 360. *Mentd. R. v. Yates* (1883), 48 J. P. 102.

**851. Necessity for—As part of record.]**—Where an indictment for a conspiracy alleged that "at the ct. of quarter sessions holden, etc., an indictment against A. B. was preferred to, & found by the grand jury":—*Held*: this allegation must be proved by a caption regularly drawn up of record, & that the minute book kept by the deputy clerk of the peace could not be received as evidence of the finding of the bill, although no record had been in fact drawn up.—*R. v. SMITH* (1828), 8 B. & C. 341; 6 L. J. O. S. M. C. 99; 108 E. R. 1069.

*Annotations*:—*Reid. Porter v. Cooper* (1834), 6 C. & P. 354; *King v. R.* (1849), 14 Q. B. 31. *Mentd. Campbell v. R.* (1847), 11 Q. B. 814.

**852. ——— To show jurisdiction.]**—The caption . . . was necessary to show that a ct. of competent jurisdiction had tried the appeal (*LORD DENMAN, C.J.*).—*R. v. YEOVELEY (INHABITANTS)* (1838), 8 Ad. & El. 806; 1 Per. & Dav. 60; 1 Will. Woll. & H. 614; 8 L. J. M. C. 9; 112 E. R. 1043.

*Annotation*:—*Mentd. Metropolis Police Comrs. v. Donovan* (1903), 88 L. T. 555.

**853. Contents of—Authority of court.]**—The style of an inferior ct. must show by what authority, & state the names of the judges before whom it is held.—*JERRET v. CALDEWELL* (1607), Cro. Jac. 184; 79 E. R. 160.

**854.** ——— *Style of an inferior court.*—ought to show by what authority it was held.—*JOHNSON v. UNDERWOOD* (1618), Cro. Jac. 493; 79 E. R. 421.

**855. ——— Names of justices.]**—*JERRET v. CALDEWELL*, No. 853, *ante*.

**856. ——— Names of jury—How far essential.]**—*R. v. MARSH*, No. 850, *ante*.

**857. Effect of error in form—Indictment quashed.]**—Erroneous style of the sessions, sufficient cause for quashing an indictment.—*R. v. ROYSTED* (1756), 1 Keny. 255; 96 E. R. 985.

*Annotation:—Refd. R. v. Wilson* (1844), 6 Q. B. 620.

**858. ——— Order quashed.]**—*R. v. HALIWEILL* (1849), 13 L. T. O. S. 161, 208; 13 J. P. Jo. 330, 346.

### SECT. 3.—OFFICERS OF QUARTER SESSIONS.

#### SUB-SECT. 1.—CUSTOS ROTULORUM.

**By whom appointed.]**—*See* 1 Will. & Mar. c. 21, s. 4; Liberties Act, 1836 (c. 87); Durham County Palatine Act, 1836 (c. 19); Lancaster County Clerk Act, 1871 (c. 73), s. 9.

**858a. ——— The Crown.]**—*HARCOURT v. FOX*, No. 859, *post*.

**859. Who may be appointed—Justice assigned commission of peace for county.]**—They, [justices of the peace], were to have a commission; they had authority to hold a ct.; & thereby they were judges of a ct. of record. This did give occasion to the commencement of the office of *custos rotulorum*; for they, being judges of record, the records of that ct. must be in their custody. . . . But in regard it might be inconvenient that the records should be dispersed among them promiscuously, & not kept together in one hand, I look upon it that it was in the power of the king to appoint some particular person to have the custody & charge of the records, & that he should be a person responsible to the subject for the safe keeping of them, & to whom he might have resort upon all occasions, when he had any use of them. This was thought convenient; for the words at the end of the commission of the peace are, “we appoint you such an one to be keeper of the records & rolls of the county.” So that though legally, as I said, the records are in the possession of all the justices of the peace . . . yet directly they are in the custody of the *custos rotulorum*, & if by negligence or misdemeanour they happen to be lost or miscarry, he is responsible to the King, & to the subject, for such loss or miscarriage (*HOLT, C.J.*).—*HARCOURT v. FOX* (1693), 4 Mod. Rep. 167; 12 Mod. Rep. 42; 1 Show. 506; Comb. 209; *Holt, K. B.* 189; 87 E. R. 328; *affd. sub nom. FOX v. HARCOURT*, Show. Parl. Cas. 158.

*Annotations:—Consd. Owen v. Saunders* (1696), 1 Ld. Raym. 158; *Harding v. Pollock* (1829), 4 Bing. 25. *Refd. Leconfield v. Thornely*, [1926] A. C. 10.

**860. Powers & duties—Custody of records.]**—*HARDING v. POLLOCK*, No. 866, *post*.

**860a. ———.]**—*HARCOURT v. FOX*, No. 859, *ante*.

*See, now, Local Government Act, 1888* (c. 41), s. 83 (3).

**Power to appoint clerk of peace.]**—*See* Nos. 861, 862, *post*.

#### SUB-SECT. 2.—CLERK OF THE PEACE.

##### A. Nature of Office.

**861. Tenure—During good behaviour.]**—By 1 Will. & Mar. c. 21, the *custos rotulorum* may appoint the clerk of the peace “for so long time only as he shall well demean himself”; & therefore if a clerk of the peace be appointed “during the pleasure of the *custos*,” the Ct., on his being deprived, will not grant a *mandamus* to restore; for the appointment being void he cannot show a title to the office.—*R. v. OWEN* (1694), 4 Mod. Rep. 293; Comb. 317; 87 E. R. 403; *subsequent proceedings, sub nom. SANDERS v. OWEN* (1699), Carth. 426, H. L.

*Annotations:—Apld. Roberts v. London Corpn.* (1882), 46 L. T. 623. *Distd. Leconfield v. Thornely*, [1926] A. C. 10. *Refd. Owen v. Saunders* (1697), 1 Ld. Raym. 158.

**862. ——— Office for life.]**—By 37 Hen. 8, c. 1, the *custos rotulorum* is authorised “to appoint a fit & able person to hold the office of clerk of the peace, during the time that the said *custos rotulorum* shall occupy the said office of *custos*, so as the said clerk of the peace demean himself justly & honestly.” By 1 Will. & Mar. c. 21, f. 1, the *custos* is authorised to nominate a clerk of the peace “for so long time only as such clerk of the peace shall well demean himself in his said office.” An appointment made by a *custos*, under these statutes, is, as to him, an appointment for life, & therefore the clerk of the peace so appointed cannot be removed from his office by the same or any succeeding *custos*; but by 1 Will. & Mar. c. 21, if he do not “well demean himself in his office” the sessions of the county, on application & proof made as the Act requires, may remove him.—*FOX v. HARCOURT* (1693), Show. Parl. Cas. 158; 1 E. R. 107; *affg. S. C. sub nom. HARCOURT v. FOX*, Comb. 209.

*Annotations:—Consd. Owen v. Saunders* (1696), 1 Ld. Raym. 158; *Harding v. Pollock* (1829), 6 Bing. 25. *Refd. Leconfield v. Thornely*, [1926] A. C. 10.

**863. ——— Freehold office.]**—Local Government Act, 1888 (c. 41), has not changed the tenure of the office of clerk of the peace of a county, which for years has been known as a freehold office, terminable only in the event of misconduct in accordance with statutory provisions, into an office held at the will of the standing joint committee of the county. It has merely superadded certain new duties to the old office, & although s. 83 of that Act vests the power to appoint & remove him in the standing joint committee, the grounds on which he may be removed are the grounds incident to the old office.

Sect. 6 [of 1 Will. & Mar. c. 21] prescribes the manner of his discharge. If a clerk of the peace should misdemean himself in the execution of his office, & a complaint thereof should be exhibited against him to the justices in quarter sessions, & proved before them, they may lawfully suspend or discharge him (*LORD SUMNER*).—*LECONFIELD (LORD) v. THORNELY*, [1926] A. C. 10; 95 L. J. K. B. 137; 134 L. T. 1; 89 J. P. 199; 42 T. L. R. 15; 23 L. G. R. 655, H. L.; *affg. S. C. sub nom. THORNELY v. LECONFIELD (LORD)*, [1925] 1 K. B. 236, C. A.

*Annotation:—Mentd. Dewhurst v. Salford Grdns.*, [1925] Ch. 655.

**864. ——— Office at will of joint standing committee.]**—*LECONFIELD (LORD) v. THORNELY*, No. 863, *ante*.

**865. ——— During pleasure.]**—*R. v. OWEN*, No. 861, *ante*.

**866. Clerk & attorney for Crown—In matters affecting Crown.]**—(1) The legal custody of the



**Sect. 3.—Officers of quarter sessions: Sub-sect. 2, A., B., C. & D.]**

records is in the justices, the actual custody is in the *custos rotulorum*.

(2) The offices of *custos rotulorum* & clerk of the peace are offices created within legal memory, & therefore, there can be no prescription affecting them.

(3) The clerk of the peace as well as the clerk of assize is clerk & attorney for the Crown as regards those matters which affect the Crown.

(4) The relation of clerk of the peace to the justices at sessions is precisely the relation of clerk of assize to the justices of assize (VAUGHAN, B.).—HARDING v. POLLOCK (1829), 6 Bing. 25; 3 Bli. N. S. 161; 1 Dow. & Cl. 453; 2 State Tr. N. S. 341; 130 E. R. 1189.

*Annotation*:—**Refd.** Maule v. White, Maule v. Herbert, Maule v. Green (1896), 60 J. P. 567.

**867. Whether subject to prescription.]**—HARDING v. POLLOCK, No. 866, *ante*.

**868. Relation to justices at sessions.]**—HARDING v. POLLOCK, No. 866, *ante*.

**869. Ministerial office.]**—DEMER v. COOK, No. 1130, *post*.

**B. Appointment.**

**870. In county—Formerly by custos rotulorum.]**—ANON. (1558), Jenk. 216; 145 E. R. 148.

*Annotations*:—**Refd.** Harding v. Pollock (1829), 6 Bing. 25. **Mentd.** Arundel v. Arundel (1603), Cro. Jac. 10.

**871. ———.]**—FOX v. HARCOURT, No. 862, *ante*.

**872. ———.]**—R. v. OWEN, No. 861, *ante*.

**873. ———.]**—*Custos rotulorum* may by parol, without deed, appoint a clerk of the peace.—SANDERS v. OWEN (1699), Carth. 426; 5 Mod. Rep. 386; 87 E. R. 721; *sub nom.* OWEN v. SAUNDERS, Colles, 70; 1 Ld. Raym. 158; *sub nom.* SAUNDERS v. OWEN, 12 Mod. Rep. 199; 2 Salk. 467; 3 Salk. 250, H. L.; *previous proceedings, sub nom.* R. v. OWEN (1694), 4 Mod. Rep. 293.

*Annotations*:—**Consd.** Harding v. Pollock (1829), 6 Bing. 25. **Refd.** R. v. M., S. & L. Ry. (1854), 4 E. & B. 88. **Mentd.** Somerset v. Fogwell (1826), 5 B. & C. 875; Rowbotham v. Wilson (1857), 27 L. J. Q. B. 61.

*See, now, Local Government Act, 1888 (c. 41), s. 83.*

**In borough.]**—*See* Municipal Corporations Act, 1882 (c. 50), s. 164.

**874. How made—Parol.]**—SANDERS v. OWEN, No. 873, *ante*.

*See, now, Local Government Act, 1888 (c. 41), s. 83.*

**C. Removal.**

**875. In county—Formerly by custos rotulorum.]**—FOX v. HARCOURT, No. 862, *ante*.

**876. ——— Recorder.]**—By 5 & 6 Will. 4, c. 76, s. 103, where a borough has a separate ct. of quarter sessions, the power of appointing the clerk of the peace is in the council of the borough; & by s. 105, the ct. of quarter sessions, of which the Recorder is sole judge, “shall have cognisance of all crimes, offences, & matters whatsoever cognisable by any ct. of quarter sessions of the peace for counties”; provided, among other things, that no Recorder, by virtue of his office, shall have power “to exercise any of the powers herein specially vested in the council”:—**Held**: the power of removing the clerk of the peace was in the Recorder.—R. v. HAYWARD (1862), 2 B. & S. 585; 31 L. J. M. C. 285; 26 J. P. 580; 9 Jur. N. S. 45; V. R. 558; 121 E. R. 1190.

*See, now, Municipal Corporations Act, 1882 (c. 50), s. 164.*

**877. ——— Justices.]**—WILDES v. RUSSELL, No. 886, *post*.

**878. ———.]**—*Ex p.* WILDES (1866), 30 J. P. Jo. 774.

**879. ———.]**—Where a charge was preferred to a ct. of quarter sessions under 1 Will. & Mar. c. 21, s. 6, against a clerk of the peace for a misdemeanour in his office [a refusal to record order of sessions], & evidence was taken, & the ct. decided that the charges were proved, & dismissed the clerk of the peace from his office & appointed another person in his place:—**Held**: on a *quo warranto* information against the person so appointed; the sufficiency of the evidence was a question entirely for the ct. of quarter sessions, & the decision of that ct. could not be reviewed by the Ct. of Q. B.—R. v. RUSSELL (1869), 10 B. & S. 91; 19 L. T. 686; 33 J. P. Jo. 69; 17 W. R. 402.

*Annotation*:—**Refd.** Leconfield v. Thornely, [1926] A. C. 10.

**880. ——— Other than justices of sessions when articles exhibited.]**—R. v. BAINES (1706), 2 Ld. Raym. 1265; 6 Mod. Rep. 192; 92 E. R. 332; *sub nom.* R. v. BANES, Holt, K. B. 512, 514; *sub nom.* R. v. BAYNES, 2 Salk. 680; *sub nom.* R. v. CUMBERLAND (CLERK OF THE PEACE), 11 Mod. Rep. 80.

*Annotations*:—**Refd.** R. v. Lloyd (1734), 2 Barn. K. B. 466; Shoppee v. Nathan, [1892] 1 Q. B. 245; Leconfield v. Thornely, [1926] A. C. 10. **Mentd.** R. v. Liverpool Corpn. (1758), 2 Keny. 424; Fletcher v. Calthrop (1845), 4 Q. B. 880; R. v. Richardson (1913), 8 Cr. App. Rep. 159.

*See, now, Local Government Act, 1888 (c. 41), s. 83.*

**881. How effected—Appointment of another to office.]**—(1) Under Municipal Corporation Act (1835), s. 76, officers “removed” under its provisions, became entitled to compensation. B., the then town clerk, made no formal surrender of his office, nor any attempt to procure his re-appointment, or to contest the election of D., who was appointed town clerk:—**Held**: this constituted a removal of B. from his office.

(2) For the purpose of establishing a claim to compensation for the loss of a connected or dependent office it ought to be shown: (a) that the office was connected or understood to be connected with or dependent upon, the corporate office lost; & (b) that the loss of it was connected with the loss of the principal office, but it is not required by the Act, that the connected or dependent office, or the office understood so to be, should be itself a corporate office:—**Held**: the circumstance of a town clerk having continued, for some time after he was removed from the office, to perform the duties of the office of clerk of the peace & clerk to the magistrates until other clerks were appointed, did not, in any way, interfere with his right to compensation for loss of those offices.—A.-G. v. POOLE CORPN. (1844), 8 Beav. 75; 14 L. J. Ch. 101; 4 L. T. O. S. 272; 8 J. P. 806; 9 Jur. 318; 50 E. R. 30.

**882. Grounds for—Misdemeanour in office—Necessity for written charge.]**—Clerk of the peace not removable but for misdemeanour.

If the sessions discharge the clerk of the peace under 1 Will. & Mar. c. 21, without a charge being made in writing & exhibited against him, the ct. will grant a *mandamus* to restore him.—R. v. EVANS (1691), Holt, K. B. 188; 4 Mod. Rep. 31; 12 Mod. Rep. 13; 1 Show. 282; 88 E. R. 1132.

*Annotation*:—**Consd.** Harding v. Pollock (1829), 6 Bing. 25.

**883. ———.]**—Justices at the quarter sessions, remove the clerk of the peace for misbehaviour; & this was adjudged to be no conviction but an order, & therefore it was not necessary to set out the evidence.—R. v. LLOYD

(1734), 2 Barn. K. B. 466; Cunn. 84, 133; Sess. Cas. K. B. 68; 2 Stra. 996; 94 E. R. 622.

*Annotations*.—*Consd. Ex p. Purdy* (1850), 10 C. B. 201. *Refd. Argllis v. Heaseman* (1735), Cunn. 157; *R. v. Bissex* (1756), Say. 304; *R. v. Killett* (1767), 4 Burr. 2063; *Leconfield v. Thornely*, [1926] A. C. 10. *Mentd. Lindsay v. Leigh* (1848), 11 Q. B. 455.

**884.** ——— *Necessity for proof.*—*LECONFIELD (LORD) v. THORNELY*, No. 863, *ante*.

**885.** ——— *Extortion—What must be proved.*—*R. v. BAINES* (1706), 2 Ld. Raym. 1265; 6 Mod. Rep. 192; 92 E. R. 332; *sub nom. R. v. BANES*, Holt, K. B. 512, 514; *sub nom. R. v. BAYNES*, 2 Salk. 680; *sub nom. R. v. CUMBERLAND (CLERK OF THE PEACE)*, 11 Mod. Rep. 80.

*Annotations*.—*Refd. R. v. Lloyd* (1734), 2 Barn. K. B. 466; *Shoppes v. Nathan*, [1892] 1 Q. B. 245; *Leconfield v. Thornely*, [1926] A. C. 10. *Mentd. R. v. Liverpool Corpn.* (1758), 2 Kony. 424; *Fletcher v. Calthrop* (1845), 6 Q. B. 880; *R. v. Richardson* (1913), 8 Cr. App. Rep. 159.

**886.** ——— *Refusal to record order of sessions.*—A clerk of the peace having received fees to which the justices thought he was not entitled, they withheld a portion of his salary, & upon a *mandamus* unsuccessfully resisted his claim, & thereby incurred costs, for the payment of which quarter sessions made an order, which it was the duty of the clerk of the peace to enter on the records of the ct. & certify to the county treasurer for settlement. The clerk of the peace, conceiving that the order was illegal, because no full bill of costs had been brought before the ct., & also because he thought the costs were not such as ought properly to be charged upon the county rate, but should have been paid by the justices, who by disputing his claim had improperly incurred them, declined to record the order or to give the necessary certificate. Quarter sessions thereupon referred it to the finance committee to consider & report what ought to be done under the circumstances; & upon their report a charge was preferred against the clerk of the peace, in the name of the county treasurer, under the 1 Will. & Mar. c. 21, s. 6, of having "misdemeaned himself in the execution of his office." The matter was heard before the justices at the next ct. of quarter sessions, & they unanimously found that the clerk of the peace had been guilty of the offence charged against him, & adjudged him to be dismissed from his office:—*Held*: the justices in quarter sessions being a competent tribunal to hear & determine the charge, & having determined it, this ct. could not question the propriety of their decision; & no such interest appeared in the justices, or in any of them, as to disqualify them from acting as judges in the matter.—*WILDES v. RUSSELL* (1866), L. R. 1 C. P. 722; Har. & Ruth. 689; 35 L. J. M. C. 241; 12 Jur. N. S. 645; 14 W. R. 796; *subsequent proceedings, sub nom. R. v. RUSSELL* (1867), 16 L. T. 478; (1869), 10 B. & S. 91.

**887.** ——— ————*Ex p. WILDES* (1866), 30 J. P. Jo. 774.

**888.** ——— ————*R. v. RUSSELL*, No. 879, *ante*.

#### D. Salary and Fees.

See Local Government Act, 1888 (c. 41), s. 83; Municipal Corporations Act, 1882 (c. 50), s. 164; Criminal Administration Act, 1851 (c. 55), ss. 9, 11.

*Assignment of emoluments.*—See CHOSSES IN ACTION, Vol. VIII., p. 440, No. 175.

*Penalty for demanding excessive fees.*—See Clerks of the Peace (Fees) Act, 1817 (c. 91), ss. 2, 4; Summary Jurisdiction Act, 1848 (c. 43), s. 30.

**889.** *Compensation for loss of fees.*—The sessions have no jurisdiction, under County Rates Act, 1814 (c. 51), s. 16, to make a prospective order for a compensation thereafter to be made to the clerk of the peace; & therefore, where a county treasurer, in obedience to such an order, made the payment, & that payment was afterwards, by an order of sessions, allowed in his accounts, the Ct. of K. B. quashed so much of the order of sessions as allowed that item; *qu.*: whether the sessions have a power to make any compensation to the clerk of the peace under above sect.—*R. v. WILLIAMS* (1819), 3 B. & Ald. 215; 106 E. R. 640.

*Annotation*.—*Refd. R. v. Saunders* (1854), 3 E. & B. 763.

**890.** ————*Before & until Municipal Corporations Act, 1835 (c. 76), T. was common clerk, prothonotary, & clerk of the peace of the borough of B. during good behaviour; & acted as clerk to the justices of the borough, as by usage the common clerk had always done, either, as T. alleged, incidentally to the office of common clerk, or as was alleged in answer, by appointment of the justices; the office of clerk to the justices not being mentioned in the charters or muniments. After the Act passed he was appointed town clerk; & afterwards, upon a separate commission of the peace being granted to the borough, another person was appointed clerk to the justices, by the justices under that commission:—Held: T. was entitled to compensation under sect. 66, for the loss of the emolument derived from the place of clerk to the justices. Although, after the appointment of the new clerk to the justices, a ct. of quarter sessions was granted to the borough, & T. was appointed clerk of the peace. Semble: if the Lords Comrs. of the Treasury order compensation to a party not holding an office which falls within sect. 66, this ct. will not enforce the order by mandamus to the corpn. But they will grant such mandamus where the Lords Comrs. have ordered compensation to a party holding such an office.—R. v. BRIDGEWATER CORPN. (1837), 6 Ad. & El. 339; 1 Nev. & P. K. B. 466; Will. Woll. & Dav. 129; 6 L. J. M. C. 78; 1 J. P. 213; 1 Jur. 40; 112 E. R. 129.*

*Annotations*.—*Distd. Ex p. Harvey* (1838), 7 Ad. & El. 739. *Consd. R. v. Poole Corpn.* (1838), 7 Ad. & El. 730. *Folld. R. v. Carmarthen Corpn.* (1839), 11 Ad. & El. 9; *R. v. Norwich Corpn.* (1842), 3 Q. B. 285. *Distd. R. v. York Corpn.* (1842), 3 Q. B. 550; *R. v. Brighton B. C.* (1857), 7 E. & B. 249. *Appld. R. v. L. G. Board* (1874), L. R. 9 Q. B. 148. *Refd. R. v. Harwich Corpn.* (1842), 2 Q. B. 909; *R. v. Manchester B. C.* (1846), 11 Jur. 222; *Temple v. Eccl. Comrs.* (1853), 3 De G. M. & G. 418; *Re Carpenter & Bristol Corpn.* (1907), 97 L. T. 461. *Mentd. R. v. Hayward* (1862), 2 B. & S. 585.

**891.** ————*Before Municipal Corporations Act, 1835 (c. 76), a person had acted as clerk to the justices of a corpn.; he had received no formal appointment from the corpn.; but the governing body had ordered that he should have a fixed salary from the corpn. funds, besides his perquisites. The office was not named in the charter. He was displaced by the justices appointed under the Act:—Held: he was entitled to compensation under Municipal Corporations Act, 1835 (c. 76), s. 66; & the corpn. having refused to give any compensation, & the Lords of the Treasury, upon appeal, having ordered one, this ct. granted a mandamus requiring the corpn. to give a bond for the amount.—R. v. CARMARTHEN CORPN. (1839), 11 Ad. & El. 9; 3 Per. & Dav. 35; 9 L. J. Q. B. 25; 113 E. R. 315.*

*Annotations*.—*Refd. Temple v. Eccl. Comrs.* (1853), 3 De G. M. & G. 418; *Re Carpenter & Bristol Corpn.* (1907), 97 L. J. K. B. 1145.

#### PART XI. SECT. 3, SUB-SECT. 2.—D.

*k. Recovery of fees illegally exacted.*—Fees illegally exacted by a

clerk of the peace for services in striking a special jury, can be recovered back as money had & received.—*HOOKE v. GURNETT* (1858), 16 U. C. R.

180.—CAN.

1. *Fees payable for quarterly return of convictions.*—*Re POUSETT* (1863), 22 U. C. R. 412.—CAN.



**Sect. 3.—Officers of quarter sessions: Sub-sect. 2, D. & E. Sect. 4: Sub-sects. 1 & 2.]**

**892. —.]—A.-G. v. POOLE CORPN., No. 881, ante.**

**893. —.]—**The borough of B. was incorporated in 1854, under Municipal Corporations Act, 1835 (c. 75), & a separate ct. of quarter sessions granted to it, & E. appointed clerk of the peace for the borough. L., who was clerk of the peace for the county of S., claimed compensation by reason of the grant of the borough sessions, & the appointment of E. as clerk of the peace of the borough:—*Held*: he was not entitled to compensation under c. 66 of the Act, as his office was not abolished, nor was he removed therefrom; & 5 & 6 Vict. c. 111, s. 2, which gives a right to compensation where an officer of a county has been deprived of any part of his emoluments in consequence of a grant of incorporation, not applying to the borough of B.—*R. v. BRIGHTON BOROUGH COUNCIL* (1857), 7 E. & B. 249; 26 L. J. Q. B. 153; 28 L. T. O. S. 265; 21 J. P. 612; 3 Jur. N. S. 585; 5 W. R. 257; 119 E. R. 1240.

**894. —.]—**Pltf., by Local Government Act, 1888 (c. 41), s. 118 (10), being clerk of the peace of Surrey, continued to be clerk of the peace at the quarter sessions held for the county of London at Newington, & for the purpose of the business at those sessions he was deemed to be clerk of the peace for the county of London. The Middlesex scale of fees, which by s. 115 was that taken in the county of London by the clerk of the peace, was lower than the Surrey scale, & the Middlesex scale was further reduced by the standing joint committee of the London County Council, & the quarter sessions:—*Held*: pltf. was only entitled, as clerk of the peace for the county of London for Newington to the fees payable under the reduced scale in Middlesex; but, by virtue of s. 119, he was entitled to receive not less remuneration whether by salary or by fees, than that to which he was entitled at the passing of the Act.—*WYATT v. LONDON COUNTY COUNCIL* (1901), 85 L. T. 629; 66 J. P. 325; 18 T. L. R. 110; *subsequent proceedings*, 18 T. L. R. 161.

—.]—*See* Criminal Justice Act, 1855 (c. 126), s. 18.

**895. Fees payable on administering oath to new justice—Not recoverable by action.]—**Fees claimed by the clerk of the peace on the qualifying of a new justice for the county for administering the oaths, etc., not being expressly within the exceptions contained in the order applicable for payment of the clerk of the peace by salary instead of by fees, are a mere honorarium, & not recoverable by action at law.—*MAULE v. WHITE, MAULE v. HERBERT MAULE v. GREEN* (1896), 60 J. P. 567.

**896. Salary—Borough with separate court of quarter sessions & commission of the peace—Population less than ten thousand—Payable by borough.]—**In the case of boroughs having a separate court of quarter sessions & commission of the peace, which contained according to the census of 1881 a population of less than ten thousand, Local Govt. Act, 1888 (c. 41), has not transferred the obligation of paying the salary of the recorder, the fees of the clerk of the peace, & the salary of the clerk of the borough justices from the borough to the county council.—*THETFORD CORPN. v. NORFOLK COUNTY COUNCIL*, [1898] 2 Q. B. 468; 67 L. J. Q. B. 907; 79 L. T.

315; 62 J. P. 724; 47 W. R. 1; 14 T. L. R. 541; 42 Sol. Jo. 686, C. A.

*Annotations:—**Reid. Bury St. Edmunds Corpn. v. West Suffolk County Council* (1898), 62 J. P. 486; *Huntingdon Corpn. v. Huntingdon County Council* (1901), 70 L. J. K. B. 755; *R. v. Warwickshire JJ.*, [1902] 2 K. B. 101; *George v. Thomas*, [1910] 2 K. B. 951

#### 1. Deputy Clerk.

**897. Appointment as deputy town clerk—Town clerk acting as clerk of the peace.]—***FAULKNER v. CHEVELL*, No. 804, *ante*.

**898. Liability for acts of assistant—Negligent keeping of records of justices.]—**The duty of the sheriff, with respect to the roll of fines sent to him by the clerk of the peace, under Levy of Fines Act, 1822 (c. 46), is not merely ministerial, & the sheriff is not justified in levying a fine stated in the roll to be unpaid, when the amount has been paid to the sheriff himself before receiving the roll. The deputy clerk of the peace is authorised to receive the amount of fines imposed at the quarter sessions; & if he receives the money & omits to notify the receipt in the roll, & damage accrues in consequence to the party fined, the latter may maintain an action against the deputy clerk of the peace for negligence.

*Qu.*: whether the deputy clerk of the peace is liable for acts of negligence of the assistant whom he appoints, under 59 Geo. 3, c. 28, to record the proceedings of the justices sitting in a second ct. at the quarter sessions.—*WILDES v. MORRIS* (1852), 22 L. J. M. C. 4; 20 L. T. O. S. 140; 16 Jur. 1115; *sub nom. MORRIS v. WILDES*, 17 J. P. 119; *sub nom. WYLES v. MORRIS*, 1 W. R. 65.

**899. Liability for own acts—Failure to notify receipt of fines—Damages at suit of party fined.]—***WILDES v. MORRIS*, No. 898, *ante*.

**900. De facto deputy—Not lawfully authorised—Power to sign certificate of conviction.]—**A certificate of a conviction, made at quarter sessions of a borough, within Municipal Corporations Act, purporting to be signed by a person described thereon as deputy clerk of the peace of the said borough, & having the custody of the records of quarter sessions, is admissible in evidence, under Evidence Act, 1845 (c. 113), s. 1, as purporting to be made by an officer having the custody of the records of the ct. where the conviction was made, within Transportation Act, 1824 (c. 84), s. 24, although Municipal Corporations Act, 1835 (c. 76), have no power to appoint a deputy clerk of the peace for a borough within that Act.

When there is a *de facto* office, & by virtue of that office, the person filling it has the custody of the records, he may give the certificate without holding the office *de jure* (*BRAMWELL, B.*).—*R. v. PARSONS* (1866), L. R. 1 C. C. R. 24; 35 L. J. M. C. 167; 14 L. T. 450; 30 J. P. 359; 12 Jur. N. S. 436; 14 W. R. 662; 10 Cox, C. C. 243, C. C. R.

#### SECT. 4.—FINANCES OF QUARTER SESSIONS.

##### SUB-SECT. 1.—EXPENSES BORNE BY COUNTY FUND.

**As to county fund.]—***See* LOCAL GOVERNMENT, pp. 109–111.

**As to county treasurer.]—***See* LOCAL GOVERNMENT, pp. 108, 109.

**901. Expenses of prosecution—Prosecution by direction of justices.]—**Justices of the peace at

#### PART XI. SECT. 4, SUB-SECT. 1.

**m. Expenses for furniture of the court house.]—**The magistrates in

quarter sessions have no power to order furniture for the court house, & the county council are not liable for furniture so supplied.—*COOMBS v.*

*MIDDLESEX COUNTY* (1858), 15 U. C. R. 367.—*CAN.*

**n. Expenses of clerk of the peace—Payment on order of chairman of the**

quarter sessions have no authority to order the costs of a prosecution for a misdemeanour, carried on under the direction of magistrates, to be allowed out of the county rates.—*R. v. WEST RIDING OF YORKSHIRE (INHABITANTS)* (1797), 7 Term Rep. 377; 101 E. R. 1029.

*Annotation*:—*Reid. R. v. Lichfield Town Council* (1843), 4 Q. B. 893.

**902. — Offence committed within contributory borough.**—Borough magistrates, acting exclusively for their borough, which does not contribute to the county rate, & concurrently for the liberties of the borough, which do contribute to it, may make the usual order on the county treasurer for expenses incurred on prosecutions touching offences committed within the contributory liberties.—*R. v. MUSSON* (1826), 6 B. & C. 74; 9 Dow. & Ry. K. B. 172; 4 Dow. & Ry. M. C. 265; 5 L. J. O. S. M. C. 28; 108 E. R. 380.

**903. — Power of treasury to disallow payments made.**—The accounts of costs of prosecutions in the county of L., after having been duly taxed by the proper officers, & paid out of the county rates, were re-taxed by officers of the Treasury, & part of them were disallowed. The justices of the county obtained a rule *nisi* for a *mandamus* to compel the Lords of the Treasury to pay the disallowed balance to their treasurer:—*Held*: the Lords of the Treasury had no right to tax these costs after they had been allowed by the proper officers; but this ct. had no jurisdiction to issue a *mandamus* to compel the Lords of the Treasury to pay the balance.—*R. v. TREASURY LORDS COMRS.* (1872), L. R. 7 Q. B. 387; 41 L. J. Q. B. 178; 36 J. P. 661; 20 W. R. 336; *sub nom. R. v. TREASURY LORDS, Ex p. LANCA-SHIRE JJ.*, 26 L. T. 64; 12 Cox, C. C. 277, D. C.

*Annotations*:—*Reid. Armytage v. Wilkinson* (1878), 3 App. Cas. 355; *Re Nathan, It. v. I. R. Comrs.* (1884), 12 Q. B. D. 461. **Mentd.** *Willcock v. Terrell* (1878), 3 Ex. D. 323; *Dixon v. Farrer* (1886), 17 Q. B. D. 658; *R. v. Income Tax Comrs., Ex p. Cape Copper Mining Co.* (1888), 57 L. J. Q. B. 513; *R. v. Joint Stock Cos. Registrar* (1888), 21 Q. B. D. 131; *R. v. Secretary of State for War*, [1891] 2 Q. B. 326; *R. v. Incorporated Law Soc.* (1895), 11 T. L. R. 557; *Hollinshead v. Hazleton*, [1916] 1 A. C. 428; *R. v. Speyer, R. v. Cassel*, [1916] 1 K. B. 595; *R. v. Army Council, Ex p. Ravenscroft*, [1917] 2 K. B. 504; *R. v. Income Tax Special Purposes Comrs., Ex p. Dr. Barnardo's Homes National Incorporated Assocn.*, [1920] 1 K. B. 26.

—*See, also, CRIMINAL LAW, Vol. XV., pp. 614 et seq., 700, 701, Nos. 7566–7569.*

**904. Expenses of appeal to sessions — Non-quarter sessions borough.**—A county borough had a separate commission of the peace, but not a separate ct. of quarter sessions. An appeal from a conviction under the Act by the borough justices having been successfully brought to quarter sessions for the county, an order was made by quarter sessions upon the borough treasurer for payment of prosecutor's costs:—*Held*: the word "place" in Vagrant Act, 1824 (c. 83), s. 9, must be construed as *ejusdem generis* with "county, riding, division," & meant a place having a separate ct. of quarter sessions; & the order of quarter sessions was therefore wrongly made upon the borough treasurer, & should have been made upon the treasurer of the county.—*R. v. WEST RIDING JJ.*, [1900] 1 Q. B. 291; *sub nom. R. v. YORKSHIRE, WEST RIDING JJ.*, 69 L. J. Q. B. 13; *sub nom. R. v. WEST RIDING OF YORKSHIRE*

*JJ., Ex p. HUDDERSFIELD CORPN.*, 16 T. L. R. 4; 44 Sol. Jo. 12, D. C.

*Annotations*:—*Consd. R. v. Warwickshire JJ.*, [1902] 2 K. B. 101. *Distd. George v. Thomas* (1910), 74 J. P. 398.

**905. —**—A county borough had a separate commission of the peace, but not a separate ct. of quarter sessions, it was not directly subject to the county rate, but under a financial adjustment made under Local Government Act, 1888 (c. 41), s. 32, it paid a fixed contribution towards the expenses of the county incurred in part on behalf of the borough, including the expenses of quarter sessions:—*Held*: the county borough, not having a separate ct. of quarter sessions, & being liable to contribute to quarter sessions expenses, was not a place separate from the county, & therefore not a "place" within Alehouse Act, 1828 (c. 61), s. 29; the licensing justices had acted for the county, their costs were costs of quarter sessions, & the order of quarter sessions had, therefore, been wrongly made upon the borough treasurer, & should have been made upon the treasurer of the county.—*R. v. WARWICKSHIRE JJ.*, [1902] 2 K. B. 101; 71 L. J. K. B. 505; 46 Sol. Jo. 409; *sub nom. R. v. WARWICK JJ., Ex p. COVENTRY CORPN.*, 86 L. T. 568; 66 J. P. 549; 18 T. L. R. 492, D. C.

**906. Expenses of sessions — Quarter sessions borough — Population under ten thousand.**—*Semble*: under Local Government Act, 1888 (c. 41), where the population of a borough having a separate ct. of quarter sessions is ten thousand or upwards, the expenses of quarter & petty sessions are payable out of the borough rates; where the population is under ten thousand, out of the county rates.—*Ex p. KENT COUNTY COUNCIL & DOVER COUNCIL, Ex p. KENT COUNTY COUNCIL & SANDWICH COUNCIL*, [1891] 1 Q. B. 389; 64 L. T. 421; *sub nom. Re DOVER COUNCIL & KENT COUNTY COUNCIL, Ex p. DOVER COUNCIL, Re KENT COUNTY COUNCIL & SANDWICH COUNCIL, Ex p. KENT COUNTY COUNCIL*, 60 L. J. Q. B. 314; 55 J. P. 248; *sub nom. DOVER, SANDWICH & RAMSGATE BOROUGH CASES*, 7 T. L. R. 250; *on appeal, sub nom. Ex p. KENT COUNTY COUNCIL & DOVER COUNCIL, Ex p. KENT COUNTY COUNCIL & SANDWICH COUNCIL*, [1891] 1 Q. B. 725, C. A.

*Annotations*:—*Dbtd. Thetford Corpn. v. Norfolk County Council*, [1898] 2 Q. B. 468. I am fully satisfied that my decision in the *Dover & Sandwich* cases was wrong (VAUGHAN WILLIAMS, L.J.). *Reid. Re Herefordshire County Council & Leominster Town Council* (1894), 15 It. 77. **Mentd.** *Re Knight & Tabernacle Permanent Bldg. Soc.*, [1892] 2 Q. B. 613.

**907. Expenses of local inquiry.**—*R. v. LAN-CASHIRE JJ.* (1854), 22 L. T. O. S. 259; 18 J. P. Jo. 86.

**Expenses of police.**—*See POLICE.*

**Salary of clerk of peace.**—*See Sect. 3, subsect. 2, D., ante.*

#### SUB-SECT. 2.—EXPENSES BORNE BY BOROUGH FUND.

**As to borough fund.**—*See LOCAL GOVERNMENT, pp. 80–87.*

**As to borough treasurer.**—*See LOCAL GOVERNMENT, pp. 77, 78.*

**908. Expenses of prosecution — Offence committed in non-contributory borough.**—Three

*magistrates.*—*Re POUSETT & COUNTY OF LAMBTON* (1862), 22 U. C. R. 80.—**CAN.**

**o. Expenses of office accommodation of county attorney & clerk of the peace.]**

—A county attorney & clerk of the peace may maintain an action against the corpn. of the county for breach of duty in not providing necessary & proper accommodation for him as such

officer, & may recover, by way of damages in such action, rent paid by him to procure such accommodation.—*LEES v. COUNTY OF CARLETON CORPN.* (1873), 33 U. C. R. 409.—**CAN.**



*Sect. 4.—Finances of quarter sessions: Sub-sect. 2. Sects. 5, 6 & 7. Part XII. Sect. 1: Sub-sect. 1, A. & B.]*

persons were indicted at the assizes for the county of S. for forging the will of C. D. It appeared that C. D. died in the borough of O., & that one of the prisoners took away the deeds, etc., of deceased to his own house, which was in the county of S., but not in the borough of O., that the forged signatures of testatrix & of one of the witnesses were written in the borough of O.; & that the offence was completed in the county of D., where the forged signatures of the second witness was written. The borough of O. did not contribute to the county rate, but had a borough fund of its own:—*Held*: (1) the order for payment of all costs & expenses of the prosecution was properly made on the treasurer of the borough of O.; (2) a *mandamus* would lie to the treasurer to compel payment.—*R. v. OSWESTRY TREASURER* (1848), 12 Q. B. 239; 11 L. T. O. S. 198; 12 Jur. 744; 12 J. P. Jo. 373; 116 E. R. 858; *sub nom.* *R. v. HAYWARD*, 17 L. J. Q. B. 223.

**909. — Non quarter sessions borough—Population ten thousand.**—A borough with a population exceeding ten thousand had a separate commission of the peace with a justices' clerk, but not a separate ct. of quarter sessions. It had the right to provide & pay for its own police, but by agreement the borough was for police purposes consolidated with the county, & the county supplied the police for which the borough paid. The county rate was leviable in the borough:—*Held*: the costs of prosecutions undertaken by the police before the borough justices in cases in which such costs were not remitted or were not paid by the parties chargeable were chargeable to the borough fund & not to the funds of the county in which the borough was situate.—*GEORGE v. THOMAS*, [1910] 2 K. B. 951; 80 L. J. K. B. 7; 103 L. T. 456; 74 J. P. 398; 8 L. G. R. 849.

**910. Expenses of attending quarter sessions.**—After the grant of a separate ct. of quarter sessions to the borough of G., the council of that borough contracted with the county justices for "the support & maintenance" of the borough prisoners in the county prisons at a certain sum per week. The borough paid all expenses of conveyance. The county under that contract provided the borough prisoners with house room, food, clothing, bedding & fuel, but claimed contribution from the borough in respect of the law expenses attending the holding of the general & quarter sessions for the county:—*Held*: these were expenses to which, under Municipal Corporations Act, 1835 (c. 76), s. 117, & Prisons Act, 1842 (c. 98), s. 19, the borough was liable to contribute.—*R. v. GRAVESEND BOROUGH COUNCIL* (1855), 5 E. & B. 459; 3 C. L. R. 1137; 25 L. T. O. S. 253; 1 Jur. N. S. 878; 119 E. R. 552; *sub nom.* *KENT COUNTY TREASURER v. GRAVESEND BOROUGH COUNCIL*, 24 L. J. M. C. 141; 19 J. P. 451.

**911. Expenses on appeal to quarter sessions.**—Where there is no surplus from the borough fund a municipal corpn. cannot pay out of such fund the costs incurred by the chief constable in opposing, by the direction of the council, appeals against the refusal of justices to renew the licenses of public-houses.—*TYNEMOUTH CORPN. v. A.-G.*, [1899] A. C. 293; 68 L. J. Q. B. 752; 80 L. T. 633; 63 J. P. 404; 15 T. L. R. 370; 43 Sol. Jo. 531, H. L.; *affg.* S. C. *sub nom.* *A.-G. v. TYNEMOUTH CORPN.*, [1898] 1 Q. B. 604, C. A.

*Annotations:—Reid.* Allsop v. Preston JJ. (1899), 64 J. P. 25. *Mentd.* Evans v. Conway JJ., [1900] 2 Q. B. 5.

*A.-G. v. De Winton*, [1906] 2 Ch. 106; *R. v. Woodhouse*, [1906] 2 K. B. 501; *Attwood v. Chapman*, [1914] 3 K. B. 275.

**912. —**—Upon an appeal against the refusal of licensing justices to renew a license the quarter sessions dismissed the appeal subject to a special case for the opinion of the High Ct. The licensing justices, who were resps., did not appear upon the argument of the case, & the High Ct. allowed the appeal & ordered resp. justices to pay to applt. the costs of the appeal to that Ct. on the special case:—*Held*: these were costs to which the licensing justices had been put within Licensing (Consolidation) Act, 1910 (c. 24), s. 32, & the licensing justices were therefore entitled to an order of quarter sessions upon the treasurer under that sect. to pay to them the amount thereof.—*R. v. SALFORD HUNDRED JJ.*, [1912] 2 K. B. 567; *sub nom.* *R. v. SALFORD HUNDRED JJ.*, *Ex p.* *BOLTON JJ.*, 81 L. J. K. B. 952; 107 L. T. 174; 76 J. P. 395; 23 Cox, C. C. 110.

*Annotations:—Reid.* Jones v. Hatherton, [1917] 2 K. B. 412; *R. v. West Riding of Yorkshire JJ.*, [1918] 1 K. B. 362.

**913. Expenses of sessions — Quarter sessions borough—Population ten thousand.**—*Ex p.* *KENT COUNTY COUNCIL & DOVER COUNCIL*, *Ex p.* *KENT COUNTY COUNCIL & SANDWICH COUNCIL*, No. 906, *ante*.

**914. — Population under ten thousand.**—*THETFORD CORPN. v. NORFOLK COUNTY COUNCIL*, No. 896, *ante*.

**915. Irrecoverable fees of clerks to justices.**—*R. v. GLOUCESTER CORPN.*, No. 812, *ante*.

**916. Damages for malicious prosecution directed by justices.**—In a municipal borough the chief constable was directed by some borough justices to lay an information against H. for conspiracy, which was dismissed, & an action for malicious prosecution brought against the constable, & £200 damages recovered:—*Held*: this sum could not be paid by the town council out of the borough fund or rate, as not being within the words of Municipal Corporations Act, 1835 (c. 76), s. 82.—*R. v. EXETER CORPN.* (1880), 6 Q. B. D. 135; 44 L. T. 101; 45 J. P. 158; 29 W. R. 441.

*Annotation:—Reid.* *R. v. Ramsgate Corpn.* (1889), 23 Q. B. D. 66.

**County rates.**—See RATES & RATING.

## SECT. 5.—DUTIES OF SHERIFF.

*See, generally, SHERIFFS & BAILIFFS.*

**Duty to summon jurors.**—See JURIES, Vol. ., p. 214, Nos. 13, 14.

## SECT. 6.—DUTIES OF POLICE.

*See* Local Government Act, 1888 (c. 41), s. 9; County Police Acts, 1839 (c. 93), s. 17; 1840 (c. 88), s. 26; County & Borough Police Act, 1856 (c. 69), s. 7; & *generally, POLICE.*

## SECT. 7.—JURIES.

**How summoned—Jurors for county sessions.**—*See* Juries Acts, 1825 (c. 50), ss. 12, 41; 1921 (c. 11), ss. 22–26; & *generally, JURIES*, Vol. XXX., pp. 214 *et seq.*

**Jurors in boroughs.**—*See* Municipal Corporations Act, 1882 (c. 50), s. 186.

## Part XII.—Jurisdiction of Quarter Sessions.

### SECT. 1.—ORIGINAL CRIMINAL JURISDICTION.

#### SUB-SECT. 1.—ON INDICTMENT.

##### A. In General.

**917. A court of oyer & terminer.]**—The ct. of quarter sessions is a continuing ct. of oyer & terminer, & not an inferior ct., so as to prevent the issuing of a *venire de novo* to it.—**CAMPBELL v. R.** (1847), 11 Q. B. 814; 2 New Mag. Cas. 354; 17 L. J. M. C. 89; 10 L. T. O. S. 396; 11 J. P. 886; 12 Jur. 117; 2 Cox, C. C. 463; 116 E. R. 680, Ex. Ch.

**Annotations:—Mentd.** Ryalls v. R. (1849), 11 Q. B. 795; Holloway v. R. (1851), 17 Q. B. 317; R. v. Charlesworth (1861), 1 B. & S. 460; Winsor v. R. (1866), L. R. 1 Q. B. 289; R. v. Castro (1880), 49 L. J. Q. B. 747; R. v. Pierce (1887), 56 L. J. M. C. 85; R. v. Paul (1890), 25 Q. B. D. 202; Mid. Ry. v. Edmonton Union (1893), 63 L. J. M. C. 38; Crane v. Public Prosecutor, [1921] 2 A. C. 299.

**918. New offences—Jurisdiction expressly given by statute.]**—Sessions has no jurisdiction as to new offences without express words.—**R. v. JAMES** (1746), 2 Stra. 1256; 93 E. R. 1166.

**919. ——— Offence against the peace.]**—The sessions cannot take an indictment on a statute creating a new offence not against the peace, unless so authorised by express words.—**R. v. CLOUGH** (1696), 5 Mod. Rep. 149; 87 E. R. 575.

**920. ——— Jurisdiction given to “King’s courts.”]**—**R. v. BRISTOW** (1754), Dunning, 30.

**921. Assault not charged by person aggrieved—True bill found by jury.]**—Offences against the Person Act, 1861 (c. 100), enacts that “where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear & determine such offence . . .” & by s. 45 their decision shall be a bar to all “further or other proceedings, civil or criminal, for the same cause”:—**Held**: justices have, nevertheless, jurisdiction to hear a charge of assault, & commit the prisoner for trial, although no complaint has been made by the party aggrieved; & an indictment found in pursuance of such committal is good.—**R. v. GAUNT** (1895), 73 L. T. 585; 60 J. P. 90; 12 T. L. R. 62; 40 Sol. Jo. 85; 18 Cox, C. C. 210, C. C. R.

**922. Jurisdiction to find indictment—Where no jurisdiction to try offence.]**—A judge at *nisi prius* has no jurisdiction to try an indictment for perjury at common law found at the quarter sessions, & removed by *certiorari* into the K. B., an indictment so found being void.—**R. v. HAYNES** (1825), Ry. & M. 298.

**Annotation:—Refd.** **R. v. Bartlett** (1843), 12 L. J. M. C. 127.

**923. ———.]**—In those cases where the jurisdiction of quarter sessions to try offences is taken away by Quarter Sessions Act, 1842 (c. 38), the jurisdiction of the quarter sessions to find a true bill in such cases, is also taken away. Therefore, when the offence is punishable by transportation for life, prisoner cannot be tried at the assizes on a bill found by the grand jury of quarter sessions.—**R. v. RAMSDEN** (1843), 2 L. T. O. S. 246; 8 J. P. 45; 1 Cox, C. C. 37.

**Annotation:—Mentd.** **R. v. Walker** (1844), 2 L. T. O. S. 288.

**924. ———.]**—The grand jury at quarter sessions may find a true bill for rape, although persons charged with such an offence are not now triable at quarter sessions. The person against whom an indictment is so returned may be tried

upon that indictment at the assizes.—**R. v. ALLUM** (1846), 7 L. T. O. S. 388; 2 Cox, C. C. 62.

**Annotation:—Refd.** **R. v. Norman** (1922), 17 Cr. App. Rep. 29.

**925. ———.]**—**R. v. BARTON** (1852), 17 J. P. 3.

**926. ———.]**—**R. v. NORMAN** (1922), 17 Cr. App. Rep. 29, C. C. A.

———.]—**See, also**, CRIMINAL LAW, Vol. XIV., p. 130, Nos. 1025, 1026.

**927. Transmission of indictment to assizes.]**—Indictments were found against a prisoner at quarter sessions for N. & transmitted to the assizes by the justices at sessions:—**Held**: although the indictments were not removed by *certiorari*, the judge of assize should have tried prisoner on these indictments, & he was improperly discharged by proclamation without such trial.—**R. v. WETHERELL** (1819), Russ. & Ry. 381, C. C. R.

**928. ———.]**—**R. v. HOLMEN**, No. 1002, *post*.

**929. Whether venire de novo may issue to sessions.]**—**CAMPBELL v. R.**, No. 917, *ante*.

**See** CRIMINAL LAW, Vol. XIV., p. 492, Nos. 5417, 5418.

##### B. Offences Triable.

**See, now**, Criminal Justice Act, 1925 (c. 86), s. 18, sched. I.

**930. Offence tending to breach of the peace—Theft by servant.]**—To solicit a servant to steal his master’s goods is a misdemeanour though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting & inciting; & such offence is indictable at sessions, having a tendency to a breach of the peace.—**R. v. HIGGINS** (1801), 2 East, 5; 102 E. R. 269.

**Annotations:—Refd.** **R. v. Bartlett** (1843), 12 L. J. M. C. 127. **Mentd.** **R. v. Meredith** (1838), 8 C. & P. 589; **R. v. Rowed** (1842), 11 L. J. M. C. 74; **R. v. Quail** (1866), 4 F. & F. 1076; **R. v. Gregory** (1867), 16 L. T. 388; **R. v. Fox** (1870), 19 W. R. 109; **R. v. Ransford** (1874), 31 L. T. 488; **Barratt v. Burder** (1893), 10 T. L. R. 124; **R. v. Brailsford**, [1905] 2 K. B. 730.

**931. ——— Writing scandalous letter.]**—**R. v. SUMMERS** (1664), 3 Salk. 194; 1 Lev. 139; 1 Keb. 788, 931; 1 Sid. 270; 91 E. R. 772.

**Annotation:—Mentd.** **R. v. Wilkes** (1763), 19 State Tr. 982.

**See, now**, Quarter Sessions Act, 1842 (c. 38), s. 1.

**932. Offence within Railways Regulation Act, 1840 (c. 97), s. 13.]**—An offence alleged to be committed under above sect. can only be tried at quarter sessions, & is not within the jurisdiction of the Central Criminal Ct.—**R. v. PARDENTON & WOOD** (1853), 6 Cox, C. C. 247.

**933. Stealing form of request—Supreme Court Funds Rules 1894—Not “document belonging to court of law.”]**—A person entitled to the balance of a sum in the hands of the Paymaster-General under an order of the Ch. Div. in a certain cause was convicted at quarter sessions of stealing a form of request for remittance filled up by him pursuant to Supreme Ct. Funds Rules, 1894, r. 48 (b):—**Held**: on a writ of error, the quarter sessions had jurisdiction to try the offence, the document in question not being a document belonging to any ct. of law or equity or relating to any proceeding therein within the exception 17 in s. 1 of Quarter Sessions Act, 1842 (c. 35).—**KING v. R.** (1897), 61 J. P. 663, D. C.

**Extortion.]**—**See** CRIMINAL LAW, Vol. XV., p. 662, Nos. 7145, 7146.



*Sect. 1.—Original criminal jurisdiction: Sub-sect. 1, B.; sub-sect. 2, A., B. & C.; sub-sect. 3, Sect. 2.]*

**Smuggling.**—See CRIMINAL LAW, Vol. XV., p. 724, No. 7837.

**Attempted suicide.**—See CRIMINAL LAW, Vol. XV., p. 814, No. 8868.

**Conspiracy to obtain by false pretences.**—See CRIMINAL LAW, Vol. XIV., p. 129, No. 1023.

**Living on earnings of prostitution—Criminal Law Amendment Act, 1912 (c. 20), s. 7 (5).**—See CRIMINAL LAW, Vol. XIV., p. 129, No. 1024.

**Offence on high seas.**—See CRIMINAL LAW, Vol. XIV., p. 141, Nos. 1137, 1138.

## SUB-SECT. 2.—ARTICLES OF THE PEACE.

### A. In General.

**934. Against whom complaint may be made—Magistrate.**—The justices at sessions may commit a fellow justice for refusing to find sureties for good behaviour, upon the complaint of a third party.—STORTON'S CASE (1673), Freem. K. B. 354; 89 E. R. 264.

—Peer.]—See PEERAGES & DIGNITIES.

—Husband—By wife.]—See HUSBAND & WIFE, Vol. XXVII., p. 261, Nos. 2306, 2307.

**935. Application should be local.**—Articles of the peace should be exhibited in the neighbourhood.—R. v. WAITE (1759), 2 Burr. 780; 97 E. R. 559.

**936. Untrue allegation in application—Committal for perjury.**—Articles of the peace appearing to be untrue, the party may be committed for perjury.—R. v. PARNELL (1759), 2 Burr. 806; 97 E. R. 572.

**937. Review by High Court.**—ANON. (1733), 2 Barn. K. B. 325; 94 E. R. 530.

**938.**—R. v. DUNN, No. 945, *post*.

**939.**—(1) When articles of the peace have been filed & an attachment issued for the purpose of bringing in deft. to find sureties, this ct. will not entertain an application to discharge the articles & to award costs under 21 Jac. 1, c. 8, s. 2, on the ground of alleged insufficiency of the articles, though notice of such application has been given to prosecutor.

It is sufficient ground for articles of the peace that complainant has been accustomed to go to a particular place, rightfully as he alleges, for the transaction of business, & has been threatened with violence if he goes there again.

(2) Affidavits are not admissible in contradiction to articles of the peace; nor for the purpose of supplying facts said to have been suppressed by complainant; as the contents of a correspondence alluded to in the articles. Nor is it an objection to the articles that such correspondence is not set out, if it does not contain any part of the menace relied upon.

(3) This Ct. will, if it sees ground, require surety of the peace, although justices have refused to do so on the same complaint.—R. v. MALLINSON (1851), 16 Q. B. 367; 14 J. P. Jo. 752; 15 J. P. Jo. 66; 117 E. R. 920; *sub nom. Ex p. MALLINSON*, 15 Jur. 746; *previous proceedings, sub nom. R. v. MALLINSON* (1850), 1 L. M. & P. 619.

**Threatened breach of peace—Duty of justices.**—See CRIMINAL LAW, Vol. XV., p. 643, No. 6839.

Recognisances to keep the peace generally, see CRIMINAL LAW, Vol. XIV., pp. 492 *et seq.*

### B. Grounds for Requiring Recognisances.

**940. Fear & threat of future personal violence.**—ANON. (1733), 2 Barn. K. B. 325; 94 E. R. 530.

**941.**—R. v. MALLINSON, No. 939, *ante*.

**942.**—H. had written a letter to a young lady, a relative of T. T. afterwards, in consequence of his writing the letter, violently assaulted H., & said, "if you write again, I will flog you within an inch of your life." On a subsequent occasion, T., meeting H., said to him, "Remember what I said to you, I am determined to put a stop to your proceedings." The ct. permitted H. to exhibit articles of the peace against T.—*Ex p. HULSE* (1851), 21 L. J. M. C. 21; 17 L. T. O. S. 147; 15 J. P. Jo. 418.

**943. — While fear actually lasts.**—If a gentleman visit a young lady as her lover, & on her parents denying him access, he intrudes himself rudely into the house, follows the young lady on a journey taken to avoid him, assaults the person under whose protection she is placed, & threatens to force her from him, it is a good cause to demand surety for his good behaviour from him; & although the surety must be demanded recently after the cause happen, & while the fear it occasions exists, yet if the party, at any distance of time afterwards, do any act, though to another person, which shows that the old grudge remains, the ct. will couple the last act with the antecedent cause of fear, & on articles exhibited, grant surety of the peace.—DENNIS v. LANE (1704), 6 Mod. Rep. 131; 87 E. R. 887.

*Annotation* :—Consd. R. v. Dunn (1840), 12 Ad. & El. 599.

**944. — Must appear from the articles.**—There ought to be a reasonable foundation on the face of the articles to induce a fear of personal danger before the ct. will require sureties of the peace. A wife may sue a *supplicavit* in Ch. against her husband, & to find sureties not to beat or evil intreat her, *aliter quam ex causa regiminis et castigationis*. The facts stated in the articles are to be considered as true until the contrary appears upon a proper prosecution. Where there are articles of separation between the husband & wife, if the husband afterwards confine her, she may have a *habeas corpus* & be set at liberty.—VANE'S (LORD) CASE (1744), 13 East, 172, n.; 2 Stra. 1202; 104 E. R. 334.

*Annotations* :—*Refd. Re Dunn* (1840), 10 L. J. M. C. 29. *Mentd. R. v. Stanhope* (1826), 12 Ad. & El. 620, n.; *Re Aston* (1844), 8 Jur. 293.

**945. — Threat by conduct — To be inferred by exhibitant.**—(1) On *habeas corpus*, bringing up a party committed by justices for not finding sureties of the peace, the ct. will not hear affidavits controverting the facts alleged in the articles of the peace. 56 Geo. 3, c. 100, s. 3, does not affect the practice in this respect. (2) Where a party exhibiting articles of peace alleges, as the ground of fear, expressions in a letter, which he submits to the ct. for their construction, the ct. will not take the words into consideration, nor act upon the articles, unless the whole letter be set forth. (3) Where the sessions, upon articles of the peace being exhibited, have ordered sureties to be found, & committed the accused party for want of them, their judgment is not final; but this ct., on *habeas corpus* & *certiorari*, will examine the articles, & if they are, on the face of them, insufficient, supersede the order of sessions as made without jurisdiction, & discharge the prisoner. (4) Articles of the peace are not sufficient unless they show a threat. The threat need not be in words, but may be inferred from a course of conduct. That inference, however, must be drawn by the exhibitant himself; & if he omit to state it in the articles, the ct. will not draw the inference.—R. v. DUNN (1840), 12 Ad. & El. 599; Arn. 21; 4 Per. & Dav. 415;

4 J. P. 728 ; 113 E. R. 939 ; *sub nom. Re DUNN*, 10 L. J. M. C. 29 ; 5 Jur. 721.

*Annotations* :—*As to* (2) & (3) *Refd.* *R. v. Mallinson* (1851), 16 Q. B. 367. *As to* (4) *Refd.* *Lort v. Hutton* (1876), 45 L. J. M. C. 95. *Generally, Mentd.* *Ex p. Gifford* (1845), 1 New Sess. Cas. 490 ; *Steward v. Gromett* (1859), 7 C. B. N. S. 191.

**945a. Prize fight.**]—When a prize fight is expected the magistrates ought to cause the intended combatants to be brought before them to enter into securities to keep the peace till the assizes or sessions & if they refuse to enter into securities to commit them.—*R. v. BILLINGHAM* (1826), 2 C. & P. 234 ; 4 Dow. & Ry. M. C. 127.

*Annotation* :—*Refd.* *R. v. Coney* (1882), 8 Q. B. D. 534.

**946. Mere abuse.**]—*Re CRAWFORD, Ex p. EDMUNDS* (1846), 10 J. P. Jo. 740.

**947. Assault.**]—*Re CRAWFORD, Ex p. EDMUNDS* (1846), 10 J. P. Jo. 740.

### C. Procedure.

**948. Execution of warrant on Sunday.**]—*JOHNSON v. COLTSON* (1680), T. Raym. 250 ; 83 E. R. 129.

*Annotation* :—*Refd.* *Ex p. Eggington* (1853), 18 Jur. 224.

**949. Hearing of evidence—Affidavits or evidence in contradiction not allowed.**]—*ANON.* (1733), 2 Barn. K. B. 325 ; 94 E. R. 530.

**950.** ———.]—One against whom articles of the peace are exhibited is not entitled to read affidavits on his own behalf, in contradiction of the facts sworn to against him in such articles.—*R. v. DOHERTY* (1810), 13 East, 171 ; 104 E. R. 334.

*Annotations* :—*Refd.* *R. v. Stanhope* (1825), 12 Ad. & El. 620, n. ; *Re Dunn* (1840), 10 L. J. M. C. 29 ; *Steward v. Gromett* (1859), 7 C. B. N. S. 191.

**951.** ———.]—*R. v. STANHOPE* (1825), 12 Ad. & El. 620, n. ; 113 E. R. 949.

*Annotations* :—*Refd.* *R. v. Dunn* (1840), 12 Ad. & El. 599 ; *Ex p. Mallinson* (1850), 15 Jur. 746 ; *R. v. Mallinson* (1851), 16 Q. B. 367 ; *Steward v. Gromett* (1859), 7 C. B. N. S. 191 ; *Lort v. Hutton* (1876), 33 L. T. 730.

**952.** ———.]—*R. v. DUNN*, No. 945, *ante*.

**953.** ———.]—*R. v. MALLINSON*, No. 939, *ante*.

**954.** ———.]—Where articles of the peace are exhibited against any person, the person against whom they are exhibited may not give evidence before the justices in contradiction of the facts stated in the articles. If it appears on oath to the satisfaction of the justices that complainant has been threatened, it is their duty to require recognisances to be entered into to keep the peace.—*LORT v. HUTTON* (1876), 45 L. J. M. C. 95 ; 33 L. T. 730 ; 40 J. P. 677.

**955. Attachment on articles in King's Bench—Whether ballable before sessions.**]—Attachment upon articles of the peace in the King's Bench, ballable before justices of the county.—*HUTT'S CASE, R. v. BOWMASTER* (1760), 2 Burr. 1039 ; 1 Wm. Bl. 233 ; 97 E. R. 695.

**956. Period of recognisance — In discretion of court.**]—Upon articles of the peace exhibited, the ct. have the power of requiring bail for such a length of time as they shall think necessary for the preservation of the peace, & are not confined to a twelve-month. Where the ct. had at first required bail for fourteen years, they afterwards lessened the time to two years, upon its appearing to them that an information was depending against deft. on the same account, which must

necessarily be determined within that time.—*R. v. BOWES* (1787), 1 Term Rep. 696 ; 99 E. R. 1327.

**957. Discharge of recognisance.**]—*R. v. LEWIS* (1730), 1 Barn. K. B. 345 ; 94 E. R. 232.

**958.** ———.]—It is usual to discharge persons committed for want of surety on articles of peace or *supplicavit*, at the end of a year, if nothing new happens.—*BAYNUM v. BAYNUM* (1746), Amb. 63 ; 27 E. R. 36.

**959. Jurisdiction of justices out of sessions—To vary recognisances—Amount of recognisance.**]—Justices out of sessions, when a person is brought before them on a sessions warrant to enter into a recognisance with sureties, under an order by the quarter sessions, have no power to vary the amount of the recognisance, etc., required by the latter.—*ANON.* (1838), 2 J. P. 232.

**960.** ——— To commit in default of recognisances.]—Articles of the peace were exhibited against A., at quarter sessions of the county of H., & he was, by that ct., ordered to enter into recognisance, before one or more justices of H., to keep the peace for six calendar months thence ensuing. Under the warrant of two justices of H., A. was brought before two justices of the same county to show cause why he should not enter into the recognisance ; & he then refused to do so ; whereupon the justices last mentioned committed him to the county gaol for the then residue of six calendar months from the date of the order of quarter sessions, unless in the meantime he should enter into the recognisance :—*Held* : the justices had no power to commit ; & prisoner was entitled to be discharged on *habeas corpus*.—*Re ASHTON* (1845), 7 Q. B. 169 ; 1 New Mag. Cas. 269 ; 1 New Sess. Cas. 581 ; 115 E. R. 452 ; *sub nom. R. v. HUNTINGDONSHIRE JJ., Re ASHTON*, 14 L. J. M. C. 99 ; 5 I. T. O. S. 72 ; 9 J. P. 568 ; 9 Jur. 727 ; 1 Cox, C. C. 209.

### SUB-SECT. 3.—INCORRIGIBLE ROGUES.

*See Vagrancy Act*, 1824 (c. 83), ss. 5, 10.

**Power to sentence.**]—*See CRIMINAL LAW*, Vol. XIV., p. 130, Nos. 1030, 1031.

**To whipping.**]—*See CRIMINAL LAW*, Vol. XIV., p. 479, Nos. 5221–5223.

**Appeals—To what court.**]—*See CRIMINAL LAW*, Vol. XIV., p. 508, Nos. 5534–5536.

### SECT. 2.—ORIGINAL CIVIL JURISDICTION.

**Matters referred to county council.**]—*See Local Government Act*, 1888 (c. 41), ss. 3 *et seq.*

**Remuneration of coroners.**]—*See County Coroners Act*, 1860 (c. 116) ; *Coroners Act*, 1887 (c. 71) ; *CORONERS*, Vol. XIII., p. 235, Nos. 39–41.

**Regulation of gas & water rates.**]—*See GAS*, Vol. XXV., p. 489, Nos. 107–111 ; *WATER SUPPLY*.

**Powers in connection with highways.**]—*See HIGHWAYS*, Vol. XXVI., pp. 480, 572, Nos. 1920–1927, 2636.

**Sessions as compensation authority.**]—*See INTOXICATING LIQUORS*, Vol. XXX., pp. 49 *et seq.*

**Sessions as judicial authority for lunacy purposes.**]—*See LUNATICS*, pp. 252 *et seq.*, *ante*.

*See, also, POLICE ; POOR LAW ; PRISONS.*

### PART XII. SECT. 1, SUB-SECT. 2.—C.

**948 i. Execution of warrant on Sunday.**]—Deft. was arrested under a warrant, brought before a magistrate & required to give sureties for good behaviour, or, in default, be imprisoned.

Deft. refused, & a warrant was made out, under which he was committed to prison till he should find the sureties. All these proceedings took place on Sunday, & the warrants & entry in the sessions book bore date of that

day :—*Held* : although the arrest might be good, the taking sureties & committal in default was a judicial act, & therefore void as being done on Sunday.—*R. v. RAMSAY* (1867), 16 W. R. 191.—*IR.*



## SECT. 3.—JURISDICTION ON APPEAL.

See Summary Jurisdiction Act, 1879 (c. 49), s. 19; Criminal Justice Administration Act, 1914 (c. 58), s. 37 (1); POOR LAW; RATES & RATING; REVENUE.

**Affiliation orders.**—See BASTARDY, Vol. III., pp. 405 *et seq.*

**Matters concerning inclosure of commons.**—See COMMONS, Vol. XI., pp. 85, 86, Nos. 1049–1059.

**Imposition of penalties for wrongful distress.**—See DISTRESS, Vol. XVIII., p. 366, Nos. 1042, 1043.

**Actions in respect of tithe.**—See ECCLESIASTICAL LAW, Vol. XIX., p. 480, Nos. 3393, 3394.

**Conviction for offences against sale under Food & Drugs Acts.**—See FOOD & DRUGS, Vol. XXV., p. 115, No. 387.

**Conviction for offences in respect of highways.**—See HIGHWAYS, Vol. XXVI., pp. 459, 460, 483, 484, 509, 545.

**Separation orders.**—See HUSBAND & WIFE, Vol. XXVII., p. 568, Nos. 6265–6267.

**Orders of licensing justices.**—See INTOXICATING LIQUORS, Vol. XXX., pp. 58 *et seq.*

## SECT. 4.—PROCEDURE.

## SUB-SECT. 1.—IN GENERAL.

**Second court—In counties.**—See Stipendiary Magistrates Act, 1858 (c. 73), s. 9.

—— **Assistant clerk of the peace.**—See Stipendiary Magistrates Act, 1858 (c. 73), s. 11.

—— **In boroughs.**—See Municipal Corporations Act, 1882 (c. 50), s. 166 (1).

—— **Assistant clerk of the peace.**—See Municipal Corporation Act, 1882 (c. 50), s. 166 (5).

As to finding of indictment by grand jury, see CRIMINAL LAW, Vol. XIV., pp. 237 *et seq.*

## SUB-SECT. 2.—ADJOURNMENT.

## A. In General.

**961. Power of court to adjourn.**—Sessions may adjourn matter for further debate.—KING'S LANGLEY (INHABITANTS) v. ST. PETER'S-IN-ST. ALBANS (INHABITANTS) (1699), 1 Ld. Raym. 481; 12 Mod. Rep. 260; 91 E. R. 1220; *sub nom.* KING-LANGLEY PARISH CASE, 2 Salk. 605; Sett. & Rem. 144.

**962. Necessity for entry as sitting on each separate day.**—Sessions cannot be entered as sitting three days together.

Though a sessions may adjourn from one day to another & to sit by adjournment, yet it must not appear in a lump, as sitting of three days together, but distinctly (HOLT, C.J.).—LINGFIELD PARISH v. BATTLE PARISH (1703), 2 Salk. 605; 91 E. R. 513.

**963. Day of holding is day of opening.**—Where an order of removal was made & executed on the day before the holding of the Epiphany Sessions, & the parish to which the pauper was removed gave due notice & entered their appeal at the Easter Sessions at which sessions the justices refused to hear the appeal, on the ground that it should have been entered at the Epiphany Sessions; this ct. granted a *mandamus* to the justices to receive such appeal, notwithstanding it appeared that the Epiphany Sessions continued for fourteen days, & were afterwards twice adjourned to distant days, & that it was the practice of the sessions to allow appeals to be

entered at any time during their continuance, or at the adjournments, & to respite the hearing to the next sessions.—R. v. SURREY JJ. (1813), 1 M. & S. 479; 105 E. R. 179.

*Annotation* :—*Reid*. R. v. Sussex JJ. (1862), 2 B. & S. 664.

**964. Necessity for formal adjournment—Effect of failure.**—An appeal to the sessions in an order of bastardy quashed because the appeal was not properly adjourned.—R. v. READING (1734), Lee temp. Hard. 79; Sess. Cas. K. B. 206; 95 E. R. 49.

*Annotations* :—*Consd.* R. v. Cambridge Union (1861), 1 B. & S. 61. *Mentd.* R. v. Rook (1753), 1 Wils. 340; R. v. Luffe (1807), 8 East, 193; R. v. Kea (1809), 11 East, 132; Cope v. Cope (1833), 1 Mood. & R. 269; R. v. Sourton (1836), 5 Ad. & El. 180; Legge v. Edwards (1855), 4 W. R. 71; Russell v. Russell, [1924] A. C. 687.

**965. ———**—R. v. POLSTEAD (INHABITANTS), No. 839, *ante*.

**966. ———**—If the justices at sessions are equally divided, & no order made nor the sessions adjourned, no order can be made at a subsequent sessions.—R. v. BODMYN (INHABITANTS) (1750), Burr. S. C. 295; *sub nom.* BODMIN v. WARLIGEN, 2 Bott. 6th ed. 750.

*Annotations* :—*Expld.* Keen v. R. (1847), 10 Q. B. 928. *Refd.* R. v. Leicestershire JJ. (1813), 1 M. & S. 442; R. v. Westmorland JJ. (1868), 9 B. & S. 288; *Ex p.* Evans, [1894] A. C. 16.

**967. ———** Exception in case of county of Middlesex.—R. v. MULLANEY, No. 833, *ante*.

**968. Necessity for presence of justices.**—A ct. of quarter sessions cannot be adjourned by the crier without the presence of the justices.—R. v. MIDDLESEX JJ., *Re* BOWMAN (1834), 5 B. & Ad. 1113; 3 Nev. & M. K. B. 110; 3 Nev. & M. M. C. 101; 3 L. J. M. C. 32; 110 E. R. 1104.

*Annotations* :—*Mentd.* R. v. Hewes (1835), 3 Ad. & El. 725; R. v. Marsh (1837), 6 Ad. & El. 236; R. v. O'Connell (1844), 5 State Tr. N. S. 1; R. v. Derbyshire JJ. (1845), 9 Jur. 551; *Re* Beverley Election Comrs., *Ex p.* Fitzgerald (1869), 34 J. P. 244.

**969. ———** In sufficient number.—R. v. WESTRINGTON (1750), 2 Const., p. 733.

*Annotation* :—*Mentd.* *Re* Beverley Election Comrs., *Ex p.* Fitzgerald (1869), 34 J. P. 244.

—— **In boroughs.**—See Municipal Corporations Act, 1882 (c. 50), ss. 165, 166.

**970. Effect of adjournment—Continuation of original sessions.**—*Semble* : an adjourned sessions is, by common practice, considered to be part of the original sessions, & not to be considered as a distinct sessions.—R. v. LANCASHIRE JJ. (1843), 4 Q. B. 910; 1 Dav. & Mer. 488; 3 Gal. & Dav. 296; 12 L. J. M. C. 110; 1 L. T. O. S. 287; 114 E. R. 1140; *sub nom.* R. v. LANCASHIRE JJ., HOLYWELL v. WARRINGTON, 7 J. P. 399; 7 Jur. 512.

*Annotations* :—*Refd.* R. v. London JJ. (1846), 15 L. J. M. C. 127; R. v. West Riding JJ. (1847), 10 Q. B. 763; R. v. Sussex JJ. (1862), 2 B. & S. 664.

**971. ———**—An adjourned quarter sessions is a continuation of the original quarter sessions. Where, therefore, an appeal under 9 Geo. 4, c. 61, s. 27, which requires that "the ct. at such sessions shall hear & determine the matter of such appeal" was dismissed with costs, which costs were not taxed until the adjourned sessions, when they were ascertained & inserted in the order of sessions :—*Held* : such adjourned sessions were a continuation of the original quarter sessions, & the taxation was warranted, & the order good.—RAWNSLEY v. HUTCHINSON (1871), L. R. 6 Q. B. 305; 40 L. J. M. C. 97; 23 L. T. 843; 35 J. P. 501; 19 W. R. 436.

*Annotation* :—*Mentd.* R. v. General Assessment Sessions (1887), Ryde, Rat. App. (1886–1890) 268.

**972. Where adjourned sitting may take place.**—Notice & grounds of appeal under Poor Law Amendment Act, 1834 (c. 76), s. 81, should be given

fourteen days before the first day of the general quarter sessions, & not fourteen days before the first day on which the adjourned sessions are appointed to be held, for the division in which the appeal is to be tried.

Where quarter sessions were held at B., & by adjournment in each of three other divisions of a county, & appls. had given notice & grounds of appeal fourteen days before holding the sessions for the division, but not fourteen days before holding the sessions at B.; & the sessions, on the objection being taken, dismissed the appeal; this ct. refused to grant a *mandamus*, compelling them to enter continuances & hear it.—*R. v. SUFFOLK JJ.* (1847), 4 Dow. & L. 628; 2 New Sess. Cas. 554; 1 Saund. & C. 296; 16 L. J. M. C. 36; 8 L. T. O. S. 370; 11 Jur. 288; 11 J. P. Jo. 70.

*Annotation*:—*Overd R. v. Sussex JJ.* (1865), 4 B. & S. 966.

#### B. For What Time.

##### (a) Adjournment of Court.

**973. To a day before the next sessions.]**—Where an order is made at an adjourned sessions, it must appear the sessions began in time.—*ST. MICHAEL COSLANY NORWICH PARISH v. ST. MATTHEW'S IPSWICH PARISH* (1729), 2 Stra. 831; 93 E. R. 879.

*Annotations*:—*Mentd. R. v. Sowton, Devonshire* (1738), Andr. 345; *R. v. Bugden Parish* (1747), 1 Wils. 183.

**974. —.]**—Where an indictment is found at an adjourned sessions, it must appear the sessions began in time.—*R. v. FISHER* (1730), 2 Stra. 865; 93 E. R. 901.

*Annotation*:—*Refd. R. v. Suffolk JJ.* (1847), 1 Saund. & C. 296.

**975. To a day subsequent to expiration of Act confirming jurisdiction.]**—Justices cannot adjourn their proceedings to a day subsequent to the expiration of an Act.—*R. v. LONDON JJ. OF THE PEACE* (1764), 3 Burr. 1456; 97 E. R. 924.

##### (b) Adjournment of Matter under Consideration.

**976. To next or subsequent sessions—General rule.]**—By Prison Act, 1865 (c. 126), s. 24, the necessity for the alteration or enlargement of an existing prison shall be proved by the presentment of two or more visiting justices, & the consideration of such a presentment shall not be entertained unless not less than three weeks' notice has been given, in some newspaper circulating in the district of the prison authority, of their intention to take the same into consideration at a time & place to be stated in the notice. Due notice having been given that the presentment of justices as to certain gaols would be taken into consideration at the Apr. quarter sessions for the county of W. the presentment was taken into consideration at those sessions & it was resolved that the matter should be referred to a select committee to inquire into it & report to the Oct. sessions. At the Oct. sessions the report was taken into consideration without any fresh notice having been given, & an order was made in conformity with the report:—*Held*: the power of adjournment was inherent in the ct. of quarter sessions & it was competent to the ct. to adjourn the matter from the Apr. to the Oct. sessions; they had in effect done so, though not formally; a fresh notice for the Oct. sessions was not necessary; & the order was therefore valid.—*R. v. WESTMORELAND JJ.* (1868), L. R. 3 Q. B. 457; 9 B. & S. 288; 37 L. J. M. C. 115; 32 J. P. 614; 16 W. R. 753; 11 Cox, C. C. 172; *sub nom. R. v. WESTMORELAND JJ., KENDAL CORPN. v. WESTMORELAND JJ.*, 18 L. T. 326.

**977. —.]**—A ct. of quarter sessions has power to respite a judgment from one session

to another, without adjourning the session.—*KEEN v. R.* (1847), 10 Q. B. 928; 2 New Mag. Cas. 271; 3 New Sess. Cas. 25; 16 L. J. M. C. 180; 9 L. T. O. S. 313; 12 J. P. 4; 11 Jur. 1060; 2 Cox, C. C. 341; 116 E. R. 352.

*Annotations*:—*Apld. Campbell & Haynes v. R.* (1847), 2 New Mag. Cas. 356; *R. v. Westmoreland JJ.* (1868), L. R. 3 Q. B. 457. *Refd. R. v. Belton* (1848), 12 J. P. 232; *R. v. Staffordshire JJ.* (1857), 3 Jur. N. S. 1148; *R. v. McLain, R. v. Barr* (1922), 91 L. J. K. B. 562.

**978. — Where no statute forbids.]—Semble**: the statement of the grounds of appeal under Poor Law Amendment Act, 1834 (c. 76), s. 81, must be sent or delivered to the overseers themselves; & service on their attorney is insufficient. But, assuming that to be so, the sessions, where such statement has been served on the attorney only, may, if they think fit, adjourn the appeal, such power being incident generally to them as a ct., except where taken away by statute.—*R. v. KIMBOLTON (INHABITANTS)* (1837), 6 Ad. & El. 603; 1 Nev. & P. K. B. 606; Nev. & P. M. C. 257; Will. Woll. & Dav. 241; 6 L. J. M. C. 90; 1 J. P. 84; 112 E. R. 231.

*Annotations*:—*Distd. R. v. Lancashire JJ.* (1857), 8 E. & B. 563. *Refd. R. v. Bond* (1837), 6 Ad. & El. 905; *R. v. North Riding of Yorkshire JJ.* (1837), 6 L. J. M. C. 110; *R. v. Poole Recorder* (1837), 1 Nev. & P. K. B. 756; *R. v. Oundle* (1842), 3 Q. B. 353; *R. v. Belton* (1848), 11 Q. B. 379; *R. v. Macclesfield* (1849), 13 Q. B. 881; *R. v. Carew* (1850), 14 J. P. Jo. 702; *R. v. Middlesex JJ.* (1850), 1 L. M. & P. 621.

**979. —.]**—Though the ct. of quarter sessions have in general power of adjournment, yet, when an Act giving any particular jurisdiction plainly intimates an intention that such particular jurisdiction is to be exercised by one particular sessions, that sessions cannot adjourn it to another (*COCKBURN, C.J.*).—*BOWMAN v. BLYTH* (1857), 7 E. & B. 47; 27 L. J. M. C. 21; 29 L. T. O. S. 312; 22 J. P. 5; 3 Jur. N. S. 886; 119 E. R. 1165, Ex. Ch.

*Annotations*:—*Distd. R. v. Cambridge Union* (1861), 1 B. & S. 61. *Consd. Redhough Colliery v. Gateshead Assmt. Com.* (1923), 130 L. T. 366. *Refd. R. v. Lancashire JJ.* (1857), 8 E. & B. 563; *Rochester Corpn. v. R.* (1858), E. B. & E. 1024; *Lewis v. Davis* (1875), L. R. 10 Exch. 86; *Caldow v. Pixell* (1877), 2 C. P. D. 562. *Mentd. R. v. Tolson* (1889), 23 Q. B. D. 168.

**980. — Adjournment for purpose of awarding costs.]**—Under 9 Geo. 4, c. 61, the sessions hearing an appeal against the refusal of justices to grant a license cannot adjourn such appeal to a subsequent session for the purpose of awarding costs there after a taxation in the interval. So held on the construction of sects. 27 & 29 but without impeaching the authority of cts. of general or quarter session to adjourn a case from one session to another when no statute interferes.—*R. v. BELTON* (1848), 11 Q. B. 379; 3 New Sess. Cas. 77; 17 L. J. M. C. 70; 10 L. T. O. S. 324; 12 J. P. 232; 12 Jur. 392, 116 E. R. 518.

*Annotations*:—*Distd. R. v. Cambridge Union* (1861), 1 B. & S. 61. *Consd. Ex p. Evans*, [1894] A. C. 16; *Redhough Colliery v. Gateshead Assmt. Com.* (1923), 130 L. T. 366. *Refd. Bowman v. Blyth* (1856), 7 E. & B. 26; *Rawnsley v. Hutchinson* (1871), L. R. 6 Q. B. 305.

**Incidental power or lawful cause.]**—*See COMMONS*, Vol. XI., p. 86, No. 1052.

**981. — Necessity for fresh notice.]**—*R. v. WESTMORELAND JJ.*, No. 976, *ante*.

#### SUB-SECT. 3.—RIGHT OF AUDIENCE.

*See Solicitors Act*, 1843 (c. 73), s. 2; *Supreme Court of Judicature (Consolidation) Act*, 1925 (c. 49), s. 215 (1).

**982. Who may attend as advocates—Discretion of court.]**—Trespass for assaulting, & turning pltf. out of a police office. Plea, that two of



*Sect. 4.—Procedure: Sub-sects. 3, 4, 5, 6 & 7.]*

defts., being justices of the peace, were assembled in a police office to adjudicate upon an information against A. for an offence against a penal statute, & were proceeding to hear & determine the same, when pltf., being an attorney entered the police office with the informer, not as his friend or as a spectator, but for the avowed purpose of acting as his attorney & advocate touching the information; & as such attorney & advocate, without the leave, & against the will, of the justices, was taking notes of the evidence of a witness then under examination before them, touching the matter of the said information, & was acting & taking a part in the proceedings as an attorney or advocate on behalf of the informer; that the above two defts. stated to pltf., that it was not their practice to suffer any person to appear & take part in any proceedings before them as an attorney or advocate & requested him to desist from so doing; & although they were willing to permit the pltf. to remain in the police office as one of the public, yet that he would not desist from taking a part in the proceedings as such attorney or advocate, but asserted his right to be present, & to take such part, & to act as such attorney & advocate for the informer; & unlawfully, & against the will of the justices, continued in the police office, taking part & acting as aforesaid, in contempt of the justices; whereupon, by order of the above two defts., the other defts. turned pltf. out of the office:—*Held*: this was a good plea, inasmuch as no person has by law a right to act as an advocate on the trial of an information before justices of the peace, without their permission.

At the quarter sessions, the justices usually require that gentlemen of the bar only should appear as advocates; but in remote places, where they do not attend, members of the other branch of the profession are permitted to act as advocates. Persons not in the legal profession are not allowed to practise as advocates in any of these cts. On the hearing of an information, the magistrates, having the discretionary power to regulate the proceedings of their own cts., may decide who shall appear as advocates, & whether when the parties are before them, they will hear any one but them (LORD TENTERDEN, C.J.).—*COLLIER v. HICKS* (1831), 2 B. & Ad. 663; 9 L. J. O. S. M. C. 138; 9 L. J. O. S. K. B. 300; 109 E. R. 1290.

*Annotations*:—*Consd.* R. v. York Sheriffs (1832), 3 B. & Ad. 770; *Ex p.* Evans (1846), 9 Q. B. 279. *Apld.* *Re* Macqueen & Nottingham Caledonian Soc. (1861), 9 C. B. N. S. 793. *Refd.* Newton v. Constable (1841), 2 Q. B. 157; Rubenstein v. — (1860), 2 L. T. 732.

983. ———.]—Justices in quarter sessions may in their discretion make an order that barristers, provided as many as four attend, shall have exclusive audience in their ct., though, until such order was made, no barristers have attended the ct. except on special retainer, & the business of advocates has always been performed by attorneys only.—*Ex p.* EVANS (1846), 9 Q. B. 279; 115 E. R. 1280; *sub nom.* R. v. DENBIGHSHIRE JJ., 2 New Sess. Cas. 422; 15 L. J. Q. B. 335; 10 Jur. 542; 10 J. P. Jo. 371; *sub nom.* *Re* DENBIGHSHIRE JJ., 1 New Mag. Cas. 547; 7 L. T. O. S. 256.

*Annotation*:—*Mentd.* R. v. L. G. Board, *Ex p.* Arldige, [1914] 1 K. B. 160.

984. ——— Barristers.]—*COLLIER v. HICKS*, No. 982, *ante*.

—.]—*See, also*, BARRISTERS, Vol. III. p. 319, Nos. 59–61.

985. ——— Persons not in legal profession.]—*COLLIER v. HICKS*, No. 982, *ante*.

986. ———.]—Practising at the quarter

sessions as an attorney without being duly admitted is a misdemeanour, indictable under Solicitor's Act, 1843 (c. 73).—*R. v. BUCHANAN* (1846), 8 Q. B. 883; 15 L. J. Q. B. 227; 7 L. T. O. S. 83; 10 Jur. 736; 2 Cox, C. C. 36; 10 J. P. Jo. 279; 115 E. R. 1107.

*Annotations*:—*Refd.* Osborne v. Milman (1886), 17 Q. B. D. 514; *R. v. Hall*, [1891] 1 Q. B. 747; *Stevens v. Chown*, *Stevens v. Clark*, [1901] 1 Ch. 894.

987. ——— Clerk to assessment committee.]

The provision in Valuation (Metropolis) Act, 1869 (c. 67), s. 62, that on an appeal against a valuation list "an assessment committee . . . may appear by their clerk" does not give the clerk a right to be heard on their behalf [at quarter sessions] for the purpose of consenting to an alteration in the list.—*R. v. LONDON JJ.*, [1896] 1 Q. B. 659; 65 L. J. M. C. 120; 74 L. T. 523; 44 W. R. 485; 12 T. L. R. 386; 40 Sol. Jo. 497; *sub nom.* *R. v. LONDON JJ.*, *Ex p.* DEWEY, 60 J. P. 420, C. A.

988. ——— Solicitors.]—*COLLIER v. HICKS*, No. 982, *ante*.

989. Limitation of members allowed to practice.]

—In the city of York, which was incorporated before the time of memory, there had been a ct. from very ancient times, held first before the mayor & bailiffs, & after a charter of Richard II., before the mayor & sheriffs. By a bye-law made in 1556, by a select body of the corpn. who had immemorially made rules & regulations as to the practice of the ct., & who had at their discretion selected the persons admitted to practice as attorneys, there, it was ordered, that from thenceforth there should be no more than four persons admitted to be attorneys in the sheriff's ct.; & from that time it did not appear that any more than that number had ever been allowed to practice:—*Held*: the bye-law was reasonable, & the usage limiting the number of attorneys to four was sufficiently ancient to satisfy 2 Geo. 2, c. 23, s. 11.—*R. v. YORK SHERIFFS* (1832), 3 B. & Ad. 770; 1 L. J. K. B. 211; 110 E. R. 282.

## SUB-SECT. 4.—CONTEMPT OF COURT.

990. What courts may punish—Sessions—Attachment—Overseer.]—*R. v. BARTLETT* (1734), as reported in Sess. Cas. K. B. 208; 93 E. R. 210.

—.]—*See, further*, CONTEMPT OF COURT, Vol. XVI., pp. 13, 14, Nos. 66–71, 78.

991. ——— King's Bench Division—Disobedience to order of sessions—Subpœna.]—Where a person has been served with a *subpœna*, not issued from the Crown Office, to appear & give evidence at quarter sessions & makes default, the ct. of K. B. cannot attach him for contempt, either by its general authority, or by 43 Geo. 3, c. 92.—*R. v. BROWNELL* (1834), 1 Ad. & El. 598; 3 L. J. M. C. 118; 110 E. R. 1335; *sub nom.* *R. v. ROOM*, 3 Nev. & M. K. B. 725; 2 Nev. & M. M. C. 368.

—.]—*See* CONTEMPT OF COURT, Vol. XVI., pp. 11, 12, 17, 22, Nos. 43, 45–48, 104, 179.

Contempt by counsel.]—*See* CONTEMPT OF COURT, Vol. XVI., p. 17, No. 126.

## SUB-SECT. 5.—THE ORDER.

992. Order bad in part—Whether whole order void.]—An order of sessions is not void by being bad in part.—*SLATER'S CASE* (1637), Cro. Car. 470; 79 E. R. 1005.

*Annotations*:—*Mentd.* *R. v. Jenkin* (1736), Lee *temp.* Hard. 301; *R. v. Greaves* (1781), 2 Doug. K. B. 632; *R. v. Glynn* (1871), L. R. 7 Q. B. 16; *R. v. Flintshire JJ.* (1872), 36 J. P. 406.

**993. Form of order—Must show commencement of sessions.]**—An order of sessions must show the commencement, but need now show the adjournments of the sessions.—*R. v. MIDDLESEX (INHABITANTS)* (1737), Andr. 101; 95 E. R. 317.

**994. — Need not show adjournments.]**—*R. v. MIDDLESEX (INHABITANTS)*, No. 993, *ante*.

**995. Amendment—Whether permissible.]**—An order of sessions not permitted to be amended.—*R. v. BRADENHAM (INHABITANTS)* (1756), Say. 285; 96 E. R. 882.

#### SUB-SECT. 6.—POWERS OF JUSTICES.

**996. Powers to delegate duties.]**—I am not satisfied that they [justices] can ever refer the examination of the matter to a certain number of themselves, because they are all judges of the fact, & therefore they transact it as judges in ct.; but allow that they may refer the examination of the fact, & reserve the judgment to themselves, yet doubtless they cannot give a power to make rates & orders (*HOLT, C.J.*).—*R. v. GLIN* (1703), 6 Mod. Rep. 87; 87 E. R. 845.

**997. —.]**—*R. v. ST. JOHN & ST. MARY PARISHES* (1714), Sess. Cas. K. B. 21; 93 E. R. 21.

**998. — Order as to costs.]**—*R. v. ST. MARY'S NOTTINGHAM (INHABITANTS)* (1737), 13 East, 57, n.; 104 E. R. 288.

*Annotation:—Mentd. R. v. Martyr* (1810), 13 East, 55.

**999. Authority to fix fees of bailiff.]**—Justices in sessions have no authority to fix the bailiff's fees for arrest; nor will the ct. of K. B. allow more than the usual fee, though more was in fact paid, in compliance with a table of fees settled by the justices at their quarter sessions, & acted upon in practice for many years.—*BOLERO v. MOSSE* (1789), 3 Term Rep. 417; 100 E. R. 651.

*Annotations:—Mentd. Martin v. Bell* (1817), 6 M. & S. 220; *Innes v. Levi* (1835), 1 Hodg. 195.

**1000. Power to regulate own practice.]**—By a rule made by the justices of the West Riding of Yorkshire at their sessions, they had provided that all intended applications, for orders in bastardy should be entered in a book, kept for the purpose in the clerk of the peace's office, before twelve o'clock at noon, on the second day of the sessions. The overseers of a parish having made an entry, did not appear to support the case when it was called on in its order. Deft., who was present to defend himself from the charge, thereupon applied to the ct., under the proviso in Poor Law Act, 1834 (c. 76), s. 73, for his costs, as on a case, where, "upon the hearing of such an application, the ct. had not thought fit to make any order." The ct. having made an order for costs against the overseers, they were indicted for refusing to obey the order:—*Held*: this was a sufficient application & hearing, to give the magistrates jurisdiction to make the order, regard being had to the rule, which it was competent for them to make for the regulation of their own practice.—*R. v. STAMPER* (1841), 1 Q. B. 119; 4 Per. & Dav. 539; 10 L. J. M. C. 73; 5 J. P. 450; 5 Jur. 841; 113 E. R. 1075.

*Annotations:—Mentd. R. v. Hastings* (1844), 6 Q. B. 141; *Vaughton v. Bradshaw* (1860), 9 C. B. N. S. 103; *R. v. Lancashire JJ., Re Mann v. Johnson* (1874), 29 L. T. 886.

**1001. Power to order defendant to be kept in custody of police.]**—A warrant of the ct. of quarter

sessions for Tipperary, dated Oct. 20, 1804, stated that A. stood indicted, in the peace office of that county, for a rescue & a riot, & commanded the police of that county to apprehend, " & him so apprehended in safe custody keep, so that you may have his body before her Majesty's justices of the peace at the next sessions, at etc., to be held in the said county on Jan. 13 next ":—*Held*: it was bad, as the sessions had no power to authorise the police to keep deft. in their custody till the next sessions.—*Re NESBITT* (1844), 1 New Sess. Cas. 366; 14 L. J. M. C. 30; *sub nom. Ex p. NISBETT*, 4 L. T. O. S. 120; 8 J. P. 823; 8 Jur. 1071.

**1002. Power of transmission to assizes—Sessions jury disagreeing—Effect of Grand Juries (Suspension) Act, 1917 (c. 4).]**—A ct. of quarter sessions has power to transmit for trial to a ct. of assizes counts in an indictment tried by it on which the jury did not agree. This power is unaffected by above Act.—*R. v. HOLMEN*, [1918] 2 K. B. 861; 88 L. J. K. B. 30; 119 L. T. 682; 83 J. P. 4; 13 Cr. App. Rep. 184, C. C. A.

**Autrefois convict.]**—See CRIMINAL LAW, Vol. XIV., p. 340, No. 3585.

**Power to compel attendance of coroner—& to refuse his fees.]**—See CORONERS, Vol. XIII., p. 260, No. 411.

**Jurisdiction to discharge jury.]**—See CRIMINAL LAW, Vol. XIV., p. 329, No. 3443.

#### SUB-SECT. 7.—DECISIONS OF JUSTICES.

**1003. What court has power over—Same sessions—Power to vary order.]**—Sessions may alter & set aside their own orders the same sessions.—*ST. ANDREW'S HOLBORN (INHABITANTS) v. ST. CLEMENT DANES' (INHABITANTS)* (1704), 2 Salk. 606; Holt, K. B. 511; 91 E. R. 514; *sub nom. ST. CLEMENT'S PARISH v. ST. ANDREW'S HOLBORN PARISH*, 6 Mod. Rep. 287.

*Annotations:—Refd. R. v. General Assessment Sessions* (1887), Ryde, Rat. App. (1886–1890), 268. *Mentd. Whitaker v. Wisbey* (1852), 12 C. B. 44.

**1004. —.]**—The justices at sessions may alter their judgment during the continuance of the sessions.—*R. v. LEICESTERSHIRE JJ.* (1813), 1 M. & S. 442; 105 E. R. 165.

*Annotations:—Mentd. Ponney v. Slade* (1839), 5 Bing. N. C. 319; *R. v. Grant* (1849), 13 Jur. 1026; *R. v. Walsall Overseers* (1878), 3 Q. B. D. 457; *Ex p. Evans*, [1894] A. C. 16; *R. v. Hertfordshire JJ., Ex p. Larsen*, [1926] 1 K. B. 191.

**1005. — Subsequent sessions.]**—*COCKFIELD (INHABITANTS) v. BOXSTEAD (INHABITANTS)* (1697), 2 Salk. 477; 91 E. R. 410.

**1006. — No order made by previous sessions—Equal division of opinion.]**—*R. v. BODMYN (INHABITANTS)*, No. 966, *ante*.

**1007. —.]**—The ct. of quarter sessions has no power of its own authority to erase an entry from the records of a past sessions. But a *mandamus* will go directing it to do so, where an entry has been made which is manifestly false, & made without jurisdiction.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1843), 5 Q. B. 1; 3 Gal. & Dav. 170; 12 L. J. M. C. 148; 1 L. T. O. S. 314; 8 J. P. 244; 7 Jur. 698; 114 E. R. 1147.

*Annotations:—Consd. Ex p. Ackworth Overseers* (1843), 1 Dow. & L. 718; *R. v. Cornwall JJ.* (1843), 8 J. P. 74. *Refd. R. v. Glamorganshire JJ.* (1846), 15 L. J. M. C. 110. *Mentd. R. v. Sevenoaks* (1845), 14 L. J. M. C. 92.

#### PART XII. SECT. 4, SUB-SECT. 6.

**p. To grant new trial.]**—Deft. was convicted of an assault at the quarter sessions & fined, but during the same sessions he obtained a new

trial on his own affidavit, & was acquitted at the following sessions:—*Held*: the quarter sessions had authority to grant such new trial.—*R. v. FITZGERALD* (1861), 20 U. C. R. 546. —CAN.

**q. To draw orders on treasurer.]**—The chairman of quarter sessions has no right to draw orders on the treasurer except when presiding in ct.—*Re DAVISON & MILLER* (1864), 24 U. C. R. 66.—CAN.



*Sect. 4.—Procedure: Sub-sect. 7. Part XIII. Sect. 1: Sub-sects. 1 & 2, A. & E.*

**1008.** ——— **Order as to costs.**—An appeal against an order of removal was dismissed at the borough sessions, for which notice of appeal had been given; & an order for costs made in favour of the respondents, appls. not appearing pursuant to their notice. At the next sessions appls. applied to rescind the former order for costs, & to be allowed then to enter & respite their appeal to the following sessions, on the ground of *mala fides* on the part of resps. The sessions, however, after hearing all the facts, refused to grant the application:—*Held*: a *mandamus* to enter continuances & hear the appeal would not lie.—*R. v. BOLTON RECORDER* (1849), 18 L. J. M. C. 139; 13 L. T. O. S. 143; 14 Jur. 431; 13 J. P. Jo. 346.

**1009.** ——— **On appeal, the quarter sessions made an order confirming an order of justices subject to a case.** The order of sessions was silent as to costs. Appls. abandoned the case; resps. applied to a subsequent sessions, who made an order, stating that the original order was confirmed, & giving resps. costs:—*Held*: the subsequent sessions had no jurisdiction to deal with the order made by the prior sessions & a rule was made absolute to bring up the second order, on *certiorari*, to be quashed.—*R. v. STAFFORDSHIRE JJ.* (1857), 7 E. & B. 935; 26 L. J. M. C. 179; 29 L. T. O. S. 196; 22 J. P. 209; 3 Jur. N. S. 1148; 5 W. R. 706; 119 E. R. 1494.

*Annotations*:—*Refd.* *R. v. West Riding of Yorkshire JJ.* (1865), 12 L. T. 380. *Mentd.* *West London Extension*

*Ry. v. Fulham Union Assmt. Com. & Fulham Overseers* (1870), 22 L. T. 523.

**1010.** ——— **—**—The quarter sessions of the county of L. made rules to regulate the payment of moneys by the treasurer for the expenses of the gaols & houses of correction, by which the expenses were to be from time to time certified by two visiting justices, & then to be paid by the county treasurer. It was the custom to allow refreshments to the justices & jurors at the sessions held at the ct. house in one of the gaols, & to charge them as part of the expenses of the gaol. At a public inquiry into the conduct of a county ct. judge in Nov. 1851, refreshments were furnished to those who attended, & two visiting justices ordered the amount to be paid by the treasurer. At an adjourned general sessions in Sept. 1852, this payment was disallowed in the accounts of the treasurer, & an abstract of his accounts, with this disallowance, was transmitted to the Secretary of State, in pursuance of County Rates Act, 1852 (c. 81), s. 50. At the annual sessions in June, 1853, the disallowance was rescinded, & the payment allowed. On motion to quash the order of sessions of June, 1853, which had been brought by *certiorari*:—*Held*: the quarter sessions in June, 1853, had no power to review & rescind the decision of the quarter sessions in Sept. 1852.—*R. v. SAUNDERS* (1854), 3 E. & B. 763; 2 C. L. R. 1689; 24 L. J. M. C. 45; 23 L. T. O. S. 157; 18 J. P. 584; 1 Jur. N. S. 86; 2 W. R. 492; 118 E. R. 1327.

*Annotations*:—*Mentd.* *A.-G. v. De Winton*, [1906] 2 Ch. 106; *R. v. Woodhouse*, [1906] 2 K. B. 501.

— **Court of King's Bench.**—*See* CRIMINAL LAW, Vol. XIV., pp. 335, 336, Nos. 3542–3544.

## Part XIII.—Appeals from Courts of Summary Jurisdiction.

### SECT. 1.—TO QUARTER SESSIONS.

#### SUB-SECT. 1.—IN GENERAL.

**1011. Proceedings must appear to be on appeal.**—Where the sessions quash an order it must appear to be on appeal.—*ANON.* (1697), 2 Salk. 479; 91 E. R. 412.

**1012. Whether appeal precludes action at law.**—Appeal to quarter sessions does not preclude an action at law.—*LEADER v. MOXON* (1773), 2 Wm. Bl. 924; 3 Wils. 461; 96 E. R. 546.

*Annotations*:—*Mentd.* *British Cast Plate Manufacturers v. Meredith* (1792), 4 Term Rep. 794; *Sutton v. Clarke* (1815), 6 Taunt. 29; *Boulton v. Crowther* (1824), 2 B. & C. 703; *Hall v. Smith* (1824), 2 Bing. 156; *Mercy Dock Trustees v. Gibbs* (1866), L. R. 1 H. L. 93; *R. v. St. Luke's* (1871), L. R. 7 Q. B. 148.

#### SUB-SECT. 2.—RIGHT OF APPEAL.

##### A. In General.

*See*, Summary Jurisdiction Act, 1879 (c. 49), s. 19; Criminal Justice Administration Act, 1914 (c. 58), s. 37; Criminal Justice Act, 1925 (c. 86), s. 25.

#### PART XIII. SECT. 1, SUB-SECT. 1.

*r. Whether appeal final.*—Where a person convicted under Petty Trespass Act, has appealed to the quarter sessions, where the conviction is confirmed, no appeal lies thence to the Q. B.—*R. v. HUSSEY* (1840), 2 P. R. 194.—*CAN.*

*t. —*—*Qu.*: whether a party having appealed to the quarter sessions under 13 & 14 Vict. c. 54, from a conviction by a justice of the peace,

has any right of appeal from the decision of that ct.—*VICTORIA PLANK ROAD CO. v. SIMMONS* (1857), 15 U. C. R. 303.—*CAN.*

#### PART XIII. SECT. 1, SUB-SECT. 2.—A.

*a. In what cases right exists—Appeal from police magistrate.*—An appeal lies from a conviction by a police magistrate to a ct. of general sessions.—*AN YICK v. LEHMERT* (1905), 2 C. L. R. 593.—*AUS.*

**1013. In what cases right exists—Where no original jurisdiction existed.**—*R. v. FLISHER, R. v. TOWILL* (1781), Cald. Mag. Cas. 135; 1 Const. 5th ed. 69.

*Annotation*:—*Refd.* *R. v. Preston* (1848), 18 L. J. M. C. 10.

**1014. — Second appeal from same conviction.**—By a local Act, a power of appeal is given on certain conditions from a conviction by a justice of the peace to any quarter sessions to be holden within six months from such conviction; if applt. lodge his appeal & the ct. dismiss it without entering into the merits, because the previous conditions have not been regularly complied with, & confirm the conviction, such judgment is conclusive, & the party cannot lodge a second appeal from the same conviction though within the six months.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1790), 3 Term Rep. 776; 100 E. R. 853.

*Annotations*:—*Distd.* *R. v. Leeds JJ.* (1792), 4 Term Rep. 583. *Appld.* *R. v. Middlesex JJ.* (1840), Woll. 32. *Distd.* *R. v. Wolverhampton Recorder* (1887), 35 W. R. 650.

**1015. — Party aggrieved assenting to act complained of—Local Act.**—By a local Act an appeal

*b. — Effect of payment of fine.*—*Re UNITED COUNTIES OF YORK & PEEL JJ., Ex p. MASON* (1863), 13 C. P. 159.—*CAN.*

*c. —*—*—*—A person by paying his fine on a summary conviction loses, any right of appeal he might otherwise have had under Criminal Code, s. 880.—*R. v. NEUBERGER* (1902), 9 B. C. R. 272.—*CAN.*

*d. —*—*—*—Any party who considers himself aggrieved by a con-

to the Quarter Sessions was given to any person thinking himself aggrieved by any order or decision of the comrs. under that Act:—*Held*: a person, who would otherwise have been entitled to appeal against an order of the comrs. directing payment out of a certain fund of expenses not properly chargeable thereon, was precluded from appealing by having originally assented to that application of the fund.—*R. v. HARROP* (1856), 27 L. T. O. S. 64; 20 J. P. 627.

**1016.** — After consent to be dealt with summarily—Summary Jurisdiction Act, 1879 (c. 49), s. 12.]—Where a person charged before a ct. of summary jurisdiction with an indictable offence elects to be dealt with summarily under above sect. & is convicted, he has no right of appeal under above Act, s. 19, which relates only to appeals from convictions under past or future Acts.—*R. v. LONDON JJ., Ex p. LAMBERT*, [1892] 1 Q. B. 664; 61 L. J. M. C. 104; 66 L. T. 378; 56 J. P. 421; 40 W. R. 575; 8 T. L. R. 338; 17 Cox, C. C. 526, D. C.

*Annotations*:—*Apld.* *R. v. Dickinson, Ex p. Davis*, [1910] 1 K. B. 469. *Refd.* *R. v. Hertfordshire JJ.*, [1911] 1 K. B. 612.

**1017.** — — — — — **Effect of Children Act, 1908 (c. 67), s. 128 (2).**—If a person, charged before a ct. of summary jurisdiction with an indecent assault on a female who in the opinion of the ct. is under the age of sixteen years, consents to be dealt with summarily by virtue of the power conferred on cts. of summary jurisdiction by above sects., he has no right of appeal under Children Act, 1908 (c. 67), s. 33.—*R. v. DICKINSON, Ex p. DAVIS*, [1910] 1 K. B. 469; 79 L. J. K. B. 256; 102 L. T. 48; 74 J. P. 76; 22 Cox, C. C. 249, D. C.

**1018.** — — — — — **Plea of guilty—Coupled with plea of extenuating circumstances—Admission of charge.**—The fact that applt., when charged, admitted an act of assault, but asked for the charge to be heard on the ground of mitigating circumstances, is not a simple plea of guilty debarring him from the right of appeal given under Summary Jurisdiction Act, 1879 (c. 49), s. 19.—*R. v. ESSEX JJ., Ex p. STARK* (1892), as reported in 61 L. J. M. C. 120, D. C.

*Annotations*:—*Refd.* *Harris v. Cooke* (1918), 119 L. T. 744. *Mentd.* *R. v. Somerset JJ.* (1900), 16 T. L. R. 166.

**1019.** — — — — — **Person aggrieved by part of conviction—Criminal Justice Administration Act, 1914 (c. 58), s. 37 (1).**—An information was preferred by applt. against resp. under the Defence of the Realm Regulations for a breach of the Pigs (Maximum Prices) Order, 1917. At the hearing resp. was present, & his solr. stated that he pleaded not guilty. At the end of the case for the prosecution resp.'s solr. submitted that there was no case for him to answer, but the justices overruled the objection & decided to fine resp. Resp.'s solr. thereupon withdrew his plea, & resp. gave evidence in mitigation. The justices then fined him 10s. Resp. appealed to quarter sessions, which held that resp. had a right of appeal under Reg. 58 of the Defence of the Realm Regulations, & allowed the appeal:—*Held*: Reg. 58 was not affected by above sect., & if a person was aggrieved by any part of the conviction, i.e. either the decision as to is guilt or the sentence, he was a person aggrieved

& had a right of appeal under Reg. 58 even if he had pleaded guilty.—*HARRIS v. COOKE* (1918), 88 L. J. K. B. 253; 119 L. T. 744; 83 J. P. 72; 16 L. G. R. 850, D. C.

*See, now*, Criminal Justice Act, 1925 (c. 86).

As to right of appeal under particular statutes, see Titles *passim*.

#### *B. From Sentence of Metropolitan Police Magistrate.*

*See* Metropolitan Police Courts Act, 1839 (c. 71), s. 50.

**1020.** What order may be appealed from—Order for payment of sum exceeding three pounds—What amounts to—Order for payment of two shillings & sixpence weekly.]—An order of a metropolitan police magistrate to pay 2s. 6d. weekly towards the relief & maintenance of a certain pauper for & during so long a time as she shall be chargeable is not an order in which the sum adjudged to be paid is more than £3, so as to give a right of appeal to quarter sessions under Metropolitan Police Courts Act, 1839 (c. 71), s. 50.—*R. v. LONDON JJ., Ex p. GREENWICH UNION*, [1900] 1 Q. B. 438; 69 L. J. Q. B. 364; 82 L. T. 296; 48 W. R. 319; 44 Sol. Jo. 245; *sub nom.* *R. v. LONDON JJ., Re GRIST, Ex p. GREENWICH UNION GUARDIANS*, 64 J. P. 357, D. C.

**1021.** — — — — — **Sentence of imprisonment for more than a month—What amounts to—Sentence of imprisonment for one month & recommendation for deportation.**—The Metropolitan Police Courts Act, 1839 (c. 71), s. 50, gives a right of appeal to quarter sessions from a summary conviction where "the penalty adjudged shall be imprisonment for any time more than one calendar month":—*Held*: where a person was convicted summarily & the magistrate sentenced him to imprisonment for one month & recommended the making of an order for his deportation, that recommendation is not part of "the penalty adjudged" within s. 50. In such a case, therefore, the person convicted had no right of appeal under the sect.—*R. v. GRAHAM CAMPBELL, Ex p. AHMED HAMID MOUSSA*, [1921] 2 K. B. 473; 90 L. J. K. B. 818; *sub nom.* *R. v. CAMPBELL, Ex p. MOUSSA*, 125 L. T. 310; 85 J. P. 189; 37 T. L. R. 611; 19 L. G. R. 461; 26 Cox, C. C. 747, D. C.

**1022.** Who may appeal—Prisoner pleading guilty—Conviction of larceny under Summary Jurisdiction Act, 1879 (c. 49).]—An adult, who is summarily convicted of larceny under above Act by a metropolitan magistrate on a plea of guilty, has no right of appeal under the Metropolitan Police Courts Act, 1839 (c. 71), s. 50.—*MOSELEY v. PUBLIC PROSECUTIONS DIRECTOR*, [1920] 1 K. B. 16; 88 L. J. K. B. 1166; 121 L. T. 581; 83 J. P. 214; 35 T. L. R. 670; 63 Sol. Jo. 750; 17 L. G. R. 562; 26 Cox, C. C. 510, D. C.

*Annotation*:—*Distd.* *Mittelman v. Denman*, [1920] 1 K. B. 519.

**1023.** — — — — — **Effect of Summary Jurisdiction Act, 1879 (c. 49), s. 19—Criminal Justice Administration Act, 1914 (c. 58), s. 37.**—In so far as Metropolitan Police Courts Act, 1839 (c. 71), s. 50, gives a right of appeal to deft. who has pleaded guilty, that sect. is not impliedly repealed by either

viction or order of a justice of the peace under any statute in force in Ontario, & relating to matters within the legislative authority of the legislature of Ontario, may, unless it is otherwise provided by the particular Act under which the conviction or order is made, appeal therefrom, to the general sessions of the peace.—*R. v. TUCKER* (1905), 6 O. W. R. 533; 10 O. L. R.

506.—CAN.

**e.** — — — — —]—Where a woman has been prosecuted before the police magistrate of a city under sect. 783 of the Code for being an inmate of a house of ill-fame & convicted under sect. 788 of the Code, there is no appeal to the general sessions.—*R. v. NIXON*, 19 C. L. T. Occ. N. 344.—CAN.

**f.** — — — — — *Conviction pursuant to order of High Court.*—*R. v. WATERFORD JJ.*, [1900] 2 I. R. 307.—IR.

**g.** — — — — — *Plea of guilty.*—The ct. can entertain an appeal from the decision of justices of the peace even when a plea of guilty has been entered.—*R. v. WORTH* (1883), 1 N. Z. L. R. 399 (S. C.).—N.Z.



**Sect. 1.—To quarter sessions: Sub-sect. 2, B.; sub-sects. 3 & 4, A. & B. (a) & (b).]**

of above sects. of above Acts.—MITTELMANN v. DENMAN, [1920] 1 K. B. 519; 89 L. J. K. B. 310; 122 L. T. 426; 84 J. P. 39; 36 T. L. R. 141; 18 L. G. R. 121; 26 Cox, C. C. 557, D. C.

#### SUB-SECT. 3.—TO WHAT COURT.

See Summary Jurisdiction Act, 1879 (c. 49), ss. 31 (1), 32; Criminal Justice Act, 1925 (c. 86), s. 21.

**1024. Next sessions after party grieved.]—**The next quarter sessions to which the appeal must be is the next after the party is grieved (*per CUR.*).—ANON. (1699), 12 Mod. Rep. 336; 88 E. R. 1362.

**1025. Sessions next after conviction.]—**An appeal against a conviction on 24 Geo. 3, c. 31, for not entering horses, etc., must be to the quarter sessions next after the conviction, & not after the execution.—PROSER v. HYDE (1786), 1 Term Rep. 414; 99 E. R. 1170.

*Annotation:—*Refd. R. v. Lancashire JJ. (1828), 1 L. J. O. S. M. C. 119.

See, also, POOR LAW; RATES & RATING.

#### SUB-SECT. 4.—GENERAL RULES OF PROCEDURE.

##### A. Rules of Practice at Sessions.

**1026. General rule—Court will not interfere with reasonable rules—Notice of trial of respited appeal.]**

—Though an appeal against an order of removal has been entered & adjourned once by virtue of Poor Relief Act, 1723 (c. 7), s. 8, & though the justices in sessions have a discretionary power to determine whether reasonable notice has been given of applt.'s intention to proceed on the trial of such adjourned appeal; yet if they dismiss the appeal at such adjourned sessions without hearing it, on the ground that they have no authority to try it for want of a sufficient length of notice to resps. according to a new rule of practice promulgated two sessions before, but then first acted upon, & which was not known to applt.'s attorney who had given the former usual notice, this ct. will grant a *mandamus* to the sessions to enter continuances & hear the appeal.—R. v. WILTSHIRE JJ. (1808), 10 East, 404; 103 E. R. 828.

*Annotations:—*Apld. R. v. Lancashire JJ. (1828), 7 B. & C. 691. *Distd. Ex p. Becke* (1832), 3 B. & Ad. 704. *Consd. R. v. West Riding of Yorkshire JJ.* (1833), 5 B. & Ad. 667; *R. v. Norfolk JJ.* (1834), 3 Nev. & M. K. B. 55; *R. v. Monmouthshire JJ.* (1835), 3 Dowl. 306. *Expld. R. v. Montgomeryshire JJ.* (1845), 3 Dow. & L. 119. *Consd. R. v. Derbyshire JJ.* (1852), Bail Ct. Cas. 113. *Refd. R. v. West Riding JJ., Beckington v. Elland* (1844), 1 New Sess. Cas. 247; *R. v. Surrey JJ.* (1845), 3 Dow. & L. 343; *R. v. Leicestershire JJ.* (1847), 3 New Sess. Cas. 1; *R. v. Buckinghamshire JJ.* (1854), 18 Jur. 1079.

**1027. ———.]—**The ct. will not interfere with the practice of the ct. of quarter sessions, unless it appears to be manifestly wrong or unjust.

Where applt. parish gave notice before Michaelmas sessions that they would enter & respite at these sessions & try their appeal with effect at the following sessions; & in the meantime a negotiation had taken place with resps., but without any determination:—*Held*: to be necessary

to give a fresh notice of appeal for the following sessions, to entitle applts. to be heard.—R. v. ESSEX JJ. (1820), 2 Chit. 385.

*Annotations:—**Distd. Ex p. Becke* (1832), 3 B. & Ad. 704. *Consd. R. v. West Riding of Yorkshire JJ.* (1833), 5 B. & Ad. 667.

**1028. ———.]—**Where, by the rules of quarter sessions of M., applts. are required to give resps. twenty-eight days' notice of trial in the case of respited appeals, & a respited appeal was dismissed at those sessions on the ground that applts. had only given fourteen days' notice of trial, this ct. refused to grant a *mandamus*; as such rule, though unnecessary, did not appear to be so unreasonable as to call for its interference.—R. v. MONTGOMERYSHIRE JJ. (1845), 3 Dow. & L. 119; 1 New Mag. Cas. 333; 2 New Sess. Cas. 78; 14 L. J. M. C. 142; 5 L. T. O. S. 220; 9 Jur. 927; 9 J. P. Jo. 389.

*Annotations:—*Refd. R. v. Derbyshire JJ. (1852), 22 L. J. M. C. 31. *Mentd. R. v. Bird, Ex p. Needes*, [1898] 2 Q. B. 340.

**1029. ——— Entry of appeal.]—**R. v. HAMPSHIRE JJ., No. 1064, *post*.

**1030. ———.]—**Where an appeal against an order of removal was dismissed on the ground that applt. had not given the notice required by the rules of the justices, this ct., thinking it reasonable that the appeal should be heard, granted a *mandamus* to the justices to enter continuances & hear the appeal.—R. v. LANCASHIRE JJ. (1828), 7 B. & C. 691; 108 E. R. 882.

*Annotations:—**Distd. Ex p. Becke* (1832), 3 B. & Ad. 704. *Expld. R. v. Montgomeryshire JJ.* (1845), 3 Dow. & L. 119. *Refd. R. v. West Riding JJ., Beckington v. Elland* (1844), 1 New Sess. Cas. 247; *R. v. Derbyshire JJ.* (1852), Bail Ct. Cas. 113.

**1031. ———.]—**R. v. DERBYSHIRE JJ., No. 1580, *post*.

**1032. ———.]—***Re* BLUES, No. 1077, *post*.

**1033. ——— Fixed sum allowed for costs.]—**A rule of practice at sessions, that when an order of removal is quashed upon appeal, only 40s. shall be allowed for applts.' costs, is bad; & if sessions act upon such a rule, this ct. will grant a *mandamus* commanding them to consider the question of costs in the particular case & to award to applts. such costs as they in their discretion shall think reasonable & just.—R. v. GLAMORGANSHIRE JJ. (1850), 1 L. M. & P. 336; 4 New Mag. Cas. 94; 4 New Sess. Cas. 110; 19 L. J. M. C. 172; 15 Jur. 679; 14 J. P. Jo. 383.

**1034. Cannot control express provision of statute.]—**A rule of practice at sessions will not control the express words of an Act of Parliament.—R. v. LINCOLNSHIRE JJ. (1824), 3 B. & C. 548; 5 Dow. & Ry. K. B. 347; 2 Dow. & Ry. M. C. 454; 3 L. J. O. S. K. B. 86; 107 E. R. 837.

*Annotation:—*Refd. R. v. Kimbolton (1837), 6 Ad. & El. 603.

**1035. ———.]—**In a notice of appeal against an order for stopping up a footway, under 55 Geo. 3, c. 68, s. 3, it sufficiently appears that applt. is a party aggrieved if it be stated that he & his tenants, occupiers of a farm & lands near the said way & who have heretofore used, & have a right to use it, & also other persons & the public will be put to great inconvenience. The statute requires "ten days' notice" of an appeal to the sessions against such order. By a rule of the West Riding

#### PART XIII. SECT. 1, SUB-SECT. 3.

**1024 i. Next sessions after party grieved.]—**R. (CREED) v. TIPPERARY, [1897] 2 I. R. 486; 30 I. L. T. 125.—IR.

#### PART XIII. SECT. 1, SUB-SECT. 4.—A.

**1034 i. Cannot control express provision of statute.]—**A magistrate has no power to state a case under Criminal Code, s. 900, for an alleged offence against an Ontario statute, not

involving the constitutionality of the statute, the procedure by way of appeal to the sessions provided for by Ontario legislation applying in such a case.—R. (BROWN) v. SIMPSON (ROBERT) CO., LTD. (1896), 28 O. R. 231.—CAN.

sessions in cases of appeal "not otherwise directed by law" ten days' notice is to be given exclusive of the day of notice & first day of sessions:—*Held*: the statute meant ten days' notice one inclusive & the other exclusive; the sessions rule did not apply to this case or if it were intended to do so this ct. would use its discretionary power of controlling the practice.—*R. v. WEST RIDING OF YORKSHIRE JJ.*, *Re BOWE* (1833), 4 B. & Ad. 685; 1 Nev. & M. K. B. 426; 1 Nev. & M. M. C. 95; 2 L. J. M. C. 93; 110 E. R. 613.

*Annotations*:—*Appld.* *R. v. Goodenough* (1835), 2 Ad. & El. 463. *Mentd.* *R. v. Turner* (1909), 3 Cr. App. Rep. 103.

**1036. Cannot impose additional condition to appeal.**—The ct. of quarter sessions has no authority to make a rule of ct., requiring one calendar month's notice of the entry & respite of an appeal against an order of removal, in addition to the notice of appeal required by Poor Relief Act, 1723 (c. 7), s. 8; & if an appeal be dismissed for want of such notice, a *mandamus* may be issued requiring sessions to hear it.—*R. v. NORFOLK JJ.* (1834), 5 B. & Ad. 990; 3 Nev. & M. K. B. 55; 2 Nev. & M. M. C. 57; 3 L. J. M. C. 66; 110 E. R. 1057.

*Annotations*:—*Expld.* *R. v. Surrey JJ.* (1849), 6 Dow. & L. 739; *R. v. Pawlett* (1873), L. R. 8 Q. B. 491.

**1037. —**—*Semble*: a rule of sessions, which requires that, upon entry of an appeal, the original order of removal must be filed by applts. with the clerk of the peace, cannot be supported.—*R. v. WEST RIDING OF YORKSHIRE JJ.*, *LONGWOOD v. HALIFAX* (1842), 2 Q. B. 705; 1 Gal. & Dav. 630; 11 L. J. M. C. 57; 6 J. P. 153; 6 Jur. 531; 114 E. R. 275.

*Annotations*:—*Consd.* *R. v. Montgomeryshire JJ.* (1845), 14 L. J. M. C. 142. *Mentd.* *R. v. Brighthelmston* (1842), 3 Q. B. 342; *R. v. Anglesca JJ.* (1843), 12 L. J. M. C. 131; *R. v. Brisby* (1849), 18 L. J. M. C. 157.

**1038. —**—On the trial of an appeal against an order of removal which had been entered & respited at a former sessions, it was objected that notice of the entry & respite which the practice of the sessions required should be given to resps., had not been given. Sessions entertained the objection & refused to hear the appeal:—*Held*: the giving of the notice was a condition in addition to the steps required by law & which sessions had no right to impose.—*R. v. SURREY JJ.* (1849), 6 Dow. & L. 735; 3 New Mag. Cas. 159; 3 New Sess. Cas. 531; 18 L. J. M. C. 175; 13 L. T. O. S. 190; 14 Jur. 506; 13 J. P. Jo. 331.

*Annotations*:—*Refd.* *R. v. Bird, Ex p. Needes*, [1898] 2 Q. B. 340. *Mentd.* *R. v. Goodrich* (1850), 15 L. T. O. S. 248.

**1039. —**—A certificate for a license having been refused at licensing sessions, all the preliminaries to an appeal to the next quarter sessions required by 9 Geo. 4, c. 61, s. 27, were duly observed; but at the sitting of the ct. quarter sessions refused to allow the appeal to be entered on the ground that by a rule of sessions an appeal must be entered & grounds of appeal deposited with the clerk of the peace three clear days before the first day of sessions; & the sessions made an order for £10 costs to resps. under Quarter Sessions Act, 1849 (c. 45), s. 6, as on an appeal which had not been entered or prosecuted. This order having been brought up & a rule to quash it obtained:—*Held*: the rule of sessions amounted to imposing an additional condition to the appeal which the statute had not imposed, & was more

than a mere rule of practice which it was competent to the sessions to make; & the order for costs must be quashed.—*R. v. PAWLETT* (1873), L. R. 8 Q. B. 491; 42 L. J. M. C. 157; 29 L. T. 390; 37 J. P. 775, D. C.

*Annotation*:—*Refd.* *R. v. Bird, Ex p. Needes*, [1898] 2 Q. B. 340.

### B. Notice of Appeal.

#### (a) Necessity for.

**1040. Entry without notice—Power of justices to adjourn hearing.**—16 Geo. 3, c. 30, which gives an appeal to the sessions against a conviction for deer stealing requires the person appealing to give six days' notice; & if an appeal be entered without notice, sessions have not authority to adjourn it to the next sessions; where the sessions did so adjourn the appeal & at the next sessions it was dismissed for want of notice & the ct. refused to grant a *mandamus* to the justices to rehear it.—*R. v. OXFORDSHIRE JJ.* (1813), 1 M. & S. 446; 105 E. R. 167.

*Annotation*:—*Refd.* *R. v. Kimbolton* (1837), 6 Ad. & El. 603.

**1041. Unconditional leave of appeal given by statute.**—*Re BLUES*, No. 1077, *post*.

#### (b) Time for Appealing.

*See* Summary Jurisdiction Acts, 1879 (c. 49), s. 31 (2), 1884 (c. 43), s. 6.

**1042. General rule—Within seven days after decision.**—An appeal from an order of justices under Distress for Rent Act, 1737 (c. 19), ss. 4, 5, by a person adjudged guilty of fraudulently removing goods to prevent a distress, is subject to the conditions & regulations prescribed in Summary Jurisdiction Act, 1879 (c. 49), ss. 31 (2), 32, & therefore, notice of appeal must be given within seven days after the decision appealed against.—*R. v. SHROPSHIRE JJ.* (1881), 6 Q. B. D. 669; 50 L. J. M. C. 72; 46 J. P. 196; 29 W. R. 567, D. C.

**1043. — — — Although shorter time prescribed.**—A person convicted of an offence against the excise laws gave notice of appeal four days after the decision:—*Held*: making absolute a rule for a *mandamus* to justices to hear the appeal, the effect of Summary Jurisdiction Acts was to repeal by implication the provision requiring notice of appeal at & immediately upon the giving of the judgment, & therefore no time was prescribed within Summary Jurisdiction Act, 1879 (c. 49), s. 31, so that by that sect. the time was seven days, & the notice given was sufficient.—*R. v. GLAMORGANSHIRE JJ.* (1889), 22 Q. B. D. 628; 58 L. J. M. C. 93; 60 L. T. 536; 53 J. P. 294; 37 W. R. 493; 5 T. L. R. 403; 16 Cox, C. C. 593, D. C.

*Annotations*:—*Expld. & Folld.* *R. v. West Riding of Yorkshire JJ., Ex p. Hawkins* (1895), 64 L. J. M. C. 192. *Consd.* *Edelsten v. L. C. C.*, [1918] 1 K. B. 81. *Mentd.* *R. v. Glamorganshire JJ., R. v. Pontypool JJ.* (1892), 61 L. J. M. C. 169.

**1044. Appeal to "next sessions"**—"Next practical sessions."—(1) Under the statutes regulating the time within which an appeal must be made, the words, "next sessions" mean "next practical sessions," & when sufficient notice has not been given to resps. for such first practical sessions, the justices are bound to respite the appeal. When, therefore, a poor rate was allowed & published too

### PART XIII. SECT. 1, SUB-SECT. 4.—

#### B. (b).

**1042 i. General rule—Within seven days after decision.**—*R. (M'KEOGH) v. COUNTY OF CLARE COUNTY COURT JUDGE, CHAIRMAN & JJ.* (1916), 50

I. L. T. 229.—IR.

*h. Appeal to "second sessions."*—A conviction having been made within twelve days of the next sessions, notice of appeal was given to such sessions, instead of to the second sessions

after the conviction, contrary to 33 Vict. c. 27, s. 1 (D.), & the appeal was not heard:—*Held*: such notice being inoperative, there had, in effect, been no appeal.—*R. v. CASWELL* (1873), 33 U. C. R. 303.—CAN.



*Sect. 1.—To quarter sessions: Sub-sect. 4, B. (b), (c) & (d).]*

late to enable applt. to try at the next sessions, & applt. entered & respited his appeal at the subsequent sessions, they being the first practical sessions, but did not give notice to resps. of his intention to try, until twelve days before the sessions following such subsequent sessions, & the justices refused to entertain the appeal at such last mentioned sessions, the ct. granted a *mandamus* to compel them to enter continuances & hear the appeal.

(2) *Semble*: when a sessions have entered & respited an appeal, a subsequent sessions have no power to review those proceedings, but are bound by them.—*R. v. SUFFOLK JJ.* (1840), 8 Dowl. 618; 4 J. P. 265; 4 Jur. 390.

*Annotation*:—*As to* (1) *Refd.* *R. v. Surrey JJ.* (1845), 3 Dow. & L. 343.

**1045. — Adjourned sessions.]** — Notice of appeal for the next quarter sessions for the county of Lancaster, against a certificate for stopping up a highway in the division of M., in the county, was served on June 24. The next quarter sessions for Lancashire were held at Lancaster on June 29, & by adjournment, at Salford, for the division of M., on July 6:—*Held*: under the proviso in Highway Act, 1835 (c. 50), s. 88, quarter sessions holden at Salford had no jurisdiction to hear the appeal, ten days' notice of appeal not having been given before the holding of quarter sessions at Lancaster.—*R. v. LANCASHIRE JJ.* (1857), 8 E. & B. 563; 27 L. J. M. C. 161; 30 L. T. O. S. 149; 22 J. P. 563; 4 Jur. N. S. 375; 6 W. R. 74; 130 E. R. 210.

*Annotations*:—*Fold.* *R. v. Lancashire JJ.* (1876), 34 L. T. 124. *Refd.* *R. v. Surrey JJ.* (1880), 6 Q. B. D. 100.

**1045a. — —.]**—B., being dissatisfied with the decision of an assessment committee given on June 16, resolved to appeal to the Kirkdale sessions of the county of Lancaster. Fourteen days' notice of appeal is required to be given to the overseers, & twenty-one days to the assessment committee. The next quarter sessions for the county of Lancaster were held on June 28, & by adjournment at Kirkdale on July 13. B. duly served his notice of appeal for the Michaelmas quarter sessions, which commenced at Lancaster on Oct. 18, & were held at Kirkdale by adjournment on Nov. 2. The justices having refused to hear the appeal on the ground that B. should have given the requisite notices for the sessions held at Kirkdale on July 13:—*Held*: the justices were wrong inasmuch as time for giving notice of appeal must be calculated in reference to the first day of the commencement of the sessions at Lancaster, & not to the first day of the adjournment thereof at Kirkdale.—*R. v. LANCASHIRE JJ.* (1876), 34 L. T. 124; 40 J. P. 438.

**1046. Two distinct sessions—Held by adjournment from one to another.]**—Though the time for giving notice of appeal must be calculated with reference to the first day of the sessions, yet when for practical convenience the county is divided into distinct divisions, & a distinct ct. is held in each division, by adjournment from one to the other, & the rules of practices made by the ct. in each division assume that the day when the ct. for that division begins its sittings is the first day of the sessions, it is sufficient if the grounds of appeal are delivered fourteen clear days before the first day of the sitting of the ct. for the division

in which the appeal is according to the practice to be tried.—*R. v. SUSSEX JJ.* (1865), 4 B. & S. 966; 34 L. J. M. C. 69; 29 J. P. 180; 11 Jur. N. S. 300; 122 E. R. 721; *sub nom.* *R. v. SUSSEX JJ., Re COLMORE PARISH OFFICERS & FUNTINGTON PARISH OFFICERS*, 11 L. T. 740; 13 W. R. 471, Ex. Ch.

*Annotations*:—*Consd.* *R. v. Derbyshire JJ.* (1871), 25 L. T. 161. *Refd.* *Re Mayor v. Harding* (1867), 9 B. & S. 27, n.; *Swift v. Lancashire JJ.* (1873), 22 W. R. 76; *R. v. Surrey JJ.* (1880), 6 Q. B. D. 100; *R. v. Norfolk JJ., Ex p. Wayland Union* (1908), 99 L. T. 936.

**Before entering into recognisances.]**—*See* Sub-sect. 4, C., *post*.

**Appeals from bastardy orders.]**—*See* BASTARDY, Vol. III., p. 405, Nos. 380–382.

### (c) Form and Contents of.

*See, now*, Summary Jurisdiction Act, 1879 (c. 49), s. 31 (2) (7).

**1047. Form of—Necessity for writing.]**—Frauds by Workmen Act, 1777 (c. 56), s. 20, an appeal is given to the sessions against certain convictions, the party giving notice in writing to the justices convicting, & entering into a recognisance to try the appeal, etc., & those justices are required to give notice to the party of his right to appeal if those justices do inform him of such right, without saying anything about the notice, & he enter into the recognisance, the sessions are bound to receive the appeal though he did not give the notice in writing.—*R. v. LEEDS JJ.* (1792), 4 Term Rep. 583; Nolan, 53; 100 E. R. 1188.

*Annotation*:—*Refd.* *R. v. West Riding of Yorkshire JJ.* (1815), 3 M.

**1048. — —.]**—Where a statute gives an appeal, applt. giving reasonable notice to the other parties; such notice need not be in writing, but a verbal notice, if reasonable as to time, is sufficient.—*R. v. SURREY JJ.* (1822), 5 B. & Ald. 539; 1 Dow. & Ry. K. B. 160; 1 Dow. & Ry. M. C. 64; 106 E. R. 1288.

*See, now*, Summary Jurisdiction Act, 1879 (c. 49), s. 31 (2), (7).

**1049. — —.]**—An appeal to quarter sessions against an order made at petty sessions can only be brought by the person seeking to appeal after a proper notice of setting out the general grounds of the appeal has been duly served by him on the other party, as required by Summary Jurisdiction Act, 1879 (c. 49), s. 31 (2).—*R. v. ESSEX JJ.* (1895), 43 W. R. 378; *sub nom.* *R. v. ESSEX JJ., Ex p. HOLMES*, 11 T. L. R. 187, D. C.

**1050. — Signature—By solicitor.]**—Notice of appeal against a conviction under Night Poaching Act, 1828 (c. 69), signed by the attorney of deft., as his attorney, is sufficient.—*R. v. MIDDLESEX JJ.* (1848), 10 L. T. O. S. 373; 12 J. P. Jo. 149.

**1051. — — —.]**—Where, by the Act of incorporation of a railway co., the directors were empowered to appoint & displace any of the officers of the co.:—*Held*: the appointment of an attorney to the co. need not be under seal; therefore a notice of appeal against a poor rate, signed by the attorneys of the co., appointed by the directors, not under seal, was sufficient; & magistrates having refused to hear an appeal on the ground that such notice of appeal was invalid rule absolute for a *mandamus* to hear the appeal was granted.—*R. v. CUMBERLAND JJ.* (1848), 5 Dow. & L. 430; 5 Ry. & Can. Cas. 332; 2 New

### PART XIII. SECT. 1, SUB-SECT. 4.—B. (c).

**k. Form of—Signature—By appellant.]**—It is not essential that the notice of appeal under 33 Vict. c. 27 (D.), from a summary conviction, should be signed by the party appealing.—*R. v. NICHOL* (1876), 40 U. C. R. 76.—CAN.

Mag. Cas. 417; 10 L. T. O. S. 377; 12 Jur. 1025; 12 J. P. Jo. 118.

*Annotation*:—**Mentd.** R. v. Surrey JJ. (1850), 14 Q. B. 684.

**1052.** — By clerk to solicitor.]—By Quarter Sessions Act, 1849 (c. 45), s. 1, a notice of appeal to a ct. of quarter sessions "shall be in writing, signed by the person or persons giving the same, or by his, her, or their attorney on his, her, or their behalf":—*Held*: a notice of appeal signed in applt.'s name by the clerk to his attorney with applt.'s authority was sufficient.—R. v. KENT JJ. (1873), L. R. 8 Q. B. 305; 42 L. J. M. C. 112; 37 J. P. 644; 21 W. R. 635.

*Annotations*:—**Consd.** Wilson v. Wallani (1880), 5 Ex. D. 155. **Refd.** Re Whitley Partners (1886), 32 Ch. D. 337; France v. Dutton, [1891] 2 Q. B. 208. **Mentd.** De Beauvais v. Green (1906), 22 T. L. R. 816.

**1053.** — Whether form of conviction must be followed.]—R. v. LANCASHIRE JJ. (1877), 41 J. P. Jo. 293, D. C.

— **Bastardy orders.**]—See BASTARDY, Vol. III., p. 405, Nos. 383–385.

**1054.** Contents of—Misdescription of person to whom notice given.]—A notice of appeal to A., esq., instead of A., clerk, is good; & where sessions had quashed an appeal against a conviction under 7 & 8 Geo. 4, c. 29, upon this ground, the ct. made a rule for a *mandamus* absolute, for although the term of imprisonment under it had expired, it was of consequence to deft. that the conviction should be disposed of, as a second offence would be felony.—R. v. LEICESTERSHIRE JJ. (1845), 6 L. T. O. S. 150; 9 J. P. Jo. 772.

**1055.** — Misdescription of convicting justices.]—R. v. SANDWICH RECORDER (1850), 16 L. T. O. S. 213; 14 J. P. 754.

**1056.** — Misdescription of sessions.]—A notice of appeal against an order adjudicating the settlement of a pauper lunatic, stated an intention of appealing to the next sessions to be held for the borough of S. Appls. & resps. appeared at the borough sessions in pursuance of this notice, when the latter objected that the appeal lay to the county sessions, & not to those of the borough, upon which objection the recorder dismissed the appeal. Appls. then entered & respite the appeal at the county sessions, which were held the next day, & at the following county sessions the ct. refused to hear the appeal, on the ground that no valid notice of appeal had been given:—*Held*: they had decided rightly, as appls., having acted upon the notice as a notice of appeal to the borough sessions, could not afterwards treat it as a notice of appeal to the county sessions; but where a notice of appeal erroneously states an intention to appeal to a borough sessions, & no steps are taken upon it by either party as a notice for those sessions, the words relating to the place may be rejected as surplusage, & the notice treated as a notice of appeal to county sessions.—R. v. SALOP JJ. (1854), 4 E. & B. 257; 3 C. L. R. 101; 24 L. J. M. C. 14; 24 L. T. O. S. 111; 19 J. P. 149; 18 Jur. 1080; 119 E. R. 99.

*Annotation*:—**Distd.** R. v. Leeds Recorder (1861), 3 E. & E. 561.

**1057.** — Grounds of appeal must be sufficiently stated.]—R. v. SANDWICH RECORDER (1850), 16 L. T. O. S. 213; 14 J. P. 754.

#### (d) Service of.

See, now, Summary Jurisdiction Act, 1879 (c. 49), s. 31 (2), (7).

**1058.** Service on Sunday.]—(1) 4 Geo. 4, c. 95, s. 87, requires notice of appeal to be served within six days after the cause of the complaint shall arise:—*Held*: when the last of the six days was

a Sunday, notice on the Monday following was too late.

(2) Where an appeal has been adjourned for the convenience of counsel on both sides, the justices at the adjourned sessions may require proof of the notice of appeal. *Semble*: a service of a notice of appeal upon a Sunday would not be a good service.—R. v. MIDDLESEX JJ. (1843), 2 Dowl. N. S. 719; 12 L. J. M. C. 59; 7 J. P. 240; 7 Jur. 396.

*Annotations*:—**Appld.** Rowberry v. Morgan (1854), 9 Exch. 730; *Ex p.* Simpkin (1859), 2 E. & E. 392. **Refd.** R. v. Middlesex JJ. (1845), 5 L. T. O. S. 221; Peacock v. R. (1858), 4 C. B. N. S. 264; Radcliffe v. Bartholomew, [1892] 1 Q. B. 161.

**1059.** —]—A notice of appeal was, according to the regular & ordinary course of post, delivered on a Sunday, & if delivered on Monday there would not have been fourteen days before the first day of the sessions:—*Held*: the notice of appeal was void.—*Ex p.* ASHFORD (CHURCHWARDENS & OVERSEERS) (1852), 16 J. P. Jo. 759; *sub nom.* ASPRELL (INHABITANTS) v. LANCASHIRE JJ., 16 Jur. 1067, n. *Annotation*:—**Refd.** R. v. Leominster (1862), 2 B. & S. 391.

**1060.** On whom—On one of joint owners.]—A. was adjudged, by justices acting under a local Act, to pay £50 to W., for & on behalf of the owners of a certain vessel, for an injury caused to such vessel by the said A. The said A. thereupon appealed, & gave notice of appeal to all the part owners of the said vessel at different times between Sept. 23 & Oct. 5. On Sept. 25, he entered into the recognisance as required by the local Act. At the hearing, the appeal was dismissed because the recognisance was not entered into within three days after all the notices had been served. By the local Act, a power of appeal is given, such applt. first giving ten days' notice in writing of his intention to bring such appeal, & of the cause thereof, to the person who is intended to be or may be affected by such appeal, & within three days after such notice given entering into a recognisance to try such appeal, etc.:—*Held*: service on one of the joint owners was good service for all, & the recognisance therefore was properly entered into.—R. v. LIVERPOOL RECORDER (1861), 31 L. J. M. C. 127; 5 L. T. 361; 25 J. P. 759; *sub nom.* R. v. MOZLEY, Re JEVONS, 10 W. R. 78.

**1061.** — On justices' clerk.]—Under Summary Jurisdiction Act, 1879 (c. 49), s. 31 (2), notice of appeal is sufficient if addressed to & served on the justices' clerk, & it is not necessary that it should be addressed to the convicting justices.

The addressing of a notice of appeal under Summary Jurisdiction Act, 1879 (c. 49), s. 31, to the clerk of the justices, instead of to the justices personally, from whose decision the appeal is laid, is a sufficient & valid form for the notice.—R. v. ESSEX JJ., [1892] 1 Q. B. 490; 56 J. P. 375; 40 W. R. 446; *sub nom.* R. v. ESSEX JJ., *Ex p.* STARK, 61 L. J. M. C. 120; 66 L. T. 676; 8 T. L. R. 334; 17 Cox, C. C. 521, D. C.

*Annotations*:—**Refd.** R. v. Somerset JJ. (1900), 16 T. L. R. 166. **Mentd.** Harris v. Cooke (1918), 119 L. T. 744.

**1062.** — Personal service unnecessary.]—Personal service of notice of appeal on the other party is not required by Summary Jurisdiction Act, 1879 (c. 49), s. 31, upon an appeal to quarter sessions from a conviction by a ct. of summary jurisdiction.—R. v. SOMERSETSHIRE JJ., *Ex p.* TALBOT (1900), 69 L. J. Q. B. 311; 64 J. P. 341; 16 T. L. R. 166, D. C.

**1063.** Failure to serve — Through fault of justices.]—An Act of Parliament authorised a conviction by two magistrates, & gave a power of



*Sect. 1.—To quarter sessions: Sub-sect. 4, B. (d) (e),*

appeal, upon the person entering into recognisances & giving notice in writing, to the convicting magistrates, of his intention to appeal. A person convicted under this Act expressed his intention to appeal; entered into the recognisances, & requested the magistrates' clerk to prepare the notice for him, but the latter declined so to do. The magistrates told applt., that they were then obliged to separate; but that if he left the notices at any time that day with their clerk, his so doing should be good service upon them. He did not send the notices until shortly before sessions; & for want of a proper notice sessions refused to hear the appeal. Applt. swore, that he believed at the time that he had done all that was necessary to secure his right of appeal:—*Held*: the magistrates ought either to have waited together a reasonable time to give applt. an opportunity to prepare his notice, or should have directed their clerk to do it for him; & the appeal ought therefore to be heard.—*R. v. GLOUCESTERSHIRE JJ.* (1828), 7 L. J. O. S. M. C. 7.

(c) *Length of.*

**1064. Adjournment of sessions—Notice for adjourned date sufficient.**—*Semble*: where notice is given that no business will be transacted on the day usually fixed for holding the sessions, but that the sessions will be adjourned for business until a future day, a notice of appeal given in time for that future day, according to the practice of the sessions, will be sufficient; & even, if a notice of appeal should be held insufficient by the sessions, the ct. will exercise a discretionary power over the sessions practice, & if they think it reasonable, will order the appeal to be heard.—*R. v. HAMPSHIRE JJ.* (1828), 7 L. J. O. S. M. C. 9.

**1065. How calculated—Fractions of day not counted.**—*R. v. MIDDLESEX JJ.*, No. 1066, *post*.

**1066.** ———.]—By a local Act, an appeal was given to quarter sessions, on applt. giving seven days' notice at least, of his intention to bring such appeal. Notice of appeal was served on resps., at half-past nine o'clock, a.m., on Dec. 31. Sessions commenced at ten o'clock, a.m., on Jan. 7, at which time the appeal was entered, but by the practice of sessions the hearing of the appeals was adjourned until Jan. 30:—*Held*: (1) the notice of appeal was given one day too late, as the words "at least" exclude both the day of giving the notice & the first day of sessions; (2) the fraction of a day could not be considered, so as to render the service of the notice good; (3) the time within which notice of appeal was to be given ought to be computed up to the day on which the appeal was entered, & not to the day on which the appeals were heard.—*R. v. MIDDLESEX JJ.* (1845), 3 Dow. & L. 109; 1 New Mag. Cas. 336; 2 New Sess. Cas. 73; 14 L. J. M. C. 139; 5 L. T. O. S. 221; 10 J. P. 6; 9 Jur. 758.

—*As to (2) Refd.* *Campbell v. Strangeways* (1877), 42 J. P. 39. *As to (3) Refd.* *R. v. Carnarvon & Anglesea Grdns.* (1849), 14 L. T. O. S. 200. *Generally, Refd.* *R. v. St. Mary, Warwick* (1853), 21 L. T. O. S. 74.

#### PART XIII. SECT. 1, SUB-SECT. 4.—C.

**1. Form of recognisance.**—The recognisance was filed by applt., instead of being sent to the clerk of the peace by the justice who took it; & the condition therein was to appeal to the "general quarter or general sessions," & not to the "ct. of general

sessions of the peace":—*Held*: a sufficient compliance with the statute.—*R. v. ESSERY* (1878), 7 L. R. 290.—**CAN.**

**m.** ———.]—A recognisance to appear at the general sessions & "enter an appeal," is sufficient.—

*C. Recognisances and Deposits in lieu thereof.*

**1067. Entering into recognisances—Time for—After notice of appeal.**—On an appeal from a ct. of summary jurisdiction to a ct. of quarter sessions, applt. first entered into recognisances & then served notice of appeal instead of entering into recognisances after giving notice of appeal. The justices thereupon dismissed the appeal:—*Held*: the justices were right.—*R. v. CHESHIRE JJ.* (1896), 60 J. P. 585.

**1068.** ——— "Forthwith."—Where a statute requires that recognisances shall be entered into "forthwith" after notice of appeal, it means "within a reasonable time," & therefore, a period of nine days, without cause assigned for the delay is too long.—*R. v. WORCESTERSHIRE JJ.* (1839), 7 Dowl. 789; 3 Jur. 1052.

*Annotation*:—**Consd.** *R. v. Berkshire JJ.* (1879), 48 L. J. M. C. 137.

**1069.** ——— "Immediately."—The word "immediately" in 6 Geo. 4, c. 129, s. 12, is to be taken to mean "promptly, according to the circumstances of the case."

W. was summarily convicted at petty sessions of an offence, & sentenced to imprisonment, under 6 Geo. 4, c. 129, sect. 12 of which Act gives a right of appeal against convictions under it, & provides, "that the execution of every judgment so appealed from shall be suspended, in case the person so convicted shall immediately enter into recognisances, etc." The conviction was on Thursday, May 2, & deft. was at once sent to gaol. On Saturday, May 4, an attorney was applied to by his friends to appeal on his behalf, & he was ready on that day to tender the requisite sureties, but no justices sat. On the Monday following, the sureties were tendered, but rejected, as being offered too late. Upon a motion to this ct. for a rule calling on the justices to take such recognisances:—*Held*: it was not necessary, under 6 Geo. 4, c. 129, s. 12, that bail should be tendered & the recognisances entered into at the time of the conviction; but it was sufficient that the application to the justices to take the recognisances be made promptly & expeditiously, according to the circumstances of the case; & in this case deft. had come promptly, according to the circumstances of it.—*R. v. ASTON* (1850), 4 New Mag. Cas. 106; 4 New Sess. Cas. 283; 19 L. J. M. C. 236; 15 L. T. O. S. 259; 15 J. P. 9; 14 Jur. 1045.

**1070.** ———.]—*Re BLUES*, No. 1077, *post*.

**1071.** ———.]—*R. v. BERKSHIRE JJ.*, No. 1528, *post*.

**1072.** ——— **Computation of Sunday.**—By 18 & 19 Vict. c. 121, s. 40, applt. shall not be heard in support of an appeal to sessions against an order of justices, unless within fourteen days after the making of the order he give a notice in writing, etc., "& shall within two days of giving such notice enter into a recognisance before some justice of the peace," etc.:—*Held*: Sunday was to be counted in the two days; & therefore, where notice of appeal was given on Friday but the recognisance was not entered into till the following Monday, sessions could not hear the appeal.—*Ex p. SIMPKIN* (1859), 2 E. & E. 392; 29 L. J. M. C. 23; 24 J. P. 262; 6 Jur. N. S. 144;

*R. v. TUCKER* (1905), 6 O. W. R. 533; 10 O. L. R. 506.—**CAN.**

**n. Entering into recognisances—Time for—Before entering appeal for hearing.**—The recognisance required by Summary Convictions Act (Provincial), s. 71 (c), must be entered into before the appeal can be entered for

121 E. R. 148; *sub nom.* R. v. LEICESTERSHIRE  
JJ., 1 L. T. 92; 8 W. R. 66.

**Annotations :—****Distd.** *Milch v. Frankau*, [1909] 2 K. B. 100.  
**Mentd.** *Mumford v. Hitchcocks* (1863), 14 C. B. N. S. 361.

**1073.** — — — Within three days.]—  
R. v. ANGLESEY JJ., No. 1079, *post*.

1074. — [REDACTED] —.]—On May 21 a metropolitan police ct. magistrate convicted appcts. of offences under Finance Act, 1910. On Saturday, May 25, they gave notice of appeal. Appcts. were informed at the police ct. & by the prosecutors that if they applied to enter into recognisances on May 29 they would be in time. They did so, but the magistrate refused to take the recognisances, on the ground that they had not applied within three days after the day on which they gave notice of appeal within Summary Jurisdiction Act, 1879 (c. 49), s. 3 (3). Appcts. now moved for a rule *nisi* for a *mandamus* directing the magistrate to take the recognisances on the ground that the question decided by him was not for the magistrate but for quarter sessions. The ct. refused the rule.—*Ex p.* ASHTON (1912), 76 J. P. 383; *sub nom.* *Ex p.* GRAFTON CLUB, 28 T. L. R. 473.

1075. — In what court—Any court of summary jurisdiction—Having proper materials before it.]—*R. v. ANGLESEY JJ.*, No. 1079, *post*.

**1076.** —————.]—By Summary Jurisdiction Act, 1879 (c. 49), s. 31 (3), appltd. from an order of a ct. of summary jurisdiction shall “enter into a recognisance before a ct. of summary jurisdiction” to prosecute such appeal: —*Held*: the recognisance may be entered into before any ct. of summary jurisdiction, whether acting for the same county as the ct. from whose order the appeal is brought, or not.

The decision in *R. v. Anglesey JJ.*, No. 1079, *post*, is, I think, an authority for saying that no ct. ought to allow such a recognisance to be entered into without having all the proper materials before it (WRIGHT, J.).—*R. v. DURHAM JJ.*, [1895] 1 Q. B. 801; 64 L. J. M. C. 187; 43 W. R. 423; 39 Sol. Jo. 383; 15 R. 319; *sub nom.* *R. v. DURHAM JJ.*, *Ex p.* NEWTON, 72 L. T. 465; 59 J. P. 264; 18 Cox. C. C. 120.

*See* Summary Jurisdiction Act, 1879 (c. 49), s. 31 (3).

1077. — Remain in force on wrongful dismissal of appeal.] — (1) A. was convicted under 6 Geo. 4, c. 129, on Saturday, Mar. 24. On Mar. 28, the convicting justices were told that A. intended to appeal, & recognisances were duly entered into before them, which recited that A. had given notice of appeal. A. was thereupon discharged from custody. The next sessions were held on Monday, Apr. 2, when the appeal was entered, but sessions confirmed the conviction, upon the ground that notice of appeal had not been given in accordance with a rule of sessions, requiring, in all cases not otherwise provided for, a notice of appeal to be given to resps. on the Saturday se'nnight previous to the sessions, & re-committed A. to gaol:—*Held*: sessions, having improperly declined to hear the appeal, had no right to commit A., & therefore the custody was illegal & the recognisances still in force; & the ct. ordered A. to be discharged upon the same recognisances, & issued a *mandamus* to sessions to hear & decide the appeal.

(2) Where a statute gives a right of appeal

without any condition, it is necessary that the party appealing should give notice of appeal to the other side.

(3) It [the appeal] cannot be said to have been abandoned by applt., because within reasonable time (which the word "immediately" in that sect. [6 Geo. 4, c. 129, s. 12] means), he entered into the recognisance (LORD CAMPBELL, C.J.).—*Re BLUES* (1855), 5 E. & B. 291; 1 Jur. N. S. 541; 119 E. R. 490; *sub nom. Ex p. BLUES*, 24 L. J. M. C. 138; 19 J. P. 822; 3 W. R. 516; *sub nom. R. v. DURHAM JJ.*, 3 C. L. R. 980; 25 L. T. O. S. 196.

*Annotation* :—**Refd.** R. v. Lancashire JJ. (1857), 8 E. & B. 563.

1078. — [Right to release.]—Under 39 & 40 Geo. 3, c. 89, s. 18, a person convicted of having in his possession naval or ordnance stores marked in the manner specified in the Act, may be sentenced to imprisonment with hard labour, without the infliction of a fine. *Semble*: by sect. 21, an appeal lies to quarter sessions, against such a conviction; but held that where an offender has been committed to prison for such offence, & subsequently enters into a recognisance to prosecute his appeal, this ct. will not discharge him from custody, as the appeal, while pending, does not operate as a suspension of the execution.—*R. v. WILLIMOTT* (1861), 1 B. & S. 27; 4 L. T. 208; 25 J. P. 596; 121 E. R. 625; *sub nom. Ex p. WILLIMOTT*, 30 L. J. M. C. 161; 7 Jur. N. S. 1053; 9 W. R. 633.

*See, now, Summary Jurisdiction Act, 1879*  
(c. 49), s. 31 (4).

1079. Deposit in lieu of recognisance—Time for—Within three days after notice of appeal.]—By Summary Jurisdiction Act, 1879 (c. 49), s. 31 (2), applt. from an order of a ct. of summary jurisdiction shall, within seven days after the decision give notice in writing of his intention to appeal, & of the general grounds of such appeal. By sub-sect. 3, applt. shall, within three days after giving notice of appeal, enter into a recognisance, or “ may, if the ct. of summary jurisdiction before whom applt. appears to enter into a recognisance think it expedient,” make a deposit instead. A ct. of summary jurisdiction made an order, & on the same day, gave leave to the person affected by the order, who intended to appeal, to make a deposit, & fixed the amount. Four days later, notice of appeal was given. The ct. of quarter sessions refused to hear the appeal. On application for a *mandamus* to compel sessions to hear the appeal:—*Held*: the intention of Summary Jurisdiction Act, 1879 (c. 49), s. 31 (2), (3) was that the ct. allowing a deposit should have the notice of appeal before them, & the allowance before the notice of appeal had been given was invalid, & therefore the refusal to hear the appeal was right.—*R. v. ANGLESEY JJ.*, [1892] 2 Q. B. 29; 61 L. J. M. C. 143; 67 L. T. 322; 56 J. P. 552; 8 T. L. R. 561; 36 Sol. Jo. 525; 17 Cox, C. C. 563.

*Annotations*:—**Folld.** R. v. Cheshire JJ. (1896), 60 J. P. 585. **Refd.** R. v. Durham JJ., [1895] 1 Q. B. 801.

By whom entered into—Appeal by limited company.]—See COMPANIES, Vol. IX., p. 678, No. 4521.

**Appeals from bastardy orders.]—See BASTARDY,**  
Vol. III., pp. 405, 406, Nos. 391, 395.

**Estreat for non-payment of costs.]—See Sub-**  
sect. 4, L., *post*.

trial.—R. v. KING (1900), 7 B. C. R.  
401.—CAN.

**No. — Who may be surety.]—**Persons non-resident within the juris-

dition of the general sessions of the peace to which an appeal is given, are not competent sureties in a recognisance to prosecute an appeal from a summary conviction of a justice of the peace.—

R. v. LYON, 9 C. L. T. Occ. N. 6.—  
CAN.

p. — *Number of sureties.*] —  
HEARY v. CLARKE (1914), 48 I. L. T.  
Jo. 39.—IR.



Sect. 1.—To quarter sessions: Sub-sect. 4, D. (a)  
(b), E. & F. (a).]

*D. Entering Appeal.*

(a) *In General.*

**1080. Right to enter appeal—After abandonment of order by respondents—To enforce payment of costs.]—**Where resps. have, previous to sessions, given notice of abandonment of their order, but have not paid the costs, appls. have a right to enter their appeal at the sessions, in order to compel resps. to pay the costs incurred by appls. before the order was abandoned.—*R. v. TOWNSTAL (INHABITANTS), R. v. STAYLEY (INHABITANTS)* (1843), 3 Q. B. 357; 2 Gal. & Dav. 676; 12 L. J. M. C. 72; 1 L. T. O. S. 78; 7 J. P. 275; 7 Jur. 463; 114 E. R. 543.

*Annotations:—Folld. R. v. Merioneth JJ.* (1844), 3 L. T. O. S. 201. *Refd. R. v. Anglesea JJ.* (1843), 12 L. J. M. C. 131; *R. v. West Riding of Yorkshire JJ.* (1843), 8 J. P. 23. *Mentd. R. v. Brisby* (1849), 18 L. J. M. C. 157.

**1081. ———.]—***R. v. MERIONETHSHIRE JJ.* (1844), 6 Q. B. 163; Dav. & Mer. 121; 1 New Mag. Cas. 65; 1 New Sess. Cas. 277; 3 L. T. O. S. 201; 8 J. P. 390; 115 E. R. 63; *sub nom. R. v. MERIONETHSHIRE JJ., LLANGAR v. DYNCIO*, 13 L. J. M. C. 114.

**1082. Appeal entered after time—No jurisdiction to hear.]—**An order of removal, made on July 29, 1843, & suspended, was served with the examinations on Aug. 7. On the following Oct. 14, a notice, dated Sept. 6, was served on resps., that appls. intended at the next quarter sessions to enter & try an appeal. The next sessions were held on Oct. 17, & by the practice of the sessions eight days' notice of trial was required.

Resps., considering the notice insufficient, did not attend the Oct. sessions, & heard nothing more of the appeal till Feb. 15, 1844, when they received from appls. a copy of an order made at the Jan. sessions, 1844, quashing the order of removal, & directing resps. to pay £5 costs, to appls. On an affidavit of resps., stating these facts & that they "were informed & believed" that no appeal had been prosecuted, or entered & respited at the Oct. sessions:—*Held*: this affidavit, uncontradicted, made out a sufficient *prima facie* case that no proceedings were taken at the Oct. sessions, at which, being the next practicable sessions after the date of the order, appls. were bound to enter, & either to try, or to respite their appeal; & not having done so, the Jan. sessions had no jurisdiction to entertain the appeal.—*R. v. SEVENOAKS (INHABITANTS)* (1845), 7 Q. B. 136; 1 New Mag. Cas. 280; 1 New Sess. Cas. 595; 14 L. J. M. C. 92; 5 L. T. O. S. 73; 9 J. P. 485; 9 Jur. 489; 115 E. R. 440.

*Annotations:—Folld. R. v. Peterborough JJ.* (1857), 7 E. & B. 643. *Consd. R. v. West Riding JJ.* (1858), E. B. & E. 713; *R. v. Sussex JJ.* (1865), 4 B. & S. 966; *Liverpool Gas Light Co. v. Everton Overseers* (1871), L. R. 6 C. P. 414. *Refd. R. v. Skircoat* (1859), 28 L. J. M. C. 224.

**1083. ———.]—**Appearance at sessions upon an appeal will not give jurisdiction if the appeal has been entered too late.—*R. v. ST. GILES, CRIPPLEGATE (INHABITANTS)* (1845), 5 L. T. O. S. 213; 9 J. P. Jo. 371.

**1084. ———.]—**An order of removal made on Sept. 6, 1856 was duly served on Sept. 10. On Sept. 21 a letter, dated Sept. 20, was received by resps. from the clerk of appls., stating certain facts as to the paupers, & adding, "I shall on

these grounds appeal against your order." On Sept. 29 copies of depositions were applied for & received on Sept. 30. Notice of intention "to commence an appeal at the next general quarter sessions" was duly received on Oct. 8. At the next quarter sessions, held on Oct. 16, the appeal was not entered or respited; & resps. applied for costs, which were, however, refused. On Oct. 20 the paupers were removed. On Dec. 23 another notice of appeal, & grounds of appeal, were served. At the next sessions, held Jan. 8, 1857, both parties appeared: but, after argument, the justices refused to hear the appeal:—*Held*: (1) the justices acted rightly, & appls. ought to have entered & respited the appeal, even though they could not have tried it, at the Oct. sessions; (2) in judging of the "practicability" of the next sessions, the time of service of the order of removal was the proper time to reckon from.—*R. v. PETERBOROUGH JJ.* (1857), 7 E. & B. 643; 26 L. J. M. C. 153; 29 L. T. O. S. 124; 22 J. P. 20; 3 Jur. N. S. 887; 5 W. R. 565; 119 E. R. 1384.

*Annotations:—As to* (1) *Consd. R. v. Sussex JJ.* (1865), 4 B. & S. 966. *Refd. R. v. West Riding JJ.* (1858), E. B. & E. 713; *R. v. Skircoat* (1859), 28 L. J. M. C. 224. *Liverpool Gas Light Co. v. Everton Overseers* (1871), L. R. 6 C. P. 414.

**1085. ———.]—**A poor rate was made for the township of Everton on July 8, 1870. The Liverpool United Gas Co., being dissatisfied therewith, on Aug. 3, applied to the union assessment committee for relief; but the committee declined to grant it. The next sessions for the borough of Liverpool were held on Sept. 1, but no appeal against the rate was then entered. The co., having given the twenty-one days' notice required by Union Assessment Act, 1864 (c. 39), s. 1, moved to enter an appeal against the rate at the sessions held on Oct. 26, contending that the sessions of Sept. were not the next practicable sessions after the decision of the assessment committee, inasmuch as it would leave them only six days before the twenty-one days, which was not a sufficient time to enable them to determine whether they would appeal or not. The recorder, yielding to this argument, allowed the appeal, to be entered & respited at the Oct. sessions:—*Held*: it was competent to this ct. to review the decision of the recorder, upon a motion for a prohibition; & he was wrong in holding the Sept. sessions not to be the next practicable sessions, & consequently he had no jurisdiction to entertain the appeal at the Oct. sessions.—*LIVERPOOL GAS CO. v. EVERTON* (1871), L. R. 6 C. P. 414; 40 L. J. M. C. 104; 19 W. R. 412; *sub nom. R. v. LIVERPOOL RECORDER, Re EVERTON TOWNSHIP, LIVERPOOL UNITED GASLIGHT CO. v. EVERTON OVERSEERS*, 23 L. T. 813; 35 J. P. 186.

*Annotations:—Refd. R. v. Surrey JJ.* (1880), 6 Q. B. D. 110; *R. v. Carmarthen JJ.* (1893), Ryde, Rat. App. [1891-93] 334; *R. v. Longe, etc., JJ. & Cooke* (1897), 66 L. J. Q. B. 278; *R. v. De Grey*, [1900] 1 Q. B. 521; *R. v. Norfolk JJ., Ex p. Wayland Union*, [1909] 1 K. B. 463. *Mentd. R. v. Shoreditch Assmt. Com., Ex p. Morgan*, [1910] 2 K. B. 859.

**1086. Erroneous entry by clerk of peace as to order appealed against—Duty of sessions to hear & determine.]—**The churchwardens & overseers instructed counsel to enter & respite an appeal against the order of maintenance, & the motion paper was handed in so indorsed, but the clerk of the peace entered it as an appeal against the order adjudicating the settlement. Appls. served a copy of this wrong entry upon resps., but de-

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D. (a).

q. *Appeal entered prematurely —  
Right of appeal not thereby lost.]—*

When an applt. lodged his appeal at the quarter sessions prematurely, & the ct. dismissed it for want of form, without entering into the merits:—

*Held*: his right of appeal to the ensuing quarter sessions was not thereby taken away.—*R. v. MEATH JJ.* (1828), 1 Hud. & B. 425.—*IR.*

livered grounds of appeal as for an appeal against the order for maintenance. Quarter sessions having refused to hear the appeal, the Ct. of Q. B. issued a *mandamus* to enter continuances & hear the appeal against the order of maintenance.—*R. v. BUCKINGHAMSHIRE JJ.* (1848), 10 L. T. O. S. 390; 12 J. P. Jo. 84.

**1087. Fees for entering appeal—Liability of solicitor to clerk of peace.]**—The solr., & not the client, is liable to the clerk of the peace for fees connected with the entering etc. of an appeal at the sessions.—*LANGRIDGE v. LYNCH* (1876), 34 L. T. 695; 40 J. P. 631, D. C.

(b) *Rules of Practice at Sessions.*

See Sub-sect. 4, A., *ante*.

*E. Abatement of Proceedings.*

**1088. Effect of death of appellant.]**—In an appeal against a poor rate, applt. had died after an appeal had been respited & before quarter sessions at which it was to be heard. The ct. refused an application that the appeal might be continued by the extrix., holding that such an appeal abates on the death of applt.—*LAWFORD v. LEIGH UNION* (1905), 1 Konst. Rat. App. 113.

**1089. —.]**—When a person who has been convicted of an offence by a ct. of summary jurisdiction has given notice of appeal to quarter sessions, but has died before the hearing of the appeal, & the appeal is dismissed in consequence, quarter sessions have no power under Quarter Sessions Act, 1849 (c. 45), ss. 5, 6 or otherwise, to make an order that resp.'s costs of the appeal should be paid by the personal representatives of deceased applt. out of the estate of deceased.—*R. v. SPOKES, Ex p. BUCKLEY* (1912), 107 L. T. 290; 76 J. P. 354; 28 T. L. R. 420; 23 Cox, C. C. 140, D. C.

*F. Respiting Appeals.*

(a) *In General.*

See, now, Summary Jurisdiction Act, 1879 (c. 49), s. 31 (5).

**1090. Discretion of justices.]**—Though a statute, giving an appeal to the sessions within four months after the cause of complaint shall arise, direct the justices at the said sessions to hear & determine the matter of such appeal, etc., yet it seems that they have an incidental power of adjourning it to another sessions, upon lawful cause, such as the absence of a material witness, of the sufficiency of which they are to judge.—*R. v. WILTS JJ.* (1811), 13 East, 352; 104 E. R. 406.

*Annotations:—***Refd.** *R. v. Kimbolton* (1837), 6 Ad. & El. 603; *R. v. Surrey JJ.* (1845), 3 Dow. & L. 343; *R. v. Bolton* (1848), 11 Q. B. 379; *Bowman v. Blyth* (1856), 7 E. & B. 26; *R. v. Cambridge Union Grdns.* (1861), 1 B. & S. 61.

**1091. —.]**—*R. v. STAFFORDSHIRE JJ.*, No. 1480, *post*.

**1092. —.]**—An order of removal was served on Sept. 13. Notice of appeal was given on Oct. 2. The next sessions were held on Oct. 18, & at those sessions the appeal was entered & respited, & came on for hearing at the following sessions, on Jan. 4, when the order was quashed:—**Held:** this ct. would not interfere, as the justices had jurisdiction to adjourn the appeal to the Jan. sessions, & as they had so adjourned it; but in each particular case the justices should exercise their judgment whether justice requires

that the appeal ought to be adjourned, & if there be time to try at the first sessions, & no reason for the delay be assigned, they ought to refuse to enter & respite.—*R. v. SKIRCOAT (INHABITANTS)* (1859), 2 E. & E. 185; 28 L. J. M. C. 224; 33 L. T. O. S. 300; 23 J. P. 502; 5 Jur. N. S. 1010; 121 E. R. 70.

*Annotation:—***Consd.** *R. v. Sussex JJ.* (1865), 4 B. & S. 966.

**1093. — Binding on subsequent sessions.]**—*R. v. SUFFOLK JJ.*, No. 1044, *ante*.

**1094. — Unless precluded by statute.]**—*R. v. BELTON*, No. 980, *ante*.

**1095. — —.]**—*BOWMAN v. BLYTH*, No. 979, *ante*.

**1096. — —.]**—The general power of a ct. of quarter sessions to adjourn to the next sessions the hearing of an appeal, where the particular Act giving the appeal does not limit the hearing & determination of it to one sessions only, extends to cases where the hearing of the appeal has commenced & the evidence is partly before the ct. Sessions have power, in such a case, to adjourn the further hearing to the next sessions, for the purpose of additional evidence being procured; or for any cause which, in their discretion, may render the adjournment expedient. Sessions may exercise this power of adjournment in appeals under 16 & 17 Vict. c. 97; the Act not limiting the hearing & determination to the sessions for which the appeal is entered, or at which it is first gone into.—*R. v. CAMBRIDGE UNION GUARDIANS* (1861), 1 B. & S. 61; 30 L. J. M. C. 137; 4 L. T. 212; 7 Jur. N. S. 1073; 9 W. R. 599; 121 E. R. 637.

**1097. — Where court equally divided.]**—*Ex p. EVANS*, No. 1127, *post*.

**1098. — —.]**—*BAGG v. COLQUHOUN*, No. 560, *ante*.

**1099. — —.]**—Where on the preliminary inquiry under Indictable Offences Act, 1848 (c. 42), s. 25, whether or not an accused person shall be committed for trial for an indictable offence the justices are equally divided in opinion, they have power to adjourn the inquiry for rehearing before themselves or before a differently constituted tribunal.—*R. v. HERTFORDSHIRE JJ., Ex p. LARSEN*, [1926] 1 K. B. 191; 95 L. J. K. B. 130; 134 L. T. 143; 89 J. P. 205; 42 T. L. R. 77; 28 Cox, C. C. 90.

**1100. — Power to respite second time.]**—Where an appeal was entered & respited without further notice of appeal, quarter sessions had jurisdiction under Poor Relief Act, 1743 (c. 38), s. 4, to grant further respites. The notice of June 13, 1922, for the Midsummer sessions, although less than a twenty-one days' notice, was therefore a valid notice for the Michaelmas sessions.—**REDHEUGH COLLIERY, LTD. v. GATESHEAD ASSESSMENT COMMITTEE**, [1924] 1 K. B. 369; 93 L. J. K. B. 499; 130 L. T. 366; 88 J. P. 25; 40 T. L. R. 169; 68 Sol. Jo. 341; 22 L. G. R. 70, C. A.; *on appeal, sub nom. GATESHEAD ASSESSMENT COMMITTEE v. REDHEUGH COLLIERY, LTD.*, [1925] A. C. 309, H. L.

**1101. Statement of new grounds of appeal.]**—A statement of the grounds of an appeal was duly served previous to Epiphany sessions, when the appeal was entered for trial, but made a *remanet* to the next sessions, in consequence of the pressure of business. In the interval, applt. served a new statement, varying in some respects from the

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**r. Effect of death of common informer.]**—**Held:** the appeal did not abate by reason of the death of the common informer.—*R. (DONOVAN) v. COUNTY CORK CHAIRMAN & JJ.* (1913), 47 I. L. T. 168.—**IR.**



*Sect. 1.—To quarter sessions: Sub-sect. 4, F. (a)*

former, upon which they proposed to rely:—*Held*: the justices at Easter sessions were not justified in refusing to hear the appeal.—*R. v. DERBYSHIRE JJ., NEWBOROUGH v. SWARKSTON* (1838), 6 Ad. & El. 612, n.; 3 Nev. & P. K. B. 591; 1 Will. Woll. & H. 365; 7 L. J. M. C. 91; 2 J. P. 568; 112 E. R. 235.

*Annotations*:—*Distd. R. v. Arlecdon* (1839), 11 Ad. & El. 87. *Folld. R. v. Kendal* (1859), 1 E. & E. 492.

**1102.** —.]—Grounds of appeal may be served fourteen days before the first day of the sessions at which the appeal is intended to be tried, & this though the hearing of the appeal has been adjourned from a former sessions, for which grounds had been duly served.

Appls. duly served grounds of appeal for the Apr. quarter sessions; upon the appeal coming on for trial they applied for its adjournment on the ground of the absence of a material witness. This application was acceded to by the ct. on payment of costs. In due time before the next sessions, in July, apps. served fresh grounds of appeal, containing grounds not included in the former grounds, & upon the appeal coming on for trial, they proposed to give evidence of one of the new grounds. This they were allowed to do, & sessions quashed the order upon such evidence:—*Held*: apps. were entitled to give the second grounds of appeal.—*R. v. KENDAL (INHABITANTS)* (1859), 1 E. & E. 492; 28 L. J. M. C. 110; 32 L. T. O. S. 274; 23 J. P. 550; 5 Jur. N. S. 545; 7 W. R. 191; 120 E. R. 994.

*Annotation*:—*Refd. R. v. Cambridge Union Grdns.* (1861), 1 B. & S. 61.

*(b) Notice of Hearing of Respited Appeal.*

**1103. Necessity for.**—Where a statute gives a party aggrieved a right of appeal, on giving security to a specified amount, he may enter & respite his appeal at the next sessions, after having given such security, without notice to the other side; but after the appeal has been respited, if he does not give the usual notice of trying it, the sessions will be authorised to dismiss it altogether.—*R. v. SALOP JJ.* (1819), 2 B. & Ald. 694; 106 E. R. 518.

**1104.** —.]—Where an appeal was entered at the Easter, & respited until the Midsummer sessions, & on June 24, a copy of the order of respite was served on resps., without any notice of trial, & resps. appeared at the following sessions in July:—*Held*: sessions were bound to hear the appeal, though no other notice of trying the appeal had been given than the service of the order of respite.—*R. v. LAMBETH (INHABITANTS)* (1823), 3 Dow. & Ry. K. B. 340; 2 Dow. & Ry. M. C. 26.

*Annotations*:—*Distd. Ex p. Becke* (1832), 3 B. & Ad. 704. *Consd. R. v. West Riding of Yorkshire JJ.* (1833), 5 B. & Ad. 667. *Mentd. R. v. Bird, Ex p. Needes*, [1898] 2 Q. B. 340.

**1105.** — *Adjournment at request of respondent.*—A rule & practice of the ct. of quarter sessions, that in all cases of appeal, not otherwise directed by law, ten days' notice in writing shall be given by apps. to resps., & that in cases of respited appeals the like notice is given, unless there be any agreement between the parties to the contrary, are not applicable to the case of an appeal adjourned to the next sessions at the instance & for the accommodation of resps.; & therefore where, an appeal having been so ad-

journed, the justices dismissed it at the next sessions because applt. had not given notice of his intention to prosecute it at those sessions, the ct. granted a *mandamus* to the justices to hear the same.—*R. v. LINDSEY JJ.* (1817), 6 M. & S. 379; 105 E. R. 1284.

*Annotation*:—*Refd. R. v. East Riding of Yorkshire JJ.* (1834), 3 Nev. & M. K. B. 93.

**1106.** —.]—Where an appeal is respited on payment of costs by resps., the order of the ct. made at that sessions is sufficient evidence, at the next sessions, that the parties were properly before the ct., so as to dispense with proof of notice of appeal.—*R. v. HERTFORDSHIRE JJ.* (1833), 4 B. & Ad. 561; 1 Nev. & M. K. B. 331; 1 Nev. & M. M. C. 90; 2 L. J. M. C. 41; 110 E. R. 566.

*Annotations*:—*Consd. R. v. Middlesex JJ.* (1843), 2 Dowl. N. S. 719. *Distd. R. v. Essex JJ.*, [1895] 1 Q. B. 38. *Consd. Rhondda Valley Breweries Co. v. Pontypridd Assmt. Com.*, [1909] 1 K. B. 652.

**1107.** — *Adjournment at request of appellant.*—After an appeal entered & respited, & notice of an intention to try at the second sessions, at which sessions the appeal is again respited at the instance of applt., applt. is not bound to give notice of his intention to try at the following sessions unless such notice be required by the rules of the particular sessions. In the absence of evidence of the existence of a rule requiring such notice the original notice of trial will be considered sufficient to entitle applt. to try his appeal at the third sessions.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1833), 5 B. & Ad. 667; 2 Nev. & M. K. B. 390; 1 Nev. & M. M. C. 433; 3 L. J. M. C. 21; 110 E. R. 937.

*Annotations*:—*Distd. R. v. Monmouthshire JJ.* (1835), 3 Dowl. 306. *Consd. R. v. Middlesex JJ.* (1843), 2 Dowl. N. S. 719. *Expld. R. v. Montgomeryshire JJ.* (1845), 3 Dow. & L. 119. *Refd. R. v. Derbyshire JJ.* (1852), Bail Ct. Cas. 113; *R. v. Buckinghamshire JJ.* (1854), 18 Jur. 1079; *R. v. Eyre* (1857), 22 J. P. 37; *R. v. Pawlett* (1873), L. R. 8 Q. B. 491. *Mentd. R. v. Hewes* (1835), 5 L. J. M. C. 45; *R. v. Sussex JJ.* (1840), 9 Dowl. 125; *Ex p. Hopwood* (1850), 14 Jur. 812.

—.]—Where, after regular notice of appeal, the hearing is adjourned to the next sessions, on the application of apps., opposed by resps., a second notice for the next sessions, in strict compliance with a rule of sessions, requiring notice on all trials of appeal, & the like notice in the case of respited appeals, is unnecessary.—*R. v. GLOUCESTERSHIRE JJ.* (1835), 3 Dowl. 298; 4 L. J. M. C. 103.

**1109.** — *Adjournment on equal division of bench.*—Where an appeal after hearing at one sessions, was respited until the following sessions, in consequence of an equal division of opinion on the bench as to the merits:—*Held*: no fresh notice of trial was necessary for the following sessions, although, in practice, the rule is otherwise, as to respited appeals.—*R. v. BUCKINGHAMSHIRE JJ.* (1825), 6 Dow. & Ry. K. B. 142; 3 Dow. & Ry. M. C. 23.

*Rules of practice at sessions.*—See Sub-sect. 4, A., *ante*.

**1110. What amounts to—Notice of grounds of appeal.**—*R. v. LINDSEY JJ.* (1843), 1 L. T. O. S. 144.

*G. The Hearing.*

See Quarter Sessions Act, 1848 (c. 45), ss. 3, 14.

**1111. Necessity to proceed to hearing.**—Where an appeal is lodged before the sessions & there be no proceedings upon it, & the sessions is not adjourned the appeal is entirely lost & the Ct. of K. B. cannot grant a *mandamus* to the justices of

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—Under C. S. U. C. c. 114, an appeal from a conviction must be heard at the ct. of quarter sessions is no power of adjournment.—*Re McCUMBER & DOYLE* (1867), 26 U. C. R. 516.—CAN.

sessions to proceed thereon.—ANON. (1725), Sess. Cas. K. B. 78; 93 E. R. 79.

**1112. Appellant not appearing—Duty of prosecutor to move that conviction be affirmed.]—**A party was convicted before two magistrates under Frauds by Workmen Act, 1777 (c. 56), & gave notice of appeal, but did not enter into recognisances to prosecute the appeal & abide the judgment, & was therefore committed for want of entering into such recognisances. When sessions arrived, he did not proceed with the appeal, & the prosecutor did not move to affirm the conviction. At the end of sessions he was discharged, the commitment for want of entering into the required recognisances being then satisfied:—*Held*: this ct. would not grant a *mandamus* to the convicting magistrates to issue their warrant against deft. upon the conviction, it being at best doubtful whether, under these circumstances, their jurisdiction was not altogether at an end.

It seems that when deft. did not proceed with the appeal, the prosecutor ought to have moved sessions to affirm the conviction.—*R. v. MIDDLESEX JJ.* (1836), 2 Har. & W. 222; 5 L. J. M. C. 134.

— **Appeal not heard at instance of respondent.]—**(1) Under Frauds by Workmen Act, 1777 (c. 56), ss. 8, 20, the ct. of quarter sessions has no power to enter & hear an appeal at the instance of resp., although the party convicted may have given notice of appeal, & entered into a recognisance, upon failure of applt. to appear; nor has the ct. any power to give costs to resps. upon failure by the party convicted to enter & try. The only remedy for those costs is by estreating the recognisances.

(2) *Seemle*: where deft. has not been imprisoned before an appeal under that statute, upon his failing to support the appeal, the convicting justices may commit him to gaol to undergo his punishment.—*R. v. BOLTON RECORDER* (1844), 2 Dow. & L. 510; 1 New Sess. Cas. 416; 14 L. J. M. C. 33; 4 L. T. O. S. 142; 9 J. P. 650; 9 Jur. 209.

**1114. Respondent not appearing—Power of court to quash.]—**(1) Where, upon an appeal against a summary conviction, the appeal is called on, and applt. appears, but no one appears for resp. sessions have power to quash the conviction with costs, as against the actual prosecutor.

(2) Upon an appeal to quarter sessions against the conviction of applt., as a rogue & a vagabond under Vagrancy Act, 1924 (c. 83), sessions have power to give costs against the prosecutor; & the justices who have convicted applt., & who do not appear to support the conviction, are not the parties against whom an order for costs can be made.—*R. v. PURDEY* (1864), 5 B. & S. 909; 5 New Rep. 76; 34 L. J. M. C. 4; 11 L. T. 309; 29 J. P. 132; 11 Jur. N. S. 153; 13 W. R. 75; 122 E. R. 1069.

*Annotations*:—As to (2) *Refd.* *R. v. London JJ.*, [1895] 1 Q. B. 616; *R. v. Kent JJ.*, [1896] 2 Q. B. 1; *R. v. Staffordshire JJ.*, & Longhurst (1898), 62 J. P. 741. *Generally, Mentd.* *Garnett v. Backhouse*, *Rolle v. Whyte* (1868), L. R. 3 Q. B. 699.

**1115. ———.]—**Upon an appeal to quarter sessions against the sentence of a convicting magistrate as being excessive, resp., prosecutor, failed to appear, & the justices quashed the conviction:—*Held*: the justices were right; in accordance with the established practice at quarter sessions, it was for resp. to begin & produce evidence of the facts. Without this evidence the justices could not modify the sentence. The only course open to them was to quash the conviction.—*R. v. SURREY JJ. & BELL*, [1892] 2 Q. B. 719;

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61 L. J. M. C. 200; 67 L. T. 266; 56 J. P. 742; 41 W. R. 79; 36 Sol. Jo. 713; 17 Cox, C. C. 547.

**1116. Proof of conviction—Variance between conviction & copy supplied to appellant.]—**(1) 48 Geo. 3, c. 74, s. 15, giving to the party grieved an appeal to the sessions against a conviction by justices of the peace for penalties incurred in respect of the duties on malt, & empowering sessions “to hear & finally determine of & concerning the truth of the facts & merits of the case in question between the parties to such conviction respectively” & after enabling sessions to amend defects of form, enacting, in the same clause, that no *certiorari* shall be allowed to set aside the determination of the sessions; & providing that upon such appeal sessions shall re-hear, re-examine, & re-consider the truth of the facts and merits of the case, etc., & re-examine the same witnesses as before, & no other; does not preclude the Crown from removing the conviction, & the order of sessions quashing the same, by *certiorari*; & this ct. will take cognisance of a case reserved by sessions, accompanying the proceedings so removed.

(2) Where sessions, upon proof that applt. had received from the clerk of the convicting magistrate a copy of his conviction, signed & sealed by such justices, purporting, on the face of it, to have been made upon the information of B. & C.; though such copy was drawn up on the back of the paper which contained the information of A., the true informer; B. & C. being only the witnesses who had been examined in support of the charge; & though the same justices had returned to sessions to be filed of record a regular conviction of the same date, signed & sealed by them, on parchment; stating it to have been made on the information of A., & supported by the evidence of B. & C., according to the truth of the case; had quashed the latter conviction so returned by the justices, as being at variance with the minutes of the conviction delivered to applt., without entering into the merits of the case, upon a preliminary objection taken by applt.; this ct. quashed the order of sessions generally; thereby setting up again the regular conviction; considering that the variance arose from the mere mistake & irregularity of the justice’s clerk; & that applt. was not really surprised by it, but had waived his appeal on the merits.—*R. v. ALLEN* (1812), 15 East, 333; 104 E. R. 870.

*Annotations*:—As to (1) *Refd.* *R. v. Boulton* (1836), 4 Ad. & El. 498. As to (2) *Refd.* *R. v. Cheshire JJ.* (1833), 2 L. J. M. C. 95; *Chaney v. Payne* (1841), 1 Q. B. 712.

**1117. ——— Defect in form.]—***R. v. MIDDLESEX JJ.*, No. 1486, *post*.

**1118. Notice of appeal—Necessity for proof of.]—***R. v. MIDDLESEX JJ.*, No. 1058, *ante*.

**1119. ——— Two notices given—Second notice bad—Appellant entitled to proceed on first.]—**Upon the hearing of an appeal to quarter sessions under Summary Jurisdiction Act, 1879 (c. 49), it appeared that two notices of appeal had been given within the time limited by the Act, & applt. had elected to proceed upon the second, which was found to be bad for want of the prescribed recognisance:—*Held*: the first notice remained good, & applt. was entitled to proceed upon it after failing upon the second.—*R. v. WOLVERHAMPTON RECORDER* (1887), 35 W. R. 650, D. C.

**1120. Power of court to amend—Defective notice of appeal.]—***R. v. SANDWICH RECORDER*, No. 1538, *post*.

**1121. ——— Defect in order of magistrate.]—**A magistrate, under 20 & 21 Vict. c. 83, made an order to destroy certain obscene books, but



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omitted in the order to state that the publication of such libels was a misdemeanour & proper to be prosecuted. B., the owner of the books containing the libels, appealed to quarter sessions, & that ct. amended the order by stating that it was sufficiently implied by the order that the publication was a misdemeanour & proper to be prosecuted; & the ct. of quarter sessions in its order contained a finding of its own, which included what was omitted in the original order. B. having moved to quash both orders:—*Held*: the ct. of quarter sessions had no power to amend the defect in the manner adopted by them, nor had the Q. B. Div. such power, inasmuch as the defect was matter of substance & not of form, & both orders were quashed accordingly.—*R. v. BRADLAUGH* (1878), 43 J. P. 125, D. C.

**1122. Right to begin—Respondent.**—*R. v. SURREY JJ. & BELL*, No. 1115, *ante*.

#### H. Evidence.

*See Quarter Sessions Act, 1849 (c. 45), s. 3.*

**1123. Parties not confined to evidence given before court below.**—Concessum that on the hearing of an appeal at quarter sessions against an order of justices, it is competent to either party to produce evidence in support of his case additional to that given before them.—*R. v. HALL* (1866), L. R. 1 Q. B. 632; 7 B. & S. 642; 35 L. J. M. C. 251; 30 J. P. 629; 12 Jur. N. S. 892.

**1124. Power of court to quash conviction—Without hearing evidence.**—(1) An order of quarter sessions quashing on appeal a conviction, stated on the face of the order that it was made "upon the said appeal coming on to be heard, & reading the said recited conviction, & hearing the allegations of counsel on both sides, & upon due proof & consideration of the premises":—*Held*: this order was good on the face of it, & it was not necessary that quarter sessions should hear evidence before quashing the conviction; it is competent to them to do so where the statement of facts which the prosecuting counsel is prepared to prove does not disclose sufficient to sustain a conviction. *Qu.*: whether the Ct. of Q. B. can review an order of quarter sessions quashing a conviction solely on a point of form, contrary to 12 & 13 Vict. c. 92, s. 26.

(2) If the justices at quarter sessions do anything maliciously & with a high hand, contrary to law, the proper remedy is by criminal information against them; & further, I have no doubt that if such a case really existed, & it were brought to the notice of the Lord Chancellor, he would advise Her Majesty to remove such justices from their office (*BLACKBURN, J.*).—*COLAM v. MANFIELD* (1872), 26 L. T. 661; *sub nom. R. v. COLAM*, 36 J. P. 660; 20 W. R. 331.

#### I. Decision of Court.

**1125. Equal divisions of opinion.**—*R. v. WARDLE & HARTON COAL CO., Ex p. BURROWS* (1898), 14 T. L. R. 424, D. C.

**1126. — Chairman has no casting vote.**—On the hearing of an appeal at sessions, the justices, including the chairman, were equally divided, whereupon the chairman gave his casting vote for resps. Appls. having objected to this course on the following day of sessions, the ques-

tion was argued by counsel on both sides, & the justices, not being entirely the same as those who voted on the preceding day, determined to adhere to the previous decision. On a case reserved *Held*: though the decision of the first court nullity, it did not clearly appear that the subsequent decision was not on the merits, & the ct. refused to quash the order.—*R. BURY (INHABITANTS)* (1839), 10 Ad. & 2 Per. & Dav. 471; 8 L. J. M. C. 83; 3 J. 3 Jur. 1103; 113 E. R. 268.

*Annotation*:—*Reid. R. v. General Assessment Sessions Ryde, Rat. App. (1886-90) 268.*

**1127. — Withdrawal of one justice.**—[A publican, having been refused the renewal of his license, appealed to quarter sessions. Four justices heard the case, & were equally divided, whereupon one of the justices withdrew in order that there might be a majority, & then the appeal was dismissed with costs. E. then applied for a *mandamus* to hear, so that the decision might be come to by a majority pursuant to 9 Geo. 4, c. 61, s. 9:—*Held*: 9 Geo. 4, c. 61, s. 9, did not apply to quarter sessions; & though at quarter sessions, in case of equality of votes, the usual course is to adjourn the hearing; yet there is no rule of law compelling this course, & if one justice withdraw, the High Ct. will not interfere with any judgment entered by quarter sessions thereupon.—*Ex p. EVANS*, [1894] A. C. 16; 63 L. J. M. C. 81; 70 L. T. 45; 58 J. P. 260; 10 T. L. R. 118; 6 R. 82, H. L.]

*Annotations*:—*Folld. R. v. Wardle, etc., JJ. & Harton Coal Co., Ex p. Burrows* (1898), 14 T. L. R. 424. *Reid. Kinnis v. Graves* (1898), 67 L. J. Q. B. 583; *R. v. Leeds JJ., Ex p. Binns* (1906), 95 L. T. 916; *R. v. Hertfordshire JJ., Ex p. Larsen*, [1926] 1 K. B. 191.

— **Respite of appeal.**—*See Nos. 560, 1127, ante.*

#### J. Powers of Court.

*See Summary Jurisdiction Act, 1879 (c. 4) s. 31 (5).*

**1128. To review own decision.**—Where sessions have decided an appeal without any reservation they cannot, at a subsequent session, enter continuance of the appeal, on the ground of having been committed on the hearing, proceed to re-hear the appeal. Having once finally decided, they cannot, at a subsequent session, review the decision.—*R. v. MIDDLEBURY (INHABITANTS)* (1830), 9 L. J. O. S. M. C. 44.

**1129. — Or adopt that of different court.**—A ct. of quarter sessions cannot, even during the same sessions, judicially vary a decision already given, unless the ct. be composed of the same justices who gave that decision, although a ct. can adopt, by a ministerial order, a decision given by a ct. differently constituted.

The assessment sessions, on July 7, 1886, made an order allowing an appeal with costs. On July 20, 1886, the ct. being differently constituted, the assessment sessions varied the order of July 7 by directing that both parties to the appeal should bear their own costs:—*Held*: the order of July 20 must be quashed.—*R. v. GENERAL ASSESSMENT SESSIONS* (1887), 51 J. P. Jo. 180; *Ryde, Rat. App. (1886-90) 268.*

**1130. Modification of conviction—Necessity for fresh warrant of commitment.**—Pltf. was convicted by a ct. of summary jurisdiction & sentenced to a term of imprisonment with hard labour. He was taken to prison under a warrant of commitment made out by the magistrate, but released

#### PART XIII. SECT. 1, SUB-SECT. 4.—H.

**1123i. Parties not confined to evidence given before court below.**—*R. v. BATHURST JJ.* (1835), 4 O. S. 340.—*CAN.*

#### PART XIII. SECT. 1, SUB-SECT.

**a. Decision of majority.**—*R. v. TYRONE CHAIRMAN*, [1908] 2 I. R. 124, 137.—*IR.*

#### PART XIII. SECT. 1, SUB-SECT. 4.—J.

**b. No power to amend charge.**—The conviction was one under O.S.U.C. c. 105, as amended by 25 Vict. c. 22:—

pending an appeal to quarter sessions. The conviction was affirmed, but the sentence was altered. No fresh warrant of commitment was made out by the recorder at quarter sessions, but the original conviction by the magistrate was altered by the recorder in accordance with his sentence. Pltf. was then taken to prison, & the only documents handed to the governor of the prison were a copy of the original conviction by the magistrate as altered by the recorder & the original warrant of commitment by the magistrate. He was detained in prison for some days, when the conviction was quashed upon other grounds & he was released.

In an action for false imprisonment against the clerk of the peace of the borough & the governor of the prison for unlawfully imprisoning pltf. :—*Held*: the action could not be maintained against the clerk of the peace, as he was merely a ministerial officer & his act was a ministerial act; but the action was maintainable against the governor, as he was not justified in receiving pltf. into custody & detaining him without a fresh warrant of commitment by the recorder, & the documents which the governor received were not equivalent to such warrant of commitment, & the governor was liable in damages to pltf.—*DEMER v. COOK* (1903), 88 L. T. 629; 19 T. L. R. 327; 47 Sol. Jo. 368; 20 Cox, C. C. 444.

#### K. The Order.

**1131. Form of—Reasons need not be stated.]**—[On appeal] sessions need not set forth the reason of their judgment.

If the sessions reverse the first order, & that being removed appears to be good, this ct. must intend it was reversed on the merits, & affirm the order of sessions. If the sessions reverse the first order, & that being removed, appears not to be good, we must intend it was reversed for form, & affirm the order of reversal (*per CUR.*).—*SOUTH CADBURY (INHABITANTS) v. BRADDON, SOMERSET (INHABITANTS)* (1710), 2 Salk. 607; Sett. & Rem. 3rd ed. 172; 91 E. R. 515.

*Annotation*:—*Refd.* *R. v. Saffron Walden, Essex* (1713), Gilb. 55.

—Sessions quashing an order, not obliged to assign any reason.—*R. v. CORNWALL JJ.* (1767), 4 Burr. 2102; 98 E. R. 96.

**1133. — Must adjudge.]**—Order of sessions must adjudge, & not state the evidence only.—*R. v. LUFFINGTON (INHABITANTS)* (1744), 1 Wils. 74; 95 E. R. 500.

**1134. — Must state sufficient to found jurisdiction.]**—An order of sessions must set forth facts sufficient to found a jurisdiction over the subject-matter, & no presumptions will be allowed to aid any deficiency in that respect. The ct., therefore, will not, since Poor Law Amendment Act, 1834 (c. 76), s. 47, which directs overseers to render quarterly accounts over which quarter sessions have no jurisdiction, presume in aid of an order dealing generally with "accounts," that they are the annual accounts over which they have juris-

*Held*: the quarter sessions could not convert the charge into one under C. S. U. C. c. 93, s. 25.—*McKENNA v. POWELL* (1870), 20 C. P. 394.—*CAN.*

#### PART XIII. SECT. 1, SUB-SECT. 4.—K.

**1134 i. Form of—Must state sufficient to found jurisdiction.]**—*R. (M'ARDLE) v. LOUTH JJ.*, [1904] 2 I. R. 64.—*IR.*

#### PART XIII. SECT. 1, SUB-SECT. 4.—L. (b).

**1141 i. Confined to sessions that heard**

diction under Poor Relief Act, 1744 (c. 38), etc., even though the order speaks of them as having been allowed by justices as required by that Act.—*R. v. SPACKMAN* (1841), 2 Q. B. 301; 1 Gal. & Dav. 619; 11 L. J. M. C. 15; 5 J. P. 782; 6 Jur. 456; 114 E. R. 118.

*Annotation*:—*Appld.* *R. v. Buckinghamshire JJ.* (1845); 9 J. P. 70.

**1135. Presumption in favour of validity.]**—*SOUTH CADBURY (INHABITANTS) v. BRADDON, SOMERSET (INHABITANTS)*, No. 1131, *ante*.

**1136. —.]**—An order of quarter sessions, in a bastardy case, must state that the case has been transmitted from petty sessions.

The facts necessary to the jurisdiction of quarter sessions should have appeared on the face of the order. Intendment is to be made in support of orders of justices when jurisdiction appears, but not before (LORD DENMAN, C.J.).—*R. v. HARTLEY WINTNEY UNION GUARDIANS* (1841), 1 Q. B. 677; 1 Gal. & Dav. 732; 10 L. J. M. C. 161; 113 E. R. 1291.

**1137. Finality of.]**—Order of sessions on appeal is final.—*R. v. —* (1692), 12 Mod. Rep. 20; 88 E. R. 1137.

**1138. —.]**—*R. v. HANDLEY*, No. 1433, *post*.

—*See BASTARDY*, Vol. III., p. 390, Nos. 287, 288.

#### L. Costs.

##### (a) Discretion of Quarter Sessions.

*See, now*, Summary Jurisdiction Acts, 1848 (c. 43), s. 27, 1879 (c. 49), s. 31 (5), Quarter Sessions Act, 1849 (c. 45), ss. 3, 5.

**1139. To refuse to reopen appeal—Except on payment of costs.]**—Where an order of two justices is affirmed on appeal by quarter sessions, without hearing, owing to the absence of applt.'s attorney, & sessions refuse to re-open the appeal, except on terms of payment of full costs, this ct. will not interfere by *mandamus*.—*R. v. LANCASHIRE JJ.* (1838), 2 Jur. 468.

**1140. Refusal to award.]**—*R. v. NOTTINGHAMSHIRE JJ., Ex p. PITNEY*, No. 1472, *post*.

##### (b) Jurisdiction of Quarter Sessions.

**1141. Confined to sessions that heard & determined appeal.]**—*R. v. STAFFORDSHIRE JJ.*, No. 1480, *post*.

**1142. Where appeal dismissed for want of jurisdiction.]**—An inhabitant of the parish of H. gave notice of appeal to quarter sessions against the allowance of the surveyor's accounts. At sessions, the ct. dismissed the appeal for want of jurisdiction, under Highway Act, 1835 (c. 50), & ordered applt. to pay the costs:—*Held*: sessions had, under Quarter Sessions Act, 1849 (c. 45), s. 5, jurisdiction to order the payment of costs; but, *semble*: they would have had no such jurisdiction under Highway Act, 1835 (c. 50).—*R. v. PADWICK* (1858), 8 E. & B. 704; 27 L. J. M. C. 113; 30 L. T. O. S. 255; 22 J. P. 576; 4 Jur. N. S. 360; 6 W. R. 224; 120 E. R. 262.

*& determined appeal.]*—Under 32 & 33 Vict. c. 31, ss. 65, 74 (D.), the ct. of quarter sessions, at which an appeal is heard, must determine, on quashing a conviction, whether any & what costs are to be paid, & when. Where, therefore, the only order made was, "conviction quashed with costs":—*Held*: no subsequent session of the ct. could interfere by way of amendment of the order or otherwise.—*Re RUSH & BOBCAYGEON VILLAGE CORPN.* (1879), 44 U. C. R. 199.—*CAN.*

**c. Appeal successful.]**—The ct.

of quarter sessions has no authority to order a person acquitted on appeal to pay any part of the costs of such appeal, or to convict him of an offence for disobeying such order.—*R. v. ORR* (1854), 12 U. C. R. 57.—*CAN.*

**d. Appeal not determined on merits.]**—Under 32 & 33 Vict. c. 31, s. 65, & 33 Vict. c. 27 (D.), the ct. of quarter sessions has no power to award costs on discharging an appeal for want of proper notice of appeal, for the words "shall hear & determine the matter of appeal" mean, decide it



*Sect. 1.—To quarter sessions: Sub-sect. 4, L. (b), (c), (d), (e) & (f).]*

**1143. — Jurisdiction to estreat recognisances.]**

—A recognisance which has been entered into by applt. after the expiration of the three days is not void, & the ct. of quarter sessions, although by reason of the recognisance being out of time it has no jurisdiction to hear the appeal, has jurisdiction to estreat the recognisance for non-payment of such costs as may have been awarded upon the dismissal of the appeal.—*R. v. GLAMORGANSHIRE JJ.* (1890), 24 Q. B. D. 675; 59 L. J. M. C. 150; 62 L. T. 730; 55 J. P. 39; 38 W. R. 640; 17 Cox, C. C. 45, D. C.

(c) *To and Against Whom Awarded.*

**1144. Against informer—Though not nominally party.]**—Where upon an appeal sessions quash the conviction, they may under Quarter Sessions Act, 1849 (c. 45), s. 5, make an order upon the informant, for payment of applt.'s costs, although such informant is not nominally a party to the appeal.—*WHITTINGTON v. SHEFFIELD JJ.* (1860), 24 J. P. 407.

**1145. — —.]**—By Quarter Sessions Act, 1849 (c. 45), s. 5, quarter sessions may, upon an appeal, order & direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs & charges as may to such ct. appear just & reasonable:—*Held*: under this provision, sessions upon quashing a conviction may order the informant to pay the costs, notwithstanding he is not nominally a party to the appeal; the nominal parties being the convicting justices.—*R. v. SMITH* (1860), 29 L. J. M. C. 216; 2 L. T. 437; 8 W. R. 589.

*Annotations*:—*Consd.* *R. v. Purdey* (1864), 5 B. & S. 909. *Refd.* *R. v. Spokes, Ex p. Buckley* (1912), 28 T. L. R. 420.

**1146. — —.]**—*R. v. PURDEY*, No. 1114, *ante*.

**1147. Against justices.]**—An information was laid by M., who was the surveyor of the local board of health of Carlisle, but without reference to his official position, against H., for the violation of a bye-law of such local board; & upon the hearing, the said H. was convicted & ordered to pay £7 10s. to the said local board for their costs. H. thereupon gave notice of appeal to the convicting justices & to M. Both the justices & M. handed their notices over to the attorney for the said local board, & he conducted the defence on the behalf of such local board. The quarter sessions quashed the conviction with costs; & the clerk of the peace directing the costs to be paid by resps., the costs were taxed, & being unpaid, application was made to justices for a warrant against the goods of M. for the amount. Upon the order of quarter sessions being removed into this ct.:—*Held*: (1) it was bad in ordering the costs to be paid by resps., who were the convicting justices, & M., for that it should have been made upon the local board, who were the parties appealed against; (2) as the order was valid, except as to that part which related to costs, it should be quashed as to that part only.—*R. v. DAVIDSON, NANSON & MORLEY* (1871), 24 L. T. 22; 35 J. P. 500.

*Annotation*:—*As to* (1) *Refd.* *R. v. Goodall* (1874), L. R. 9 Q. B. 557.

**1148. — —.]**—Where parties convicted by justices appeal to quarter sessions, & on doing

merits.—*Re MADDEN* (1871), 31 U. C. R. 333.—CAN.

• — —.]—Where an appeal to the sessions is dismissed without being heard & determined on the merits, there is no power to impose

costs.—*R. v. BECKER* (1891), 20 O. R. 676.—CAN.

**PART XIII. SECT. 1, SUB-SECT. 4.—**  
L. (d).

*f. Form of—No payee named.]*—*Qu.*: whether an order of the sessions,

so are required by 34 & 35 Vict. c. 32, to give notice of appeal to these justices, this does not make the justices parties to the appeal, & if such justices do not take any part in the appeal as parties, or appear, quarter sessions cannot make an order on them to pay costs.—*R. v. GOODALL* (1874), L. R. 9 Q. B. 557; 43 L. J. M. C. 119; 38 J. P. 616.

*Annotations*:—*Refd.* *Mid. Ry. v. Edmonton Union* (1893), 70 L. T. 355; *R. v. London JJ.*, [1895] 1 Q. B. 616.

**1149. — Acting bonâ fide.]**—*R. v. WEST RIDING JJ.* (1883), 47 J. P. Jo. 804.

— **Appeals under Licensing Acts.]**—*See* INTOXICATING LIQUORS, Vol. XXX., p. 64, Nos. 492–495.

**1150. Against respondent—Though not appearing on appeal.]**—Costs may be granted in a proper case against a resp., deft. before the justices, even although he does not appear upon the appeal.—*USK URBAN DISTRICT COUNCIL v. MORTIMER* (1903), 90 L. T. 25; 68 J. P. 38; 20 T. L. R. 96 48 Sol. Jo. 132; 2 L. G. R. 135, D. C.

*Annotation*:—*Mentd.* *Bower v. Caistor R. D. C.* (1911), 75 J. P. 186.

**To & against the Crown.]**—*See* CONSTITUTIONAL LAW, Vol. XI., pp. 531, 533, Nos. 344, 367; REVENUE.

(d) *Form and Contents of Order.*

**1151. Form of—"Costs."]**—At the hearing of a respited appeal against a poor rate, the appeal was dismissed, on the non-appearance of applt., & sessions made the following order: "Surrey, to wit. At the general quarter sessions of the peace, holden at St. Mary, Newington, on etc. Whereas, at the last general quarter sessions of the peace, holden in & for the county of Surrey, appeal was then made at this ct." The appeal was then recited, & the entry & respite thereof "until the next general quarter sessions, to be holden in & for the county of Surrey." It then ordered the appeal to be dismissed, & further "that said applt. do forthwith pay to said resps. the sum of £115 costs." On motion for a *certiorari*:—*Held*: the order was good, although no notice had been given that more than nominal costs would be asked for; it sufficiently showed that it was made at quarter sessions holden in & for the county of Surrey; & the term "costs" showed, with sufficient certainty, that they were costs of the appeal.—*LONDON & BRIGHTON RY. CO. v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1848), 17 L. J. M. C. 119; 12 Jur. 897; *sub nom. Ex p. LONDON, BRIGHTON & SOUTH COAST RY. CO.*, 2 Saund. & C. 265; 3 New Mag. Cas. 12; 11 L. T. O. S. 131; 12 J. P. Jo. 358.

**1152. Contents of—Payment to clerk of the peace.]**—A mistake in ordering costs to be paid directly to the party to the appeal instead of to the clerk of the peace, is not a defect of jurisdiction, but merely erroneous procedure; & therefore, where such an order had been made under an Act taking away the *certiorari*, the ct. refused to set it aside when brought before them by *certiorari*.—*R. v. BINNEY* (1853), 1 E. & B. 810; 1 C. L. R. 236; 22 L. J. M. C. 127; 17 J. P. 440; 17 Jur. 854; 118 E. R. 640.

*Annotation*:—*Refd.* *R. v. Winder*, [1900] 2 Q. B. 666.

**1153. — —.]**—An appeal against a poor rate was at sessions referred under Quarter Sessions Act, 1849 (c. 45), which directs that the

simply ordering costs of an appeal to be paid, without directing to whom they are to be paid, etc., under 32 & 33 Vict. c. 31 (D.), s. 74, is regular.—*Re DELANEY v. MACNABB* (1873), 21 C. P. 563.—CAN.

arbitrator's award shall be entered as the judgment of the ct. of general or quarter sessions in the appeal. The award was subsequently entered as the judgment of the sessions, in its terms, which, after dismissing the appeal, confirming the assessment, & directing applt. to pay his own costs, were, that applt. "pay to resps. their costs of the said appeal & of this reference." The amount of the costs of resps. was duly ascertained & made part of the judgment. Subsequently the order of sessions founded on the award was removed into the Ct. of Q. B. by *certiorari*, to be enforced under Quarter Sessions Act, 1849 (c. 45), s. 18. A rule *nisi* for quashing the writ of *certiorari* & order of sessions, having been obtained on the ground that under Quarter Sessions Act, 1849 (c. 45), s. 5, the order ought in conformity with Justices Protection Act, 1848 (c. 44), s. 27, to have directed payment to be made to the clerk of the peace, & not to resps.:—*Held*: (1) as payment of costs to the party was authorised by Poor Relief Act, 1744 (c. 38), s. 4, the order of sessions was good, & had been rightly removed into this ct. for the purpose of being enforced under Quarter Sessions Act, 1849 (c. 45), s. 18; (2) in founding an application under the Quarter Sessions Act, 1849 (c. 45), s. 18, it was enough to show neglect to obey an order of sessions within a reasonable time; (3) Summary Jurisdiction Act, 1848 (c. 43), s. 27, applied only to appeals against summary convictions & orders of justices mentioned in that Act.—*R. v. HUNTLEY* (1854), 3 E. & B. 172; 2 C. L. R. 246; 23 L. J. M. C. 106; 22 L. T. O. S. 273; 18 Jur. 745; 118 E. R. 1105; *sub nom. Ex p. HUNTLY*, 18 J. P. 520.

*Annotations*:—*As to* (1) *Refd.* *Gay v. Matthews* (1863), 4 B. & S. 440. *As to* (3) *Refd.* *R. v. Ely JJ.* (1855), 20 J. P. 116.

1154. ———.]—An order for costs made by the ct. of quarter sessions, under Quarter Sessions Act, 1849 (c. 45), s. 5, is rightly made, directing the unsuccessful party to pay the costs to the clerk of the peace to be by him paid over to the successful party.—*GAY v. MATTHEWS* (1863), 4 B. & S. 440; 2 New Rep. 371; 33 L. J. M. C. 14; 8 L. T. 674; 11 W. R. 922; 122 E. R. 524, Ex. Ch.

#### (e) When Appeal Abandoned.

1155. Abandonment by respondents—Entry by appellants to recover costs.]—*R. v. TOWNSTAL (INHABITANTS)*, *R. v. STAYLEY (INHABITANTS)*, No. 1080, *ante*.

1156. ——— Costs of appellant to notice of abandonment.]—Resps. in an appeal which had been entered & respited, served applts. with a notice that they had abandoned the order, on the ground of a defect in the examination, & that they intended to apply at the ensuing sessions to quash the order upon a special entry "quashed, not upon the merits." They also offered to pay applts. all reasonable costs up to that time incurred by them, & all costs of maintenance; & warned them that all future costs incurred by them in prosecuting & trying the appeal, would be at their peril. Applts. applied at the ensuing sessions to have the appeal heard, & the order quashed generally. Sessions quashed the order, with a special entry in the form desired by resps., & allowed applts. their costs up to the time of the notice of the abandonment, & the costs of coming to sessions. Upon an application for a *mandamus* to the justices to enter continuances & hear the appeal:—*Held*: sessions had done right.—*R. v. WEST RIDING OF YORKSHIRE JJ., PONTEFRAC T v. THREW* (1843), 8 J. P. 23.

#### (f) Taxation.

1157. Taxation & adoption during same sessions.]—The recorder at a municipal sessions may, on ordering costs, refer the taxation of the amount to an officer of the ct., but such taxation must be adopted by him during the continuance of the same sessions. An order for such costs, founded on a subsequent adoption, is invalid.—*R. v. LONG* (1841), 1 Q. B. 740; 1 Gal. & Dav. 367; 10 L. J. M. C. 124; 6 Jur. 98; 113 E. R. 1314.

*Annotations*:—*Consd.* *Freeman v. Read* (1860), 9 C. B. N. S. 301. *Appld.* *R. v. Winder*, [1900] 2 Q. B. 666. *Refd.* *R. v. Clark* (1844), 8 Jur. 489; *R. v. Belton* (1848), 12 J. P. 232; *Read v. Freeman* (1860), 3 L. T. 369.

1158. ———.]—Quarter sessions have no power to make a general order for the costs of an appeal, though they may refer the taxation of the amount to their officers, provided they during the session adopt his decision, & incorporate it in the order. This rule is equally applicable, whether the sessions have a discretion to award costs or not.—*SELLWOOD v. MOUNT* (1841), 1 Q. B. 726; 1 Gal. & Dav. 358; 10 L. J. M. C. 121; 6 Jur. 78; 113 E. R. 1309.

*Annotations*:—*Consd.* *Freeman v. Read* (1860), 9 C. B. N. S. 301. *Refd.* *R. v. Winder* [1900] 2 Q. B. 666. *Refd.* *R. v. Long* (1841), 1 Q. B. 740; *R. v. Belton* (1848), 12 J. P. 232. *Mentd.* *Lock v. Sellwood* (1841), 1 Q. B. 736; *R. v. Yorkshire West Riding JJ.* (1843), 1 L. T. O. S. 317; *Leary v. Patrick* (1850), 15 Q. B. 266; *R. v. Flintshire JJ.* (1854), 2 C. L. R. 878.

1159. ———.]—Order for costs by quarter sessions must be taxed & completed before sessions ended.

Where a ct. of quarter sessions has confirmed a rate with costs, the taxation of such costs, after the end of the sessions is irregular, & an order for the payment of such taxed costs cannot be enforced.—*R. v. BUDDEN* (1858), 30 L. J. O. S. 257; 6 W. R. 213; 22 J. P. Jo. 52.

1160. ——— Unless by consent of parties.]—Where it appears that the parties to an appeal have consented that costs of appeal shall be taxed by the clerk of the peace, this ct. will not interfere, though the order for payment of costs may not have been made until after that ct. of quarter sessions has ceased to exist.—*R. v. SHREWSBURY & HEREFORD RY. CO.* (1855), 25 L. T. O. S. 65; 3 W. R. 373.

*Annotations*:—*Folld.* *Freeman v. Read* (1860), 9 C. B. N. S. 301. *Appld.* *Ex p. Watkins* (1862), 5 L. T. 605. *Refd.* *Southampton Gas Light & Coke Co. v. Southampton Grdns.* (1877), 25 W. R. 671.

1161. ———.]—Upon an application to justices to enforce payment of a highway rate pursuant to Quarter Sessions Act, 1849 (c. 45), s. 5, & Summary Jurisdiction Act, 1848 (c. 43), s. 27, notice of appeal was given under Highway Act, 1835 (c. 50), s. 105, & recognisances duly entered into. The appeal was entered, & upon the hearing the rate was confirmed, subject to a case: the clerk of the peace made a note in the minute book of the sessions, "Costs agreed to be taxed out of ct."; the order of sessions was afterwards confirmed, & the costs were at a subsequent time taxed & allowed at £33 7s. Nothing was said at sessions about the costs; but, by a rule of sessions made in 1843, it was ordered that "the costs of every appeal tried should be taxed by the clerk of the peace during the same sessions, & be paid by the party against whom the ct. should decide such appeal, unless the ct. should then make any order to the contrary":—*Held*: it was not competent to applt. under the circumstances to object that the taxation had taken place out of sessions, that having been brought about by his own consent.—*FREEMAN v. READ* (1860), 9 C. B. N. S. 301; 30 L. J. M. C.



*Sect. 1.—To quarter sessions: Sub-sect. 4, L. (f) & (g); sub-sects. 5 & 6, A., B., C., D., E., F., G., I. & J. Sect. 2: Sub-sects. 1 & 2, A. & B. (a) & (b).]*

123; 142 E. R. 118; *sub nom.* READ v. FREEMAN, 3 L. T. 369; 25 J. P. 87; 7 Jur. N. S. 546; *sub nom.* REED v. FREEMAN, 9 W. R. 141.

*Annotation:—*Refd. Southampton Gaslight & Coke Co. v. Southampton Grdns. (1877), 36 L. T. 548.

**1162. ——— Attendance at taxation without protest.]—**Where a party objects to an order of quarter sessions, on the ground that the amount of costs inserted in the order was ascertained by taxation after sessions had expired, he should protest against the taxation before the taxing officer; otherwise if he attends & proceeds with the taxation without protesting, he waives the objection.—*Ex p.* WATKINS (1862), 5 L. T. 605; 26 J. P. 71; 10 W. R. 249.

*Annotation:—*Refd. R. v. Hampshire JJ. (1864), 3 New Rep. 487.

**1163. ——— Slight evidence of consent sufficient.]—**I think it right to say that the practice to tax out of sessions has become, I believe, so common that the slightest evidence of consent would induce me to hold that consent had been given (LORD HERSCHELL, C.).—MIDLAND RY. CO. v. EDMONTON UNION, [1895] A. C. 485; 64 L. J. Q. B. 710; 72 L. T. 811; 60 J. P. 68; 11 T. L. R. 448; 11 R. 246, II. L.

*Annotations:—*Appld. R. v. Cumberland JJ. (1903), 68 J. P. 153; R. v. Dixey, *Ex p.* Cobb & Castle (1911), Konst. & W. Rat. App. 323. Refd. R. v. Winder, [1900] 2 Q. B. 666. Mentd. West Ham Union v. St. Matthew, Bethnal Green, [1896] A. C. 477; M. S. & L. Ry. v. Doncaster Union Grdns., [1897] 1 Q. B. 117; Sharpington v. Fulham Grdns., [1904] 2 Ch. 449; Chester Waterworks Co. v. Chester Union Grdns. (1907), 96 L. T. 566.

**1164. ——— Adoption at adjourned sessions.]—**It is no objection to an order, that the amount of costs, having been in the meantime taxed by the clerk of the peace, was inserted in the order at an adjourned sessions, as the circumstances of the case warranted the conclusion that the parties assented to such a course. *Qu.*: whether, without such consent, the adjourned sessions would have had jurisdiction to insert in the order of a matter heard at the original sessions.—R. v. MORTLOCK (1845), 7 Q. B. 459; 1 New Mag. Cas. 329; 2 New Sess. Cas. 108; 14 L. J. M. C. 153; 5 L. T. O. S. 149; 9 J. P. 454; 9 Jur. 621; 115 E. R. 562.

*Annotations:—*Appld. R. v. Lambeth Highways Surveyors (1854), 3 C. L. R. 35. Refd. *Ex p.* L. B. & S. C. Ry. (1848), 3 New Mag. Cas. 12; Freeman v. Read (1860), 9 C. B. N. S. 301. Mentd. Bancroft v. Mitchell (1867), 8 B. & S. 558; R. v. Speyer, R. v. Cassel, [1916] 1 K. B. 595.

**1165. ———.]—**If a ct. of quarter sessions on hearing an appeal direct costs to be given & adjourn the ct., it is sufficient to have the costs taxed by the clerk of the peace between the day of hearing & the adjournment day, & on the adjournment day to draw up the order, inserting a direction to pay the amount of costs ascertained on the taxation.—R. v. HAMPSHIRE JJ. (1864), 3 New Rep. 487; 33 L. J. M. C. 104; 9 L. T. 730; 12 W. R. 441; *sub nom.* R. v. HAMPSHIRE JJ., *Re* THURLOW & NEWPORT PARISH OFFICERS, 28 J. P. 151.

**1166. ———.]—**RAWNSLEY v. HUTCHINSON, No. 971, *ante*.

**1167. ———.]—**On an appeal to quarter sessions, under 9 Geo. 4, c. 61, s. 27, sessions in Oct. last dismissed the appeal with costs. After the ct. had risen a clerk in the office of the clerk

of the peace taxed the costs under protest of applt.'s attorney. Sessions had been adjourned, & before the day of adjournment the costs were certified, & the amount was inserted in the order of sessions. The order was removed into this ct. in Mar. for the purpose of enforcing it:—*Held*: the order of sessions purporting on the face of it to be drawn up by the ct. in the absence of any direct statement that it was not so drawn, will be presumed to have been rightly made; & there had been a sufficient adoption of the taxation by the adjourned sessions, although no mention of the amount was made in ct.—R. v. PHILLIPS, *Re* PHILLIPS & FARQUHAR JJ. (1873), 29 L. T. 100; 37 J. P. 824.

(g) *Enforcement of Order for Payment.*

*See* Summary Jurisdiction Act, 1848 (c. 43), s. 27; Quarter Sessions Act, 1849 (c. 45), s. 5.

**1168. Against public body—Without funds to pay.]—**Where quarter sessions make an order giving successful applt. his costs, the course pointed out by Summary Jurisdiction Act, 1848 (c. 43), s. 27, & Quarter Sessions Act, 1849 (c. 45), s. 5, must be pursued, although resps., public comrs., say they have no funds out of which to pay the costs, & that they dispute the validity of the order.

Where there was an appeal against a rate made by comrs. under a town improvement Act, & applt. succeeded, & sessions made an order for his costs, which resps. declined to pay, stating that they had no funds out of which to pay them, & that they should dispute the validity of the order, & no steps were taken under the sects., but applt. applied to this ct. for a rule for a *mandamus* commanding resps. to make a rate for the payment of such costs, the rule was refused.—AUSTIN v. MILTON-NEXT-SITTINGBOURNE COMRS. (1865), 29 J. P. 760.

#### SUB-SECT. 5.—REFERENCE TO ARBITRATION.

*See* Part XV., *post*.

#### SUB-SECT. 6.—PROCEDURE IN PARTICULAR CASES.

##### A. Poor Law Cases.

*See* POOR LAW.

##### B. Rating Cases.

*See* RATES & RATING.

##### C. Highway Cases.

*See* HIGHWAYS, Vol. XXVI., pp. 483–485, Nos. 1950–1982.

##### D. Licensing Cases.

*See* INTOXICATING LIQUORS, Vol. XXX., pp. 58–66, 103, 104, Nos. 441–514, 793–802.

##### E. Lunacy Actions.

*See* LUNATICS, pp. 262 *et seq.*, *ante*.

##### F. Actions Under Public Health Acts.

*See* PUBLIC HEALTH.

##### G. Shipping Cases.

*See* SHIPPING.

##### H. Cases in regard to Commons and Rights of Common.

*See* COMMONS, Vol. XI., pp. 85–87, Nos. 1038–1059.

#### PART XIII. SECT. 1, SUB-SECT. 4.—L. (g).

*g. Formal order condition precedent.]—*Re BOTHWELL & BURNSIDE (1900), 31 O. R. 695.—CAN.

*I. Actions in regard to Food and Drugs.*

See *FOOD & DRUGS*, Vol. XXV., pp. 115, 122, 140, Nos. 387, 439, 570.

*J. Revenue Cases.*

See *REVENUE*.

## SECT. 2.—APPEAL TO HIGH COURT—CASE STATED.

## SUB-SECT. 1.—IN GENERAL.

See, generally, Summary Jurisdiction Act, 1857 (c. 43); Summary Jurisdiction Act, 1879 (c. 49), s. 33.

**1169. Case now deemed to be stated under both Acts—Case stated under Summary Jurisdiction Act, 1857 (c. 43).]**—Justices stating a case under above Act may be taken to have stated it under all their powers, including those of Summary Jurisdiction Act, 1879 (c. 49).—*ROCHDALE BUILDING SOCIETY v. ROCHDALE CORPN.* (1886), 51 J. P. 134; 2 T. L. R. 397, D. C.

**1170. — Case stated under Summary Jurisdiction Act, 1879 (c. 49).]**—A special case, expressed to have been stated under Summary Jurisdiction Act, 1857 (c. 43), only, was stated on the application of an informant, the information having been dismissed. An objection was taken that the appeal could not be heard, on the ground that the informant was not a person aggrieved within sect. 33 of above Act:—*Held*: having regard to sect. 33, sub-sect. 2 of above Act, the provisions of the two Acts as to stating cases must be read together, & the informant being a party to the proceeding, the appeal could be heard.

*Qu.*: whether a prosecutor after an acquittal is a person aggrieved so as to be entitled to apply to the High Ct. under sect. 33 for an order requiring a case to be stated.—*STOKES v. MITCHESON*, [1902] 1 K. B. 857; 71 L. J. K. B. 677; 86 L. T. 767; 66 J. P. 615; 50 W. R. 553; 18 T. L. R. 543; 20 Cox, C. C. 254, D. C.

## SUB-SECT. 2.—WHEN RIGHT OF APPEAL EXISTS.

*A. Person Aggrieved.*

See Summary Jurisdiction Act, 1879 (c. 49), s. 33.

**1171. Must be a party to proceedings—Tenant convicted under Metropolitan Streets Act, 1867 (c. 134), s. 6—Landlord not “a person aggrieved.”]**—In the metropolis, a tenant of D. left a package on the pavement of a court (in the city), 141 feet long & 25 feet wide, with two foot pavements, & was charged under above sect., with leaving the package longer than necessary. D., the freeholder, contended that the ct. was private property for the sole use of the tenants, & was not a street. On the tenant being convicted:—*Held*: D. was not a “a person aggrieved,” & was not entitled to have a special case stated under Summary

Jurisdiction Act, 1879 (c. 49), s. 33.—*DRAPERS’ Co. v. HADDER* (1892), 57 J. P. 200; 9 T. L. R. 36, D. C.

*Annotation*:—*Refd.* *Foss v. Best* (1906), 75 L. J. K. B. 575.

**1172. Information against party dismissed—Under Probation of Offenders Act, 1907 (c. 17).]**—A person was charged under the Military Service Acts, 1916 & 1918, with failing to appear when called out to attend for military duty. He claimed that he came within the exception contained in those Acts in favour of “regular ministers of any religious denomination.” The justices were not satisfied that he came within the exception, & they found the offence proved but dismissed the information under above Act, considering it inexpedient to inflict any punishment:—*Held*: there had been a “determination” by the justices within Summary Jurisdiction Act, 1879 (c. 49), s. 33, & the accused was entitled to appeal therefrom by way of case stated.—*OATEN v. AUTY*, [1919] 2 K. B. 278; 88 L. J. K. B. 1072; 121 L. T. 215; 83 J. P. 173; 35 T. L. R. 441; 63 Sol. Jo. 554; 17 L. G. R. 697; 26 Cox, C. C. 443, D. C.

See, now, Criminal Justice Act, 1925 (c. 86), s. 7 (1).

*B. Conviction Order or Other Proceeding.**(a) Dismissal of Information.*

See, now, Summary Jurisdiction Act, 1879 (c. 49), s. 33.

**1173. Whether appeal lies.]**—*DAVYS v. DOUGLAS*, No. 1311, *post*.

**1174. —.]**—B. was apprehended by W., a constable, & brought before a justice, who discharged B. at once on the ground that he had been illegally apprehended. W. then applied for a case to be stated under Summary Jurisdiction Act, 1857 (c. 43):—*Held*: as the matter was ended by the discharge of B., the magistrate had no power to state a case, there having been no determination of an information, & there being no party any longer interested in the result of the case.—*WILLIAMSON v. BILBOROUGH* (1864), 28 J. P. 745.

**1175. —.]**—*STOKES v. MITCHESON*, No. 1170, *ante*.

— **Dismissal of purely criminal charge.]**—See Sub-sect. 2, B. (b), *post*.

*Dismissal of Criminal Charge.*

**1176. Whether appeal lies—On refusal to commit.]**—(1) The ct. has no jurisdiction to hear an appeal against a decision of justices by way of case stated unless applt. has given resp. notice in writing of the appeal together with a copy of the case as required by Summary Jurisdiction Act, 1857 (c. 43), s. 2, & this is so although applt. has been unable to serve resp., having failed to find him notwithstanding every effort to do so.

(2) *Semble*: justices have no power to state a case under Summary Jurisdiction Act, 1879 (c. 49), s. 33, where they have dismissed an information for felony & declined to commit the person charged for trial.—*Foss v. Best*, [1906] 2 K. B. 105; 75

## PART XIII. SECT. 2, SUB-SECT. 1.

*h. Whether decision of High Court final.]*—To a declaration in prohibition, deft. pleaded that pltf. had already taken the opinion of the Ct. of Q. B. on a special case stated by justices, on his application, raising a question as to their jurisdiction; & that that ct. against him, affirming the

jurisdiction of the justices. Demurrer to this plea overruled.—*DEVONSHIRE (DUKE) v. FOOTE* (1872), 7 I. R. Eq. 365.—*IR.*

## PART XIII. SECT. 2, SUB-SECT. 2.—A.

*k. Person pleading guilty.]*—*R. v. BROOK* (1902), 5 Terr. L. R. 369.—*CAN.*

## PART XIII. SECT. 2, SUB-SECT. 2.—B. (a).

**1173 i. Whether appeal lies.]**—*Held*: there was no appeal in a case which the justices had pronounced too insignificant to occupy their attention & to which the production of the certificate of the justices would have been a complete answer.—*CHESLEY v. GRASSIE* (1868), 7 N. S. R. 191.—*CAN.*



**Sect. 2.—Appeal to High Court—Case stated: Sub-sect. 2, B. (b), C., D., E. & F; sub-sect. 3, A. & B.]**

L. J. K. B. 575; 95 L. T. 127; 70 J. P. 383; 22 T. L. R. 542; 21 Cox, C. C. 226, D. C.

**Annotations:—As to (1) N.F. Wills v. McSherry, [1913] 1 K. B. 20. Distd. Godman v. Crafton, [1914] 3 K. B. 803. Refd. Verney v. Fletcher (1909), 73 J. P. 131; Hollidge v. Ruislip-Northwood U. D. C. (1912), 77 J. P. 126. As to (2) Distd. R. v. Allen, [1912] 1 K. B. 365.**

**1177. ——— Order of to costs under Costs in Criminal Cases Act, 1908 (c. 15), s. 6 (3).]**—Where justices acting as examining justices under above sub-sect. dismiss a charge against a person for an indictable offence, not dealt with summarily, & order the prosecutor to pay the costs of the defence on the ground that in their opinion the charge was not made in good faith, they have power to state a special case for the opinion of the High Ct., & if they refuse to do so, the ct. has jurisdiction to order them to state a case.—*R. v. ALLEN*, [1912] 1 K. B. 365; 81 L. J. K. B. 258; *sub nom. R. v. ALLEN, Ex p. HARDMAN*, 106 L. T. 101; 76 J. P. 95; 28 T. L. R. 145; 22 Cox, C. C. 669, D. C.

**1178. ——— Dismissal under Probation of Offenders Act, 1907 (c. 17) — “Accused an aggrieved person.”]**—*OATEN v. AUTY*, No. 1172, *ante*.

#### C. Court of Summary Jurisdiction.

**1179. When justices form a court of summary jurisdiction—Justices acting under private Act.]**—*LEICESTER BOROUGH (DEPUTIES OF FREEMEN) v. HEWITT*, No. 1185, *post*.

—See *COURTS*, Vol. XVI., p. 99, Nos. 6–14; *DISTRESS*, Vol. XVIII., pp. 398, 399, 415, 422, Nos. 1389–1397, 1546–1550, 1603–1605; *INTOXICATING LIQUORS*, Vol. XXX., p. 69, Nos. 546–548; *LUNATICS*, p. 257, No. 176, *ante*; *PUBLIC HEALTH*; *RATES & RATING*; *THEATRES*.

**Justices acting as examining justices in indictable cases.]**—See Sub-sect. 2, B. (b), *ante*.

**Cases under Summary Jurisdiction, Married Women Act, 1895 (c. 39).]**—See *HUSBAND & WIFE*, Vol. XXVII., pp. 568, 569, Nos. 6270–6272.

#### D. Matters of Jurisdiction.

See, now, Summary Jurisdiction Act, 1879 (c. 49), s. 33.

**1180. Want of jurisdiction—Justices declining to hear case.]**—*R. v. WEST RIDING JJ.* (1866), 6 B. & S. 802; 122 E. R. 1389; *sub nom. R. v. RAWSON*, 15 L. T. 179; 31 J. P. 564.

**1181. ——— Justices hearing case.]**—In a proceeding for a penalty under Contagious Diseases (Animals) Act, 1869 (c. 70), before the justices for the county of Pembroke, against the master of a vessel for having carried sheep on board such vessel without having the places used for such sheep divided into pens, as required by the Animals Order of 1875, it was proved that the vessel brought the sheep from Ireland to New Milford, in Milford Haven, which is in the body of the county of Pembroke, & that the vessel arrived there without having the places on board for the sheep divided as required by the order. On these facts the justices determined that they had no jurisdiction to

convict the master:—**Held:** (1) the justices had jurisdiction as the offence continued, so as to be in Pembrokeshire within the jurisdiction of the justices, when the vessel arrived at New Milford with the sheep without pens, as required by the order; (2) though Contagious Diseases (Animals) Act, 1869 (c. 70), s. 108, gives a power of appealing from the justices to the quarter sessions it does not deprive a party of the right to have a case stated for the opinion of the superior ct., under Summary Jurisdiction Act, 1857 (c. 43); (3) the justices having necessarily heard the case before they determined that they had no jurisdiction, the opinion of the ct. was properly applied for on a case under Summary Jurisdiction Act, 1857 (c. 43), instead of on an application for a *mandamus* to the justices to hear.—*MUIR v. HORE* (1877), 47 L. J. M. C. 17; 37 L. T. 315; 41 J. P. 471, D. C.

#### E. Where Magistrates' Order Discretionary.

**1182. General rule.]**—(1) The power of justices to grant or refuse an order enabling a local authority to enter lands under Public Health Act, 1875 (c. 55), s. 305, is wholly discretionary, their decision being, therefore, final.

Pltf. applied to the justices under Public Health Act, 1875 (c. 55), s. 305, for an order authorising them, as the local authority, to enter upon certain lands of deft. for the purposes of the Act. The application was dismissed, but the justices stated a case under Summary Jurisdiction Act, 1857 (c. 43), s. 2, for the opinion of this ct.:—**Held:** (2) the justices had no power to state a case, as this was not the determination of a complaint within Summary Jurisdiction Act, 1857 (c. 43), s. 2; (3) on a case being stated, resp. was entitled to his costs of opposing it, as without jurisdiction.—*DISS URBAN SANITARY AUTHORITY v. ALDRICH* (1877), 2 Q. B. D. 179; 46 L. J. M. C. 183; 36 L. T. 663; 41 J. P. 549, D. C.

#### F. Effect of Other Statutes.

**1183. Whether right of appeal excluded—Appeal given to quarter sessions.]**—The power of appeal to the quarter sessions given by 20 & 21 Vict. c. 83, does not take away the jurisdiction of the magistrate under Summary Jurisdiction Act, 1857 (c. 43), to state a case under that Act for the opinion of one of the superior cts. on a point of law arising under 20 & 21 Vict. c. 83.—*STEELE v. BRANNAN* (1872), L. R. 7 C. P. 261; 41 L. J. M. C. 85; 26 L. T. 509; 36 J. P. 360; 20 W. R. 607.

**1184. ———.]**—*MUIR v. HORE*, No. 1181, *ante*.

**1185. ——— Justices' decision made final & conclusive—By Act passed before Summary Jurisdiction Act, 1879 (c. 49).]**—By a private Act of 1845, provision was made for allotments to be held by the deputies of the freemen in trust for freemen, or their widows, resident within the borough. Application had to be made to the deputies for any such allotment, & any person aggrieved with their decision could appeal to the justices, of the borough in petty or special sessions, whose determination was “to be final & conclusive, & not removable by *certiorari*, or any other writ or process whatsoever, into any of Her Majesty's cts. of record.”

#### PART XIII. SECT. 2, SUB-SECT. 2.—F.

**1. Whether right of appeal excluded—Right given by Imperial statute—Effect of subsequent Dominion statute.]**—20 & 21 Vict. c. 43 (Imp.), giving the power to a magistrate exercising summary jurisdiction under Jervis' Act, to state a case for the opinion of the Superior Ct., is not provided for or inconsistent with Can. Stat. 37 Vict.

c. 42, & is not repealed by sect. 7 thereof.—*R. v. AH POW* (1880), 1 B. C. R., pt. 1, 147.—**CAN.**

**m. ——— Question involving validity of statute.]**—A case can be stated by a justice under 52 Vict. c. 15, s. 5 (O), for the judgment of the ct. of appeal, only when the constitutional validity of the statute under which he had acted is called in question.—*R. v. EDWARDS*,

*R. v. LYNCH* (1892), 19 A. R. 706.—**CAN.**

**n. ———.]**—A case can be stated by a justice of the peace under R. S. O. 1897, c. 91, s. 5, for the judgment of the ct. of appeal only when the constitutional validity of a statute is involved.—*R. v. TORONTO RY. Co.* (1899), 26 A. R. 491.—**CAN.**

**o. ——— Justices' decision made**

By Leicester Extension Act, 1891, the borough had been enlarged to include certain areas called "the added areas." Appct., a freeman of the borough, & resident in one of the added areas, applied to the deputies for an allotment, but his application was refused on the ground that he was not resident within the borough as constituted at the time of the enactment of the Act of 1845. He appealed to the justices, who granted his application, but at the request of the deputies they stated a case under Summary Jurisdiction Act, 1879 (c. 49), s. 33:—*Held*: as by Interpretation Act, 1889 (c. 63), s. 13, the words "ct. of summary jurisdiction" includes justices sitting under any Acts other than the Summary Jurisdiction Acts, the justices here formed a ct. of summary jurisdiction from which an appeal lay by a case stated under Summary Jurisdiction Act, 1879 (c. 49), s. 33.—**LEICESTER BOROUGH (DEPUTIES OF FREEMEN) v. HEWITT** (1893), 62 L. J. M. C. 51; 68 L. T. 201; 57 J. P. 344; 5 R. 211, D. C.

**Metropolitan Building Acts.**]—*See* METROPOLIS.

**Metropolitan Management Acts.**] *See* METROPOLIS.

**Public Health Acts.**]—*See* PUBLIC HEALTH.

**Merchant Shipping Act, 1894 (c. 60).** *See* SHIPPING.

**Friendly Societies Act, 1858 (c. 101).**] *See* FRIENDLY SOCIETIES, Vol. XXV., p. 326, Nos. 275, 276.

### SUB-SECT. 3.—DUTY OF JUSTICES.

#### A. In General.

*See* Summary Jurisdiction Act, 1857 (c. 43).

**1186. Whether objection must be formally taken—Matter going to root of jurisdiction.**]—A magistrate cannot refuse to state a case on the ground that an objection has not been formally brought to his notice, where the objection is of such a kind as goes to the root of the whole matters before him for adjudication, & one, therefore, which he must be presumed to have known.—*Ex p. MARKHAM* (1869), 21 L. T. 748; 34 J. P. 150; 18 W. R. 258.

**1187. Discretion of justice.**]—Appct. was called upon on June 26, 1909, at the instance of the chief constable of Liverpool, to show cause why he should not be ordered to find sureties to keep the peace & to be of good behaviour. The information of the chief constable stated that appct. had informed him that he intended to lead a parade of his Bible class through certain streets of Liverpool on Sunday, June 27, & that the chief constable apprehended & believed that if appct. did so the natural consequence would be a breach of the peace, riot, & disorder. Upon appct. undertaking at the hearing not to hold a procession on Sunday, June 27, he was released on bail. At the adjourned hearing on July 1, the chief constable expressed his willingness to withdraw the proceedings as the proposed object had been attained—viz. the prevention of the procession on June 27, but the magistrate refused to allow this unless appct. would enter into his own recognisances to keep the

peace & to be of good behaviour, & he made an order accordingly, or, in the alternative, that appct. should go to prison for four months. Appct. refused to enter into the recognisances. A rule *nisi* having been obtained calling upon the magistrate to show cause why he should not state a case, the magistrate filed an affidavit in which he stated that appct. had been twice previously directed to find sureties to keep the peace, that serious sectarian riots had taken place in Liverpool on June 5 & 20 in connection with processions of appct.'s Bible class, that the chief constable had reasonable grounds for anticipating a breach of the peace if the procession had taken place on June 27, that a few days previously appct. had, in addressing a meeting, used insulting language with reference to Roman Catholics, that between the date of granting the warrant against appct. & his decision he had had to hear charges against numbers of rioters animated by sectarian animosities, & that he could not use any discretion in favour of a person who had acted as appct. had done:—*Held*: the rule *nisi* must be discharged; the magistrate had ample grounds for saying that he would not be satisfied with anything less than appct. entering into his recognisances to be of good behaviour; & he was justified in refusing to state a case; even although the day of the intended parade had passed, the magistrate had, in the circumstances of the case, jurisdiction to make such an order.—*R. v. LITTLE & DUNNING, Ex p. WISE* (1909), 101 L. T. 859; 74 J. P. 7; 26 T. L. R. 8; 22 Cox, C. C. 225, D. C.

#### B. Point of Law Involved.

*See, generally*, Summary Jurisdiction Act, 1857 (c. 43), s. 4; Summary Jurisdiction Act, 1879 (c. 49), s. 33.

**1188. Justices bound to state a case.**]—*GREEN v. PENSAM* (1858), 22 J. P. Jo. 737.

**1189.** —.]—Justices under Summary Jurisdiction Act, 1857 (c. 43), are not bound to state & sign a case on demand, unless they think it involves some doubtful or difficult point of law.—*CRICK v. CRICK* (1858), 6 W. R. 594; 22 J. P. Jo. 368.

**1190.** —.]—*R. v. WATSON JJ.* (1884), 48 J. P. Jo. 149, D. C.

**1191.** —.]—*R. v. PRIESTLEY* (1885), 49 J. P. Jo. 148, D.

**1192.** —.]—A police magistrate, acting under Metropolis Management Act, 1855 (c. 120), s. 129, decided that certain ashes from the furnaces of an hotel were not "refuse of trade" within the sect., & declined to state a case on the ground that the decision was "final & conclusive" & no point of law arose:—*Held*: in the circumstances, there was a question of law upon the construction of sect. 129, & the magistrate was not entitled to refuse to state a case.—*R. v. BRIDGE* (1890), 24 Q. B. D. 609; 59 L. J. M. C. 49; 62 L. T. 297; 54 J. P. 629; 38 W. R. 464; 17 Cox, C. C. 66, D. C.

*Annotations*:—**Appld.** *Goodwin v. Sheffield Corpn.*, [1902] 1 K. B. 629. **Consd.** *Kydd v. Liverpool Watch Committee*, [1907] 2 K. B. 591. **Distd.** *Westminster Corpn. v. Gordon Hotels*, [1907] 1 K. B. 910; *Wills v. McSherry*, [1914] 1 K. B. 616. **Refd.** *Manchester Profiteering Committee v. Samuel* (1920), 89 L. J. K. B. 684.

**1193. What amounts to point of law—Decision founded on decision of High Court from which no**

(1907), 42 N. S. R. 180.—**CAN.**

—.]—There is no authority which enables a magistrate to state a case for the opinion of the ct. in prosecutions under Liquor Act (1901) for offences in respect of which there is no appeal.—*R. v. MACDONALD*

(Alta.), [1922] 2 W. W. R. 166; 69 D. L. R. 251; 37 Can. Crim. Cas. 298.—**CAN.**

**q.** — *Conviction for keeping disorderly house.*]—*R. v. DAVIDSON* (Alta.), [1917] 2 W. W. R. 718; 35 D. L. R. 94; 28 Can. Crim. Cas. 56.—**CAN.**

### PART XIII. SECT. 2, SUB-SECT. 3.—B.

**1188 i. Justices bound to state a case.**]—*R. v. LEE WING KING* (Ont.) (1922), 37 Can. Crim. Cas. 16.—**CAN.**

**r. What amounts to point of law.**]—Where justices in petty sessions decide that complainant being a known agent may sue for a debt due



*Sect. 2.—Appeal to High Court—Case stated: Sub-sect. 3, B., C., D., E. & F.; sub-sect. 4, A. (a)*

**appeal lies.**—A magistrate ought not to be ordered to state a case, upon the ground that his decision was erroneous in point of law, when he has decided in accordance with a previous decision of the Q. B. Div. upon the same point from which there was no right of appeal.—*R. v. SHIEL* (1900), 82 L. T. 587; 16 T. L. R. 349; 19 Cox, C. C. 507, C. A.

*Annotation:—Mentd. Dicksee v. Hoskins* (1901), 85 L. T. 205.

### C. Question of Fact Involved.

*See, generally, Summary Jurisdiction Act, 1857 (c. 43), s. 4; Summary Jurisdiction Act, 1879 (c. 49), s. 33.*

**1194. Justices should refuse to state case.**—*CRICK v. CRICK*, No. 1189, *ante*.

**1195.** —.]—The ct. will not entertain an appeal from a decision of a magistrate, under Summary Jurisdiction Act, 1857 (c. 43), upon a question of fact.—*NEWMAN v. BAKER* (1860), 8 C. B. N. S. 200; 141 E. R. 1142.

*Annotation:—Refd. Shiel v. Sunderland Corpn.* (1861), 6 H. & N. 796.

**1196.** —.]—A. was committed by the justices for deserting his wife & family. It appeared that they had been known as man & wife for twenty years, & their daughter, aged thirty-seven, said she had always looked upon them as married; he had compromised a previous charge of the same nature by agreeing to pay 5s. a week. In 1858 A. was married to another woman, was charged with bigamy & discharged. On the hearing of the charge of desertion, it was contended that there was no proof of deft.'s marriage; it was then proposed to call the woman, but he objected to this on the ground that her evidence was not admissible. The justices committed A., & refused to grant a case for the opinion of this court:—*Held*: they had well determined.—*R. v. YEOMANS* (1860), 1 L. T. 369; 24 J. P. 149.

**1197.** —.]—Justices are not bound to state a case under Summary Jurisdiction Act, 1857 (c. 43), when the application discloses no point on which a case ought to be granted.—*R. v. RUTLANDSHIRE JJ.* (1866), 13 L. T. 722.

**1198.** —.]—*Re BASINGSTOKE SCHOOL* (1877), 41 J. P. Jo. 118, D. C.

**1199.** —.]—*R. v. WELBY* (1883), 47 J. P. Jo. 405, D. C.

**1200.** —.]—The G. road was a lane 340 feet long; there were no buildings on either side of it, except four houses at one part of it, & the land was bounded on the north & south by back gardens & the backs & sides of houses. In proceedings taken by the Fulham Board of Works for the paving of the lane as a "new street" within the meaning of Metropolis Management Acts, the magistrate held that the lane was not a "street" within the above Acts, & refused to state a case under Summary Jurisdiction Act, 1857 (c. 43), as he considered the question one of fact:—*Held*: the question whether the lane was a "street" or not was a question of fact & not of law, & the magistrate could not be compelled to

to his principal such a decision is one which involves an important question or principle of law within Justices Act, 1898, s. 2.—*BEVAN v. MOORE* (1899), 24 V. L. R. 634, 792.—**AUS.**

### PART XIII. SECT. 2, SUB-SECT. 3.—C.

**1194 i. Justices should refuse to state case.**—*R. v. TAYLOR, Ex p. LEWIS* (1879), 5 V. L. R. (L.) 108.—**AUS.**

**1194 ii.** —.]—*RITCHIE v. PROUD-FOOT*, Mac. 1098.—**N.Z.**

### PART XIII. SECT. 2, SUB-SECT. 3.—D.

**1204 i. Justices may refuse to state a case—Necessity to give certificate.**—When giving a certificate under Justices of the Peace Act, 1908, s. 294, a justice should state specifically that he is of opinion that the application is merely

state a case.—*R. v. SHEIL* (1884), 50 L. T. 590; 49 J. P. 68, D. C.

**1201.** —.]—*Ex p. HAWKE* (1894), 10 T. L. R. 667, D. C.

**1202.** —.]—Resps. F. & B., were charged with wilfully & falsely pretending to be respectively doctors of medicine, contrary to Medical Act, 1858 (c. 90), s. 40. In F.'s case, the only proof of the charge offered was a copy of the Medical Register for the year, in which her name did not appear, & the evidence of the informant, a retired doctor of medicine, to whom she gave a medical certificate signed with the letters M.D. after her name. She had a degree of M.D., of the University of Zurich, 1877, in respect of which she had at one time been registered. In B.'s case, the only proof was a copy of the Medical Register for the year, in which B.'s name did not appear, & the evidence of the same informant, who had twice consulted B. & received from him, for payment, medical advice & medicine, & an unsigned certificate. In B.'s handbills, & on the window blinds of his place of business, he was described as "Dr. B., M.D., U.S.A.," & in his consulting room was hung up what purported to be a diploma of some American university. The magistrate dismissed the summons in either case, on the ground that there was no proof of any wilful & false pretence:—*Held*: the magistrate could not be called upon to state a case, as his determination had proceeded solely on a question of fact.—*R. v. LEWIS & FRICKHART, R. v. LEWIS & BRIDGWATER* (1896), 60 J. P. 392, 433; 12 T. L. R. 415; 40 Sol. Jo. 515, D. C.

**1203.** —.]—A railway co. acquired a piece of land solely for the purpose of their railway & works, but for the time it was used as garden ground for which the railway co. received rent. the justices found as a fact that the land was not used by the railway co. solely or in any way or at all as a part of their railway or works, & that therefore the co. were not entitled to the exemption provided by 55 & 56 Vict. c. 57, s. 22:—*Held*: this was a question of fact on which there was evidence for the justices, & the ct. would not grant a writ of *mandamus* for them to state a case.—*R. v. JONES & BARRY URBAN DISTRICT COUNCIL, Ex p. MEIN* (1907), 96 L. T. 723; 71 J. P. 326; 5 L. G. R. 722, D. C.

*See, also, Sub-sect. 6, B. & C., post.*

### D. Application Frivolous.

*See Summary Jurisdiction Act, 1857 (c. 43), s. 4.*

**1204. Justices may refuse to state a case—Necessity to give certificate.**—Sect. 4 [20 & 21 Vict. c. 43] provides that if the justices be of opinion that the application is merely frivolous, but not otherwise, they may refuse to state a case, & shall, on the request of applt., sign & deliver to him a certificate of such refusal. In this case the justices were in this dilemma—they ought either to have stated a case or to have given a certificate that the point was frivolous (*RIDLEY, J.*).—*R. v. BELL, ETC. JJ., Ex p. FLINN & SONS* (1899), 15 T. L. R. 487, D. C.; *subsequent proceedings, sub nom. Ex p. FLINN & SONS* (No. 2), [1899] 2 Q. B. 607, D. C.

frivolous & that he refuses to state a case on that ground.—*KERRIGAN v. HUTCHISON* (1914), 34 N. Z. L. R. 503.—**N.Z.**

**t.** —.]—The only power a magistrate has to refuse to state a case is that conferred by Justices Act, s. 103. Under that section he may refuse if, in his opinion, the application is frivolous.—*Ex p. HENDERSON*, 42 N. S. W. W. N. 72.—**AUS.**

*E. Application by Attorney-General.*

See Summary Jurisdiction Act, 1857 (c. 43), s. 4.

1205. Justices bound to state a case.]—S. was summoned at the instance of an officer of the Inland Revenue to recover a penalty imposed by Medicines Stamp Act, 1812 (c. 150), s. 2, in respect of the sale unstamped of a box of lozenges called "Pure Gum Pastilles," when the justices dismissed the summons. On an application to them to state & sign a case for the opinion of the High Ct., the justices refused on the ground that the application was frivolous under Summary Jurisdiction Act, 1857 (c. 43), s. 4. Subsequently, on motion being made on behalf of the A.-G. for a rule to the justices to state & sign a case, the ct. made the rule absolute.—*R. v. SHARPE* (1902), 67 J. P. 181, D. C.

*F. Enforcement of Duty.*

See, generally, Sect. 3, post.

1206. By rule in nature of mandamus—Ordering justices to state case.]—*R. v. ALLEN*, No. 1177, ante.

1207. When rule granted—Determination wrong on face of proceedings.]—To enable the ct. to interfere it must appear that the determination of the justices was wrong.—*R. v. MACCLESFIELD JJ.* (1860), 2 L. T. 352.

1208. — Discretion of court—Justices' decision virtually correct.]—The High Ct. has jurisdiction under Summary Jurisdiction Act, 1857 (c. 43), s. 5, to determine whether it is proper to order the justices to state a case, & therefore in a case where the justices have acquitted but ought to have convicted with a nominal penalty the High Ct. is not compelled to order the justices to state a special case.—*R. v. DAVEY*, [1899] 2 Q. B. 301; 80 L. T. 798; 15 T. L. R. 344; 19 Cox, C. C. 365; *sub nom. R. v. DAVEY, Ex p. BISHOP*, 68 L. J. Q. B. 675; 63 J. P. 515; 43 Sol. Jo. 478, D. C.

1209. To what court application should be made.]—An application for a rule calling upon justices to show cause why a case should not be stated under Summary Jurisdiction Act, 1857 (c. 43), should be made to the Ct. of Q. B. Div., & not to the Div. Ct. of Appeal.—*Re ELLERSHAW, Ex p. LONGBOTTOM* (1876), 1 Q. B. D. 481; 45 L. J. M. C. 163; 2 Char. Pr. Cas. 114; 40 J. P. Jo. 342.

## SUB-SECT. 4.—PROCEDURE.

*A. Application to Justices.**(a) In General.*

1210. Strict compliance with Summary Jurisdiction Rules, 1886, r. 18—Whether condition precedent to right of appeal.]—A court of summary jurisdiction has no power to state a special case under Summary Jurisdiction Act, 1879 (c. 49), s. 33, unless an application has been made to the ct. in writing, & unless a copy of such application has been left with the clerk of the ct. within seven days from the date of the proceeding to be questioned, according to above rule.—*SOUTH STAFFORDSHIRE WATERWORKS CO. v. STONE* (1887), 19 Q. B. D. 168; 56 L. J. M. C. 122; 57 L. T. 368;

51 J. P. 662; 36 W. R. 76; 16 Cox, C. C. 300, D. C.

Annotations:—*Folld. Lockhart v. St. Albans Corpn.* (1888), 21 Q. B. D. 188; *Westmore v. Paine*, [1891] 1 Q. B. 482; *R. v. London (Lord Mayor) & Northfleet White Lead Co.* (1893), 9 T. L. R. 426.

1211. — — —.]—*LOCKHART v. ST. ALBANS CORPN.*, No. 1217, post.

1212. — — —.]—By Summary Jurisdiction Rules, 1886, r. 18, an application to a ct. of summary jurisdiction under Summary Jurisdiction Act, 1879 (c. 49), s. 33, to state a special case shall be made in writing. Applt. having been convicted by a ct. of summary jurisdiction consisting of five justices, made an application in writing for a case to two only of such justices, who stated & signed the case:—*Held*: applt. had not complied with the directions of the rules under Summary Jurisdiction Act, 1879 (c. 49), s. 33, & there was consequently no power to state the case.—*WESTMORE v. PAINE*, [1891] 1 Q. B. 482; 60 L. J. M. C. 89; 64 L. T. 55; 55 J. P. 440; 39 W. R. 463; 7 T. L. R. 214; 17 Cox, C. C. 244, D. C.

Annotation:—*Consd. R. v. Stoke-on-Trent JJ.*, [1926] 2 K. B. 461.

1213. — — —.]—*R. v. LONDON (LORD MAYOR) & NORTHFLEET WHITE LEAD CO.* (1893), 9 T. L. R. 426, D. C.

1214. — — —.]—*LANE v. RENDALL*, as reported in [1899] 2 Q. B. 673.

Annotation:—*Mentd. L. C. C. v. Payne*, [1904] 1 K. B. 191.

See, now, Summary Jurisdiction Rules, 1915, r. 52.

1215. Must be in writing.]—*Qu.*: where a case is applied for under Summary Jurisdiction Act, 1857 (c. 43), s. 2, whether the application to the justices must be in writing.—*POTTON (CHURCHWARDENS) v. BROWN* (1864), as reported in 28 J. P. 408.

Annotation:—*Consd. South Staffordshire Waterworks Co. v. Stone* (1887), 56 L. J. M. C. 122.

1216. — — —.]—*SOUTH STAFFORDSHIRE WATERWORKS CO. v. STONE*, No. 1210, ante.

1217. — — —.]—The ct. has no jurisdiction to entertain a special case stated under Summary Jurisdiction Act, 1879 (c. 49), s. 33, unless the directions given by Summary Jurisdiction Rules, 1886, r. 18, have been complied with.

Therefore in a case where no notice of application for the case in writing had been given to the justices making the order appealed against, though a notice of application in writing had been served on their clerk:—*Held*: there was no power to state a case, & the appeal must be dismissed.—*LOCKHART v. ST. ALBANS CORPN.* (1888), 21 Q. B. D. 188; 57 L. J. M. C. 118; *sub nom. RUTTER v. ST. ALBANS CORPN.*, *LOCKHART v. ST. ALBANS CORPN.*, 52 J. P. 420; 36 W. R. 800, C. A.

Annotations:—*Folld. Westmore v. Paine*, [1891] 1 Q. B. 482. *Refd. R. v. Lincolnshire Appeal Tribunal, Ex p. Stubbins*, [1917] 1 K. B. 1.

*(b) Time for.*

See Summary Jurisdiction Rules, 1915, r. 52.

1218. Service of application.]—*R. v. KNILL* (1893), 57 J. P. Jo. 277.

Annotation:—*Appld. R. v. Stoke-on-Trent JJ.*, [1926] 2 K. B. 461.

## PART XIII. SECT. 2, SUB-SECT. 3.—F.

*a. Application to Supreme Court.*—If a justice refuses to state a case under Justices of the Peace Act, 1908, s. 294, the only remedy open to applt. is an application to the Supreme Ct. under sect. 295 & a writ of mandamus will not lie.—*KERRIGAN v. HUTCHISON* (1914), 34 N. Z. L. R. 503.—N. Z.

## PART XIII. SECT. 2, SUB-SECT. 4.—A. (a).

*b. Strict compliance with provisions of code—Whether condition precedent to right of appeal.*—*R. v. EARLEY* (No. 2) (N. W. T.) (1906), 3 W. L. R. 193.—CAN.

*c. — — —.]*—A party applying to a justice for a stated case must

comply strictly with Criminal Code, s. 761, & the Rules of Ct. made in that behalf under Criminal Code, s. 576. The provisions of said sects. are not merely directory.—*PERRITT v. KEILLY*, [1921] 3 W. W. R. 333; 62 D. L. R. 299; 35 Can. Crim. Cas. 401; 14 Sask. L. R. 457.—CAN.

1215 i. Must be in writing.]—An application by telegram to a justice



*Sect. 2.—Appeal to High Court—Case stated: Sub-sect. 4, A. (b), (c) & (d), & B. (a) & (b).]*

**1219.** —.]—Appct., against whom a bastardy order had been made by resp. justices, left with the clerk of the justices within seven clear days a written application to the justices to state a case, but did not leave therewith copies for each of the justices as required by Summary Jurisdiction Rules, 1915, r. 52, which provides: "An application to a ct. of summary jurisdiction under Summary Jurisdiction Act, 1879 (c. 49), s. 33, to state a special case shall be made in writing & shall be left with the clerk of the ct. at any time within seven clear days from the date of the proceedings to be questioned, & there shall also be left with him a copy of such application for each of the justices constituting such ct. which shall be duly forwarded by him to each of the said justices. . . ." The justices, being informed that appct. had gone to Canada, declined to state a case without additional security for costs. Appct. then obtained a rule *nisi* for an order to the justices to state a case on the ground that they had no jurisdiction to require additional security: —*Held*: the limitation of seven clear days in r. 52 applied not merely to the application to state a case but also to the compliance with the

this respect was a condition precedent to the jurisdiction of the justices to state a case, where there had not been such compliance the ct. ought in its discretion not to order the justices to state a case & the rule *nisi* must be discharged —

*sub nom.* R. v. STROKE-ON-TRENT JJ., HOUGH, 135 L. T. 122; 90 J. P. 144; 568, D. C.

*Annotation*:—*Consd.* R. v. Stoke-on-Trent JJ., [1926] 2 K. B. 461.

**1221.** —.]—R. v. STROKE-ON-TRENT JJ., No. 1219, *ante*.

**1222. Limitation of time—Sunday to be included.**—Sunday is to be computed in the three days allowed for an application to justices to state a case for the opinion of one of the superior cts. under Summary Jurisdiction Act, 1857 (c. 43), s. 2, although it be the last day.—PEACOCK v. R. (1858), 4 C. B. N. S. 264; 27 L. J. C. P. 224; 31 L. T. O. S. 101; 22 J. P. 403; 6 W. R. 517; 140 E. R. 1085.

*See, also*, Morris v. Barrett (1859), 7 C. B. N. S. 264; 27 L. J. C. P. 224; 31 L. T. O. S. 101; 22 J. P. 403; 6 W. R. 517; 140 E. R. 1085. *sub nom.* R. v. STROKE-ON-TRENT JJ., HOUGH, 135 L. T. 122; 90 J. P. 144; 568, D. C.

of the peace to state & sign a case under Justices of the Peace Act, 1882, s. 236, is a sufficient application in writing under that sect.—FOUNTAIN v. McDONELL (1904), 23 N. Z. L. R. 913.—N. Z.

PART XIII. SECT. 2, SUB-SECT. 4.—A. (c).

PART XIII. SECT. 2, SUB-SECT. 4.—A. (d).

**e. Recognisance given before case delivered.**—A recognisance for appeal, may be entered into at any time before the special case is stated & delivered.—R. v. WYATT, *Ex p.* RUTHERFORD (1877), 3 V. L. R. (L.) 126.—AUS.

**1223.** —.]—Where the last of the three days allowed for an application to justices to state a case under Summary Jurisdiction Act, 1857 (c. 43), s. 2, falls on a Sunday, it is to be computed as one of the days, & an application made on the Monday is too late.—WYNNE v. RONALDSON (1865), 12 L. T. 711; 29 J. P. 566; 13 W. R. 899.

(c) *Service of Application.*

**1224. Service of copies—Service on justices or justices' clerk.**—Where an application is made under Summary Jurisdiction Act, 1879 (c. 49), s. 33, to a ct. of summary jurisdiction to state a special case, it is a sufficient compliance with the rule dated Mar. 20, 1906, made in substitution of Summary Jurisdiction Rules, 1886, r. 18, if the previous practice of serving a copy of the application on each justice personally is followed instead of leaving the justices' copies with the clerk of the ct.—R. v. WOODCOCK, [1907] 2 K. B. 104; 76 L. J. K. B. 683; *sub nom.* R. v. WOODCOCK, *Ex p.* PENNINGTON, 96 L. T. 672; 71 J. P. 241; 21 Cox, C. C. 429, D. C.

*See, also*, Nos. 1218, 1219, *ante*.  
now, Summary Jurisdiction Rules,

(d) *Recognisances.*

*See, generally*, Summary Jurisdiction Act, 1857 (c. 43), s. 3; Summary Jurisdiction Rules, 1915, rr. 28, 52.

**1225. Recognisance given before case delivered—& within three days from determination of case.**—Where justices convict, & upon being immediately thereupon applied to for a case, accede at once, it is sufficient, under Summary Jurisdiction Act, 1857 (c. 43), s. 3, that applt. enter into a recognisance within three days from the determination & before a case is stated & delivered to him, though the recognisance be not entered into "at the time of making such application."—CHAPMAN v. SON (1858), 1 E. & E. 25; 28 L. J. M. C. 30; 32 L. T. O. S. 89; 23 J. P. 228; 5 Jur. N. S. 134; 120 E. R. 817.

*Annotations*:—*Refd.* Simpson v. Johnson (1859), 23 J. P. Jo. 756; Ashdown v. Curtis (1862), 26 J. P. 312; Stanhope v. L. J. M. C. 100.

**1226. — Though not within the three days.**—The recognisances required to be given by applt. on a case stated by justices, under Summary Jurisdiction Act, 1857 (c. 43), s. 3, need not be given within the three days mentioned in s. 2; it is enough if this is done before the case is given out by the justices.—STANHOPE v. THORSBY (1866), L. R. 1 C. P. 423; Har. & Ruth. 459; 35 L. J.

that applt. do "personally" appear, & the omission of the word "personally" renders the recognisance void.—R. (CORBALLIS) v. SCHICK (Sask.), [1921] 1 W. W. R. 225; 55 D. L. R. 583.—CAN.

58 D. L. R. 239.—CAN.

**m. When recognisance estreated.**—R. v. MANNING (1901), 22 J. P. 227.

**n. Jurisdiction to take—Whether presumed.**—The Ct. of K. B. will presume that a magistrate who takes a recognisance to appear in that ct., had authority or information for so doing.—R. v. COLCLOUGH (1800), Rowe, 470.—IR.

**o. Deposit in lieu of recognisance.]**

**f. Recognisance given by town or city.**—A recognisance given by town or city is sufficient to bind municipality.—THOMAS v. HALL (1904), 7 W. A. L. R. 110.—AUS.

**g. Recognisance given after case opened.**—BESTWICK v. BELL (1889), 1 Terr. L. R. 193.—CAN.

**h. Form.**—A recognisance entered into under Criminal Code, s. 880, is bad if the word "personally" omitted from the condition to appear & try the appeal & abide the judgment of the ct. thereupon.—R. v. WEDDERBURN, *Ex p.* SPRAGUE (1903), 36 N. B. R. 213.—CAN.

**k. —.]**—A recognisance under sect. 750 of the Code to secure the appearance of an applt. on an appeal from a summary conviction adjudging imprisonment, must be conditioned

M. C. 182 ; 14 L. T. 332 ; 30 J. P. 342 ; 12 Jur. N. S. 374 ; 14 W. R. 651.

*Annotation* :—*Reid v. Kettle, Ex p. Ellis*, [1905] 1 K. B. 212.

**1227. Recognisance given after case delivered.]—**Application to justices to state a case was made on Sept. 21, 1893. The case was not stated till Dec. 20, following, & applt. did not enter his recognisance till Dec. 21 :—*Held* : that there had been no compliance with rule 18. of the rules of 1886 under Summary Jurisdiction Act, 1879 (c. 49).—*WALKER v. DELACOMBE* (1894), 63 L. J. M. C. 77 ; 58 J. P. 88.

**1228. Whether fresh recognisance required—Bankruptcy of appellant & death of surety—Before case delivered.]—**Applt. having been convicted at a metropolitan police ct. of an offence against London Building Act, 1894 (c. ccxiii), applied to the magistrate to state a case, & his application was refused. Applt. then entered into a recognisance with one surety with the consent of the magistrate under Summary Jurisdiction Act, 1857 (c. 43), s. 3, to prosecute the appeal & applied to & obtained from the High Ct. a rule absolute for a *mandamus* to the magistrate to state the case. In the meantime applt. had been adjudicated bkpt., & his surety had died. The magistrate stated & signed the case in pursuance of the order of the ct., but declined to deliver it up until applt. had entered into a fresh recognisance :—*Held* : the recognisance previously entered into was valid, & the magistrate had no authority to require a fresh recognisance.—*R. v. KETTLE, Ex p. ELLIS*, [1905] 1 K. B. 212 ; 74 L. J. K. B. 254 ; 92 L. T. 59 ; 69 J. P. 55 ; 53 W. R. 364 ; 21 T. L. R. 151 ; 3 L. G. R. 112 ; 20 Cox, C. C. 753, D. C.

**1229. Appeal by corporation—Recognisance entered into by clerk—Must be made on behalf of corporation—& charge corporate property.]—**Where, on a case stated by justices, applts. are a corpn., a recognisance entered into by their clerk, which does not show that it was entered into on their behalf & that it is their property which is made liable, does not satisfy Summary Jurisdiction Act, 1857 (c. 43), s. 3.—*LEYTON URBAN DISTRICT COUNCIL v. WILKINSON* (1926), 43 T. L. R. 35 ; 70 Sol. Jo. 1069 ; 90 J. P. Jo. 600, D. C.

#### B. Form of Special Case.

##### (a) In General.

*See, generally*, R. S. C., Ord. 34 ; & C. O. R., r. 129, 131, 132.

**1230. What should be set forth—Facts which have arisen—& decision thereon.]—**In stating a case for the opinion of the High Ct. under Local Government Act, 1888 (c. 41), s. 29, the facts which

—Deft. deposited a marked cheque for \$100 with the convicting magistrate :—*Held* : the recognisance was a condition precedent to the jurisdiction of the ct. to hear the appeal, & no substitute was permissible.—*R. v. GEISER* (1901), 21 C. L. T. 604 ; 8 B. C. R. 169.—*CAN.*

*p.* —.—*R. v. NEUBERGER* (1902), 9 B. C. R. 272.—*CAN.*

*q.* —.—*FOUNTAIN v. McDONELL* (1904), 23 N. Z. L. R. 913.—*N.Z.*

*r. Production—Whether evidence that recognisance given within proper time.]—*On an objection that a recognisance had not been entered into within the time prescribed by Justices of the Peace Act, s. 292 :—*Held* : production of the recognisance as transmitted by the registrar under sect. 325 is not proof of the circumstances in which it was given & does not relieve resp. of his obligation.—*PURVES v. INGLIS* (1915), 34 N. Z. L. R. 1051.—*N.Z.*

*t. Duty of justices to fix amount.]—*Where an appeal is taken by way of stated case under Summary Jurisdiction Act, 1908, s. 62, from a ct. of summary criminal jurisdiction, the ct. must immediately fix the amount of consignment or caution to enable applt. to comply timeously with the requirements of the sect.—*MACKINTOSH v. WOOSTER*, [1919] S. C. (J.) 15.—*SCOT.*

*a.* —.—*Excessive amount demanded.]—**LEARMOUTH v. SALMON*, [1926] S. C. (J.) 103.—*SCOT.*

#### PART XIII. SECT. 2, SUB-SECT. 4.—B. (a).

**1231 i. What should be set forth—Conclusion of fact—& not the evidence.]—**In stating a case under the statute, the findings & conclusion of the magistrate upon the whole evidence must be set forth, & not merely the evidence.—*R. v. GAINES* (1908), 6 E. L. R. 342 ; 43 N. S. R. 253.—*CAN.*

have actually arisen, & the decision thereon, must be set forth ; & the High Ct. will not answer abstract questions as to the construction of the statute, unless arising out of facts which have actually occurred.—*Re CARDIGAN COUNTY COUNCIL* (1890), 54 J. P. 792.

**1231. — Conclusion of fact—& not the evidence.]—**Where by statute an appeal by special case is confined to matters of law, the case should set forth the conclusion of fact drawn by the ct. below, & not the evidence itself.—*Ex p. WHITE* (1842), 3 Mont. D. & De G. 7.

**1232. — — — — —.]—**In stating a case for the High Ct., justices should state facts which they consider to have been proved, & not merely evidence from which facts may be inferred. *Semble* : if this rule is disregarded, the ct. will, in future, remit the case for restatement.—*STAR TEA CO., LTD. v. NEALE* (1909), as reported in 8 L. G. R. 5, D. C.

**1233. Title of affidavits.]—**When a case stated & signed by justices is transmitted to the superior ct., all affidavits made in the matter must be entitled in the names of the parties, even though the affidavit is made with a view to show that the appeal has been wrongly received & set down in the paper.—*JOHNSON v. SIMPSON* (1859), 1 L. T. 60 ; 23 J. P. 775.

**1234. Form of appendix—Evidence & documents set out at length.]—***HADLEY v. PERKS*, No. 322, *ante*.

**1235. Shorthand notes of proceedings before justices—Stated to be deemed part of case—Whether entertained by court.]—**The ct. refused to look at shorthand notes of proceedings before justices annexed to a special case stated by them, although the case contained a paragraph stating that the shorthand notes were to be deemed part of the case.—*NEEDHAM & CO., LTD. v. WORCESTERSHIRE COUNTY COUNCIL* (1909), as reported in 7 L. G. R. 595.

*Annotation* :—*Mentd. Kyle v. Jewers* (1914), 84 L. J. K. B. 255.

#### (b) Signature of Case.

**1236. Signature of all justices necessary—Whether assenting to decision or not.]—**A case stated under Summary Jurisdiction Acts for the opinion of the High Ct. should be signed by all the justices taking part in the hearing & determination of the ct. of summary jurisdiction, whether assenting to or dissenting from the decision of that ct.—*BARKER v. HODGSON* (1904), 68 J. P. 310, D. C.

**1237. — Extension of time granted.]—***NANTYGLO URBAN DISTRICT COUNCIL v. EBLEY* (1905), 69 J. P. Jo. 40, D. C.

#### PART XIII. SECT. 2, SUB-SECT. 4.—B. (b).

**1236 i. Signature of all justices necessary—Whether assenting to decision or not.]—**Application to state a case under Justices of the Peace Statute, 1865, s. 150, may be made to a justice who has, at the hearing of the complaint, dissented from the finding of the majority of the Bench, if such justice duly forwards such case to the other justices who decided the case, & if they sign it.—*KEW LOCAL BOARD OF HEALTH v. WHIDYCOMBE* (1886), 12 V. L. R. 347.—*AUS.*

**1236 ii. — — — — —.]—**All the justices who took part in the adjudication must sign the special case, even though the determination is by a majority only of such justices.—*SHERIDAN v. WILLMOTT* (1911), 11 S. R. N. S. W. 494 ; 28 N. S. W. N. 155.—*AUS.*

*b. Signature by surviving justice only.]—**KEAN v. ROBINSON*, [1910] 2 I. R. 306, 323.—*IR.*



*Sect. 2.—Appeal to High Court—Case stated: Subsect. 4, B. (b), C., D. (a), (b), (c) & (d), & E. (a).]*

1238. ———.]—WALKER v. CUMMINGS (1912), as reported in 28 T. L. R. 442.

1239. ———.]—HAYCOCK v. JOEL (1924), 88 J. P. Jo. 717.

1240. **Signature after resignation—Purely ministerial act.**—The proceedings in the police ct. took place before the stipendiary had ceased to hold that office. The act of signing the case was a purely ministerial act & the ct. would hear the appeal (DARLING, J.).—GROCOCK v. GROCOCK, [1920] 1 K. B. 1; 88 L. J. K. B. 1068; 121 L. T. 466; 83 J. P. 185; 35 T. L. R. 509; 63 Sol. Jo. 627; 17 L. G. R. 623; 26 Cox, C. C. 485.

*Annotation:—Mentd.* Colchester v. Peck, [1926] 1 K. B. 366.

### C. Time for Stating Special Case.

See Summary Jurisdiction Rules, 1915, r. 52.

1241. **Rule only directory—As regards the justices.**—H. demanded from justices a special case under Summary Jurisdiction Act, 1879 (c. 49), s. 33, on Sept. 29. Applt., on getting a draft case, asked for alterations, & without any fault of his, the case was not finally stated till Feb. 19, when he duly lodged the case in the Crown Office. Resps. moved to strike out the case as it had not been stated within three months pursuant to Summary Jurisdiction Rules, r. 18:—*Held*: the three months for stating the case were not a condition precedent, but only directory, & the ct. had jurisdiction to hear the case.—HUGHES v. WAVERTREE LOCAL BOARD (1894), 58 J. P. 654; 10 T. L. R. 357, D. C.

*Annotations:—Refd.* Lane v. Rendall, [1899] 2 Q. B. 673. *Mentd.* Walker v. Cummings (1912), 28 T. L. R. 442; R. v. Lincolnshire Appeal Tribunal, *Ex p.* Stubbins, [1917] 1 K. B. 1.

### D. Transmission of Case to High Court.

#### (a) In General.

See, generally, Summary Jurisdiction Act, 1857 (c. 43), s. 2.

1242. **Summary Jurisdiction Act, 1857 (c. 43), s. 2—Not superseded by Crown Office Rule, 141.**—PHILLIPS v. JONES (1893), 57 J. P. Jo. 84.

1243. ———.]—**Strict compliance therewith—Condition precedent to hearing of appeal.**—MORGAN v. EDWARDS, No. 1266, *post*.

1244. ———.]—Under above sect. applt. must within three days after receiving the case for the justices, transmit same to the ct. "first giving notice in writing of such appeal, with a copy of the case so stated & signed, to the other party to the proceeding":—*Held*: this is a condition precedent to the right to have the case set down for argument.—GLOUCESTER LOCAL BOARD OF HEALTH v. CHANDLER (1863), 32 L. J. M. C. 66; 7 L. T. 722; 27 J. P. 88.

*Annotation:—Mentd.* Crowther v. Boulton (1884), 13 Q. B. D. 680.

1245. ———.]—Where applt. has neglected to lodge a case stated by justices within the time specified by above sect., the ct. has power to grant the costs of a rule to show cause why it should not be struck out of the list.—GREAT NORTHERN & LONDON & NORTH WESTERN JOINT COMMITTEE v. INETT (1877), 2 Q. B. D. 284; 46 L. J. M. C. 237; 41 J. P. 710; 25 W. R. 584.

1246. ———.]—The ct. has no jurisdiction to hear an appeal from justices by case stated, unless the requirements of above sect.

have been complied with.—VERNEY v. FLETCHER (MARK) & SONS, LTD., [1909] 1 K. B. 444; 78 L. J. K. B. 292; 100 L. T. 348; 73 J. P. 131; 25 T. L. R. 248; 21 Cox, C. C. 783, D. C.

#### (b) When Transmission Complete.

1247. **Whether actual lodging in Crown Office essential—Delivery to office of court.**—Where a case has been stated & signed by justices & delivered to the party, who at once sends it to his London agent to be transmitted to the office of the superior ct., the statute [Summary Jurisdiction Act, 1857 (c. 43)] is not complied with unless the case has actually been delivered within three days to the office of the ct., though the town agent kept it by mistake. *Qu.*: whether if such a case is duly put into a regular course of transmission to the ct., *e.g.* by post, & does not reach it within time in consequence of something over which the sender has no control, this is a compliance with the statute.—*Re* BANKS v. GOODWIN (1863), 3 B. & S. 548; 1 New Rep. 316; 32 L. J. M. C. 87; 7 L. T. 740; 27 J. P. 404; 9 Jur. N. S. 891; 11 W. R. 309; 122 E. R. 206.

*Annotation:—Refd.* Mackinnon v. Clark, [1898] 2 Q. B. 251.

1248. ———.]—The transmission to the ct. of a case stated under Summary Jurisdiction Act, 1857 (c. 43), includes lodging the case in the Crown Office within the statutory period.—ASPINALL v. SUTTON, [1894] 2 Q. B. 349; 63 L. J. M. C. 205; 58 J. P. 622; 10 R. 465, D. C.

*Annotation:—Consd.* Mackinnon v. Clark (1897), 67 L. J. Q. B. 68.

1249. ———.]—**Reaching the building—By midnight of third day.**—TOWNSEND v. ARNOLD (1906), cited in 81 L. J. K. B. at p. 257; 76 J. P. at p. 69; *sub nom.* ARNOLD v. TOWNSEND, cited in 105 L. T. at p. 959; 22 Cox, C. C. at p. 639.

*Annotation:—Consd.* Holland v. Peacock (1911), 105 L. T. 957.

1250. ———.]—**Deposited in letter box of Law Courts—After office hours of third day.**—Under Summary Jurisdiction Act, 1857 (c. 43), s. 2, where a case is stated by a magistrate, applt. shall within three days after receiving the case transmit it to the Crown Office of the K. B. Div. A case was deposited in the letter box at the Royal Cts. of Justice on the third day, but at so late an hour that the case was not received at the Crown Office until the following day:—*Held*: Summary Jurisdiction Act, 1857 (c. 43), s. 2, had been complied with.—HOLLAND v. PEACOCK, [1912] 1 K. B. 154; 81 L. J. K. B. 256; 105 L. T. 957; 76 J. P. 68; 10 L. G. R. 123; 22 Cox, C. C. 636, D. C.

*Annotation:—Consd.* Retail Dairy Co. v. Clarke, [1912] 2 K. B. 388.

#### (c) Computation of Time.

See Summary Jurisdiction Act, 1857 (c. 43), s. 2; & generally, TIME.

1251. **Sundays to be included.**—PENNELL v. UXBRIDGE (CHURCHWARDENS), No. 1253, *post*.

1252. **Offices closed during holiday—Case transmitted first open day—Sufficient.**—Applt. having applied to justices to state a case under Summary Jurisdiction Act, 1857 (c. 43), received the case from them on Good Friday, & transmitted it to the proper ct. on the following Wednesday:—*Held*: as the offices of the ct. were closed from Friday until Wednesday, applt. had transmitted the case as soon as it was possible to do so, & therefore, had sufficiently complied with the requirements of Summary Jurisdiction Act, 1857

### PART XIII. SECT. 2, SUB-SECT. 4.—D. (a).

*o. Summary Convictions Act—Strict compliance therewith—Condition precedent to hearing of appeal.*—COOKSLEY v. NAKASHIBA (1901), 21 C. L. T. 492; 8 B. C. R. 117.—CAN.

## PART XIII.—APPEALS FROM COURTS OF SUMMARY JURISDICTION.

(c. 43), s. 2, which directs that the case shall be transmitted by applt. within three days after he has received it.—*MAYER v. HARDING* (1867), L. R. 2 Q. B. 410; *sub nom. Re MAYOR v. HARDING*, 9 B. & S. 27, n.; 16 L. T. 429; 31 J. P. 376; *sub nom. MEYER v. HARDING*, 15 W. R. 816; *subsequent proceedings, sub nom. MEYER v. HARDING*, 17 L. T. 140.

*Annotation*:—*Refd. Waterton v. Baker* (1868), L. R. 3 Q. B. 173.

**1253. When time begins to run—Receipt of case by attorney appearing at police court.**—(1) Sunday is not to be excluded in reckoning the three days within which a case granted under Summary Jurisdiction Act, 1857 (c. 43), s. 2, must, under that sect. be transmitted to the superior ct.

(2) Applt.'s London attorney instructed a local attorney to appear for him before justices; & the local attorney having conducted the case to the close, applt. himself applied to the justices for a case. A case having been granted, it was received from the justices by the local attorney on a Thursday, but was not transmitted to the Crown Office till the following Monday:—*Held*: the three days for the transmission to the Crown Office were to be reckoned from the time when the local attorney received the case; & such transmission on the Monday was too late.—*PENNELL v. UXBRIDGE (CHURCHWARDENS)* (1862), 31 L. J. M. C. 92; 5 L. T. 685; 26 J. P. 87; 8 Jur. N. S. 99; 10 W. R. 319.

*Annotations*:—*As to* (1) *Refd. Re Mayor v. Harding* (1867), 16 L. T. 429. *As to* (2) *Refd. Mackinnon v. Clark*, [1898] 2 Q. B. 251. *Generally, Mentd. Godman v. Crofton*, [1914] 3 K. B. 803.

**1254.** ———.]—*Re BANKS v. GOODWIN*, No. 1247, *ante*.

### (d) Costs.

**1255. Failure to transmit within time—Costs of obtaining rule to strike out.**—*GREAT NORTHERN & LONDON & NORTH WESTERN JOINT COMMITTEE v. INETT*, No. 1245, *ante*.

**1256.** ——— **Amended case.**—A case stated by justices under Summary Jurisdiction Act, 1857 (c. 43), was sent back to the justices for amendment. Applt. failed to transmit the amended case to the ct. within three days from receiving it, & the case therefore dropped:—*Held*: notwithstanding the case was dead, the ct. had jurisdiction to grant resp. his costs.—*CROWTHER v. BOULT* (1884), 13 Q. B. D. 680; 49 J. P. 135; 33 W. R. 150, D. C.

**Costs generally.**—*See* Sub-sect. 8, *post*.

### E. Notice of Appeal to Respondent.

#### (a) In General.

*See* Summary Jurisdiction Act, 1857 (c. 43), s. 2; C. O. R., 1906, r. 130.

**1257. Such notice condition precedent—To right to have appeal heard.**—By Summary Jurisdiction Act, 1857 (c. 43), s. 2, which gives power to justices to state a case for the opinion of the superior cts., it is enacted that applt. "shall within three days after receiving such case, transmit same to the ct. named in his application, first giving notice in writing of such appeal, with a copy of the case, so stated & signed," to resp.:—*Held*: the giving such notice with a copy of the case to resp., is a condition precedent to his right to have the case heard by the ct.—*WOODHOUSE v. WOODS* (1859), 29

L. J. M. C. 149; 1 L. T. 59; 23 J. P. 759; 6 Jur. N. S. 421.

*Annotations*:—*Apld. Morgan v. Edwards* (1860), 5 H. & N. 415. *Consd. Wills v. McSherry*, [1913] 1 K. B. 20. *Refd. Parkgate Iron Co. v. Coates* (1870), 39 L. J. C. P. 317.

**1258.** ———.]—*GLOUCESTER LOCAL BOARD OF HEALTH v. CHANDLER*, No. 1244, *ante*.

**1259.** ———.]—(1) The High Ct. has no jurisdiction to hear an appeal by way of case stated under Summary Jurisdiction Act, 1857 (c. 43), s. 2, unless applt. has given resp. notice in writing of the appeal with a copy of the case before transmitting the case to the High Ct.

(2) Applt. entered a special case stated by justices under Summary Jurisdiction Act, 1857 (c. 43), s. 2, & on the following day sent a copy of the case & notice of appeal to resp.:—*Held*: the sect. had not been complied with, & the case must be struck out.—*EDWARDS v. ROBERTS*, [1891] 1 Q. B. 302; 60 L. J. M. C. 6; 55 J. P. 439, D. C.

*Annotations*:—*As to* (1) *Consd. Wills v. McSherry*, [1913] 1 K. B. 20. *Refd. Anderson v. Reid* (1902), 86 L. T. 713; *Hollidge v. Ruislip-Northwood U. D. C.* (1912), 77 J. P. 126. *As to* (2) *Refd. Verney v. Fletcher* (1909), 73 J. P. 131; *Godman v. Crofton*, [1914] 3 K. B. 803.

**1260.** ———.]—*HILL v. WRIGHT & WILSON*, No. 1270, *post*.

**1261.** ——— **Disappearance of respondent.**—*FOSS v. BEST*, No. 1176, *ante*.

**1262.** ———.]—By Summary Jurisdiction Act, 1857 (c. 43), s. 2, either party, if dissatisfied with the determination of the justices, may apply for a case, & such party shall within three days after receiving the case, transmit same to the ct., "first giving notice in writing of such appeal, with a copy of the case so stated & signed to the other party."

Appls. duly delivered a copy of the case to resps.' solrs., but he did not with such copy give notice in writing of such appeal, & resps.' solrs. indorsed upon the case that they accepted service thereof on behalf of resps.:—*Held*: the giving of the notice of appeal was a condition precedent to the right of applt. to have his appeal heard, & the ct. had no jurisdiction to hear the appeal, notwithstanding that the case had been duly delivered to resps.' solrs., & a statement had been indorsed thereon by resps.' solrs. that they accepted service of the case on behalf of resps.—*RUST v. ST. BOTOLPH, BISHOPSGATE (CHURCHWARDENS & OVERSEERS)* (1906), 94 L. T. 575, D. C.

*Annotations*:—*Distd. Dickeson v. Mayes*, [1910] 1 K. B. 452. *Refd. Verney v. Fletcher* (1909), 73 J. P. 131.

**1263.** ———.]—*HOLLIDGE v. RUISLIP-NORTHWOOD URBAN DISTRICT COUNCIL*, No. 1274, *post*.

**1264. What documents should constitute notice—Copy of application & copy of case stated.**—Summary Jurisdiction Act, 1857 (c. 43), s. 2, provides that a party dissatisfied with the determination by justices of an information may apply to the justices to state a case, & such party shall "after receiving such case, transmit same to the ct. . . first giving notice in writing of such appeal, with a copy of the case so stated, to . . . resp.":—*Held*: applts., who sent to resp. a copy of their notice of application to the justices to state a case, & a copy of the case, had complied with the requirements of Summary Jurisdiction Act, 1857 (c. 43), s. 2, as to giving notice of appeal.—*DICKESON & CO. v. MAYES*, [1910] 1 K. B. 452; 79 L. J. K. B. 253; 102 L. T. 287; 74 J. P. 139; 26 T. L. R. 236, D. C.

## PART XIII. SECT. 2, SUB-SECT. 4.—E. (a).

**1257 i. Such notice condition precedent—To right to have appeal heard.**—*SOUTH DUBLIN UNION v. JONES* (1883),

12 L. R. Ir. 358.—IR.

**1264 i. What documents should constitute notice—Copy of application & copy of case stated.**—Service upon resp. of a copy of the case stated for

the superior ct. is not sufficient notice of appeal under 20 & 21 Vict. c. 43, s. 2; notice in writing of the appeal should be given.—*LITTLE v. DONNELLY* (1871) 1 R. 5 C. L. 1.—IR.



*Sect. 2.—Appeal to High Court—Case stated: Sub-sect. 4, E. (b) & (c), & F.; sub-sect. 5, A.]*

*(b) Sufficiency of Service of Notice.*

*See Summary Jurisdiction Act, 1857 (c. 43), s. 2.*

**1265. Respondent unable to be found—Service on respondent's solicitors within time—Service on respondent after time expired—No objection by respondent.]**—When a case is stated under Summary Jurisdiction Act, 1857 (c. 43), sect. 2, is satisfied if applt., within three days of his obtaining the case from the justice, seeks to find resp., but cannot do so, &, within such three days, gives notice to the attorney who represented resp. before the magistrate, &, after the expiration of the three days, gives notice to resp., who does not object. Under such circumstances, the ct. will hear applt. though resp. does not appear.—*SYRED v. CAR-RUTHERS* (1858), E. B. & E. 469; 27 L. J. M. C. 273; 23 J. P. 37; 6 W. R. 595; 120 E. R. 584.

*Annotations:—Distd. Hill v. Wright & Wilson* (1896), 60 J. P. 312. *Folld. Anderson v. Reid* (1902), 18 T. L. R. 463. *Distd. Foss v. Best*, [1906] 2 K. B. 105. *Consd. Wills v. McSherry*, [1913] 1 K. B. 20; *Godman v. Crofton*, [1914] 3 K. B. 803.

**1266. — Every effort made to serve respondent.]**—By Summary Jurisdiction Act, 1857 (c. 43), s. 2, which empowers justices to state a case for the opinion of the superior cts., it is enacted, that applt. "shall within three days after receiving such case transmit same to the ct. named in his application, first giving notice in writing of such appeal, with a copy of the case so stated & signed, to the other party":—*Held*: the transmitting the case to the ct., & the giving notice with a copy of the case to resp. within the time named, are conditions precedent to the right of applt. to have the case heard; & an objection arising from the omission to do so cannot be waived.

*Qu.*: whether it might not be sufficient, if applt. had done all in his power to comply with the statute, though he might have failed to give such notice & a copy of the case to resp. within the proper time, if such failure arose from resp. keeping out of the way.—*MORGAN v. EDWARDS* (1860), 5 H. & N. 415; 29 L. J. M. C. 108; 24 J. P. 245; 6 Jur. N. S. 379; 157 E. R. 1243.

*Annotations:—Refd. Stanhope v. Thorsby* (1866), L. R. 1 C. P. 423; *Re Mayor v. Harding* (1867), 16 L. T. 429; *Waterton v. Baker* (1868), L. R. 3 Q. B. 173; *Park Gate Iron Co. v. Coates* (1870), L. R. 5 C. P. 634; *Dowdeswell v. Francis* (1874), 22 W. R. 755; *South Staffordshire Waterworks Co. v. Stone* (1887), 56 L. J. M. C. 122; *Lockhart v. St. Albans Corpn.* (1888), 21 Q. B. D. 188; *Dickeson v. Mayes*, [1910] 1 K. B. 452; *Wills v. McSherry*, [1913] 1 K. B. 20. *Mentd. The Forest Queen* (1870), 40 L. J. Adm. 17.

**1267. — —.]**—No copy of the special case with notice in writing of the appeal had been given to resp., but every effort having been made to serve resp., & the ct. being satisfied that resp. knew about it, the ct. thereupon decided to hear the appeal.—*TEDDINGTON URBAN DISTRICT COUNCIL v. VILE* (1906), 70 J. P. 381; 4 L. G. R. 782, D. C.

**1268. — —.]**—*Foss v. BEST*, No. 1176, ante.

**1269. — — Service on respondents' solicitor within time.]**—Resps. to an appeal against a decision of justices by way of case stated were nine seamen, of whom all but one were foreigners. Applts.' solr. had made every effort to serve

resps. with notice in writing of the appeal together with a copy of the case as required by Summary Jurisdiction Act, 1857 (c. 43), s. 2, but had been unable to do so, as the whereabouts of resps. could not be ascertained, except that they were either at sea or abroad:—*Held*: notwithstanding the want of service the ct. in the circumstances had jurisdiction to hear the appeal.—*WILLS & SONS v. MCSHERRY*, [1913] 1 K. B. 20; 82 L. J. K. B. 71; 107 L. T. 848; 77 J. P. 65; 29 T. L. R. 48; 23 Cox, C. C. 254, D. C.; *subsequent proceedings*, [1914] 1 K. B. 616, D. C.

*Annotation:—Refd. Godman v. Crofton*, [1914] 3 K. B. 803.

**1270. Service only on respondents' solicitor.]**—(1) The ct. has no jurisdiction to hear an appeal against the decision of justices by way of case stated under Summary Jurisdiction Act, 1857 (c. 43), s. 2, unless applt. has given notice in writing of appeal together with copy of the case to resps.

(2) Such notice was sent only to resps.' solrs., & not to resps. themselves:—*Held*: insufficient.—*HILL v. WRIGHT & WILSON* (1896), 60 J. P. 312, D. C.

*Annotations:—As to (1) Refd. Rust v. St. Botolph, Bishops-gate* (1906), 94 L. T. 575. *As to (2) Consd. Wills v. McSherry*, [1913] 1 K. B. 20; *Godman v. Crofton*, [1914] 3 K. B. 803. *Refd. Anderson v. Reid* (1902), 18 T. L. R. 463; *Verney v. Fletcher* (1909), 73 J. P. 131.

**1271. — No longer representing him—Respondent unable to be served through absence at sea.]**—The notice of appeal & copy of the case stated by the magistrate could not be personally served on deft., who was a master mariner & was at sea, within three days after the receiving of the case by applt., but within the three days applt. served the notice & copy of the case on the solr. who had represented deft. before the magistrate, but who had ceased to represent him in the matter, & efforts were made to have deft. personally served on his return, & he was personally served with the notice & case some months afterwards on his return to the United Kingdom:—*Held*: the provisions of Summary Jurisdiction Act, 1857 (c. 43), s. 2, as to giving notice of appeal to deft., were sufficiently complied with to enable the ct. to hear the appeal in the absence of deft.—*ANDERSON v. REID* (1902), 86 L. T. 713; 66 J. P. 564; 18 T. L. R. 463, D. C.

*Annotations:—Folld. Wills v. McSherry*, [1913] 1 K. B. 20. *Refd. Michael v. Phillips* (1923), 93 L. J. K. B. 21.

**1272. — Indorsement by solicitor of acceptance of service.]**—*RUST v. ST. BOTOLPH, BISHOPS-GATE (CHURCHWARDENS & OVERSEERS)*, No. 1262, ante.

**1273. — Solicitor having authority to accept service.]**—By Summary Jurisdiction Act, 1857 (c. 43), s. 2, a party dissatisfied with the determination of justices as being erroneous in point of law may apply to the justices to state & sign a case for the opinion of the High Ct., & such party, called "applt.," shall within three days after receiving such case transmit same to the ct., "first giving notice in writing of such appeal with a copy of the case so stated & signed, to the other party," called "resp.":—*Held*: where the solrs. to resp. had authority to accept service & notice of appeal on resp.'s behalf, notice in writing of the appeal was properly given to resp. when it was given to & accepted by the solrs. on behalf of resp.—*GODMAN v. CROFTON*, [1914] 3 K. B. 803

**PART XIII. SECT. 2, SUB-SECT. 4.—E. (b).**

**1266 i. Respondent unable to be found—Every effort made to serve respondent.]**—Where resp. has left the jurisdiction, & personal service cannot, after all due diligence, be effected upon him, or

upon any person representing him, the ct. has no jurisdiction to try the appeal.—*R. v. READER, R. v. THOMPSON* (B. C.), [1922] 3 W. W. R. 1112; 70 D. L. R. 226; 38 Can. Crim. Cas. 201.—*CAN.*

**1270 i. Service only on respondent's**

*solicitor.]*—On an appeal from an order made under Justices of the Peace Act 1882, service of the notice of appeal case stated on the solr. who was acting for the resp. in the ct. below is not sufficient service on resp.—*MCWILLIAM v. MCWILLIAM* (No. 2) (1900), 1 N. Z. L. R. 824.—*N.Z.*

83 L. J. K. B. 1524 ; 111 L. T. 754 ; 79 J. P. 12 ; 12 L. G. R. 1330 ; 24 Cox, C. C. 424, D. C.

**1274. Verbal notice of receipt of case—No notice of appeal.]—**By Summary Jurisdiction Act, 1857 (c. 43), s. 2, a party applying to justices for a case stated "shall, within three days after receiving such case, transmit same to the ct. named in his application, first giving notice in writing of such appeal, with a copy of the case so stated & signed, to the other party."

Applt.'s solrs., after receiving the case from the justices, informed the clerk to resps. orally that they had received it, & the clerk to resps. suggested that it should be printed. Applt.'s solrs. then, within the three days above prescribed, set the case down for hearing, & after doing so they wrote to resps.' solrs. stating that they were having the case printed. No notice of appeal or copy of the case was served on the clerk to resps. or on resps.' solrs. within the three days:—*Held*: the ct. had no jurisdiction to hear the appeal.—*HOLLIDGE v. RUISLIP-NORTHWOOD URBAN DISTRICT COUNCIL* (1912), 77 J. P. 126, D. C.

(c) *Time for Service of Notice.*

See Summary Jurisdiction Act, 1857 (c. 43), s. 2.

**1275. Not later than day on which case transmitted—Though within the three days.]—**An applt. under Summary Jurisdiction Act, 1857 (c. 43), must give resp. notice of appeal with a copy of the case, before transmitting the case to the ct.

A case having been stated by justices under Summary Jurisdiction Act, 1857 (c. 43), it was delivered to applt. on Friday, Feb. 7. On Feb. 8 he transmitted it to the Crown Office, & on the same day he sent by post to resp. at Hastings, a notice of appeal, & a copy of the case, which in due course were delivered to him the next day:—*Held*: such notice & copy case were given too late. *Semble*: if the notice & copy case be given to resp. on the same day as the case is transmitted to the ct., it will be sufficient.—*ASHDOWN v. CURTIS* (1862), 31 L. J. M. C. 216 ; 6 L. T. 331 ; 26 J. P. 312 ; 8 Jur. N. S. 511 ; 10 W. R. 667.

*Annotations*:—*Consd.* Banks v. Goodwin (1863), 32 L. J. M. C. 87. *Folld.* Edwards v. Roberts (1890), 55 J. P. 439. *Apprvd.* Verney v. Fletcher (1909), 73 J. P. 131.

**1276. ———.]—***EDWARDS v. ROBERTS*, No. 1259, ante.

**1277. ———.]—**In an appeal by way of case stated from a decision of justices difficulty was experienced in serving resp. with the notice of appeal & a copy of the case, with the result that, when he was ultimately found, instead of the service on him taking place before the case had been lodged at the Central Office in compliance with Summary Jurisdiction Act, 1857 (c. 43), s. 2, it was not effected until half an hour afterwards:

*Held*: notwithstanding the irregularity in the service, the ct. in the circumstances had jurisdiction to hear the appeal.—*SIMMONDS v. ELLIOTT*, [1917] 2 K. B. 894 ; 87 L. J. K. B. 42 ; 117 L. T. 626 ; 82 J. P. 37 ; 15 L. G. R. 816 ; 26 Cox, C. C. 54, D. C.

*Annotation*:—*Mentd.* Robins v. Wood (1917), 87 L. J. K. B. 224.

*F. Amendment of Special Case.*

See Summary Jurisdiction Act, 1857 (c. 43), s. 7.

**1278. Application to High Court—When made.]—**An application to send back for amendment a case on appeal from justices under Summary

Jurisdiction Act, 1857 (c. 43), s. 2, may be entertained before the day of argument.—*YORKSHIRE TIRE & AXLE CO. v. ROTHERHAM LOCAL BOARD OF HEALTH* (1858), 4 C. B. N. S. 362 ; 27 L. J. C. P. 235 ; 22 J. P. 625 ; 6 W. R. 443 ; 140 E. R. 1125.

*Annotation*:—*Expld.* Mersey Docks & Harbour Board v. Jones (1860), 8 C. B. N. S. 114.

**1279. ———.]—**A case having been stated by justices under Summary Jurisdiction Act, 1857 (c. 43), a rule obtained by applt., calling on resps. to show cause why it should not be sent back to the justices to set forth the grounds of the determination more fully, was discharged. *Semble*: unless something appeared equivalent to a refusal on the part of the justices to state the case, the practice should be to apply to the ct. at the time of the argument to send the case for amendment if it then appears to them to be defective.—*CHRISTIE v. ST. LUKE, CHELSEA GUARDIANS* (1858), 8 E. & B. 992 ; 27 L. J. M. C. 153 ; 30 L. T. O. S. 273, 366 ; 22 J. P. 496 ; 4 Jur. N. S. 733 ; 6 W. R. 333 ; 120 E. R. 369.

**1280. ——— Mere suggestion of misconduct in drawing case.]—**The ct. will not, on a mere suggestion by applt. at the argument that there has been misconduct or negligence in drawing a case, send it back to be re-stated or amended.—*TOWNSEND v. READ* (1861), 10 C. B. N. S. 308 ; 30 L. J. M. C. 223 ; 4 L. T. 447 ; 25 J. P. 455 ; 8 Jur. N. S. 39 ; 9 W. R. 659 ; 142 E. R. 471 ; *subsequent proceedings*, 10 C. B. N. S. 317.

*Annotations*:—*Refd.* Watts v. Kent JJ., Perch v. Kent JJ. (1866), 14 L. T. 448. *Mentd.* Barton v. Piggott (1874), 31 L. T. 401.

SUB-SECT. 5.—PRACTICE OF HIGH COURT.

*A. In General.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 24 ; Summary Jurisdiction Act, 1857 (c. 43), s. 6.

**1281. Function of the court.]—**The duty of the ct., upon a case stated under Summary Jurisdiction Act, 1857 (c. 43), is simply to answer the question of law put to them by the magistrates.—*BUCKMASTER v. REYNOLDS* (1862), 13 C. B. N. S. 62 ; 143 E. R. 25.

*Annotation*:—*Mentd.* R. v. Prince (1875), L. R. 2 C. C. R. 154.

**1282. Facts found by magistrate—Accepted as true.]—**Facts stated to a superior ct. by a police magistrate who has had the opportunity of determining on their truth must be taken as true by the ct.—*CLARK v. JOSLIN* (1873), 27 L. T. 762 ; 21 W. R. 294.

**1283. ——— Case not remitted for statement of evidence.]—***JONES v. CATTERALL* (1902), 18 T. L. R. 367 ; 46 Sol. Jo. 396, D. C.

**1284. Court will not give opinion—Where neither party appears.]—**The ct. will not, at the instance of the justices, pronounce any opinion upon a case stated pursuant to Summary Jurisdiction Act, 1857 (c. 43), where applt. & resp. decline to appear.—*WALTERS v. WILLIAMS* (1860), 9 C. B. N. S. 179 ; 142 E. R. 70.

**1285. ——— Death of respondent before argument.]—***FINCHLEY URBAN DISTRICT COUNCIL v. BLYTON* (1913), 77 J. P. Jo. 556, D. C.

**Powers of High Court.]—**See Sub-sect. 6, post.

PART XIII. SECT. 2, SUB-SECT. 5.—A.

*d. Forum.]—Qu.*: whether a special case stated under 53 Vict. c. 4, s. 139 (B.), should not be first heard by the judge in equity.—*WARD v. HALL* (1899),

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*e. ———.]—Qu.*: whether a judge at chambers, exercising jurisdiction under Summary Convictions Act, R. S. 1900, c. 161, s. 73, upon a case stated,

can be regarded as a delegate of the ct., or as sitting under a special authority independently of the ct.—*R. v. DIMMOCK* (1906), 39 N. S. R. 286.—CAN.



*Sect. 2.—Appeal to High Court—Case stated: Sub-sect. 5, B., C. & D.; sub-sect. 6, A., B., C. & D.]*

### B. Parties.

**1286. Information on behalf of company—Conviction of defendant—Who should be made respondent on appeal.]**—Upon an information before justices on behalf of a railway co., for an offence against their act of incorporation, in placing stones & rubbish on the railway, & thereby obstructing the free passage of same, the evidence was that the act was done by certain persons employed by deft. to repair a wall between the railway & his premises adjoining, & that on one occasion deft. himself, who was standing by, nodded his head & directed the workmen to go on. On appeal under Summary Jurisdiction Act, 1857 (c. 43), s. 2:—*Held*: (1) there was evidence to warrant the justices in convicting deft; (2) the person lodging the complaint on behalf of the co. was properly made resp. in the appeal.—*ROBERTS v. PRESTON* (1860), 9 C. B. N. S. 208; 142 E. R. 81.

**1287. Justices have no right to appear—Where not made parties.]**—The justices have no right to be heard in support of their decision, upon the argument of a case stated by them for the opinion of the ct. under Summary Jurisdiction Act, 1879 (c. 49).—*SMITH v. BUTLER* (1885), 16 Q. B. D. 349; 50 J. P. 260; 34 W. R. 416; 2 T. L. R. 69.

*Annotation*:—*Reid. Ex p. Flinn* (1899), 81 L. T. 221.

### C. Counsel.

**1288. Only one counsel heard on each side.]**—This ct. will hear only one counsel on each side upon appeals from inferior cts.—*HOWES v. PEAKE* (1876), 33 L. T. 818; *sub nom. HAWES v. PEAKE*, 24 W. R. 407; 3 Char. Pr. Cas. 468, D. C.; *affd.* on other grounds, 35 L. T. 584, C. A.

**1289. —.]**—Upon the argument of a special case only one counsel is heard on each side, except when the case is stated upon an order of sessions, when it is brought before the ct. upon an order *nisi* to quash, & there all the counsel instructed on both sides may be heard.—*SPURLING v. BANTOFT*, [1891] 2 Q. B. 384; 60 L. J. Q. B. 745; 65 L. T. 584; 56 J. P. 132; 40 W. R. 157; 17 Cox, C. C. 372, D. C.

### D. Right to Begin.

**1290. Appeal against conviction—Respondent begins.]**—*JONES v. TAYLOR*, No. 1292, *post*.

**1291. —.]**—On appeal under Summary Jurisdiction Act, 1857 (c. 43), resp. is entitled to begin.—*BLACKPOOL BOARD OF HEALTH v. BENNETT, SAME v. KENYON* (1859), 4 H. & N. 127; 23 J. P. 198; 7 W. R. 382; 157 E. R. 784; *sub nom. BENNETT v. BLACKPOOL LOCAL BOARD OF HEALTH, KENYON v. SAME*, 28 L. J. M. C. 203; *sub nom. R. (ON THE PROSECUTION OF BLACKPOOL LOCAL BOARD OF HEALTH) v. BENNETT*, 32 L. T. O. S. 260.

*Annotation*:—*Mentd. R. v. Lundie* (1861), 31 L. J. M. C. 157.

**1292. Appeal against dismissal of complaint—Appellant begins.]**—The general rule in appeals is that resp. [in an appeal against a conviction] begins; but, when, under Summary Jurisdiction Act, 1857 (c. 43), applt. insists that a complaint has been wrongfully dismissed, applt. is to begin.—

### PART XIII. SECT. 2, SUB-SECT. 5.—D.

**1. General rule.]**—In the argument of cases stated for the opinion of the ct. by justices of the peace, under 20 & 21 Vict. c. 43, s. 2, counsel addresses the ct. in the same order as in law arguments.—*R. v. BROPHY* (1859), 9 L. C. L. R. App. xi.—*IR.*

**1290 i. Appeal against conviction—**

*Respondent begins.]*—In an appeal under the general appeal clauses of the Justices of the Peace Act, 1882, by the person convicted, it is the duty of the prosecutor to begin.—*OLIVER v. TAYLOR* (1896), 15 N. Z. L. R. 449.—*N.Z.*

**1290 ii. —.]**—Counsel for applt. should begin on an appeal from a conviction as well as on other appeals.

*JONES v. TAYLOR* (1858), 1 E. & E. 20; 28 L. J. M. C. 204, n.; 120 E. R. 815.

*Annotations*:—*Folld. Ellis v. Kelly* (1860), 30 L. J. M. C. 35. *Mentd. Foulger v. Steadman* (1872), L. R. 8 Q. B. 65; *Perth General Station Committee v. Ross*, [1897] A. C. 479.

**1293. —.]**—On an appeal, under Summary Jurisdiction Act, 1857 (c. 43), against the decision of justices dismissing the complaint, applt. begins.—*ELLIS v. KELLY* (1860), 6 H. & N. 222; 30 L. J. M. C. 35; 3 L. T. 331; 25 J. P. 279; 8 Jur. N. S. 1119; 9 W. R. 56; 158 E. R. 92.

*Annotations*:—*Mentd. Leman v. Fletcher* (1873), L. R. 8 Q. B. 319; *Carpenter v. Hamilton* (1877), 41 J. P. 615; *R. v. Baker* (1891), 66 L. T. 416; *Steel v. Ormsby* (1894), 10 T. L. R. 483; *R. v. Lewis, Stipendiary Magistrate* (1896), 40 Sol. Jo. 515; *Hunter v. Clare*, [1899] 1 Q. B. 635; *Brindley v. Shelton Iron, Steel & Coal Co.* (1923), 128 L. T. 783.

### SUB-SECT. 6.—POWERS OF HIGH COURT.

#### A. In General.

*See* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 24; Summary Jurisdiction Act, 1857 (c. 43), ss. 6, 8.

**1294. To quash conviction.]**—On an appeal to this ct. under Summary Jurisdiction Act, 1857 (c. 43), against a conviction under 50 Geo. 3, c. 41, s. 6:—*Held*: this ct. had power to quash the conviction, there being no evidence set forth by the case to support it.—*WATKIN v. FENWICK* (1858), 23 J. P. 516; 7 W. R. 16.

**1295. To affirm as to some & quash as to others—Where several convicted.]**—*BROWN v. TURNER* (1863), 13 C. B. N. S. 485; 1 New Rep. 283; 32 L. J. M. C. 106; 7 L. T. 681; 27 J. P. 103; 9 Jur. N. S. 850; 11 W. R. 290; 143 E. R. 192.

*Annotations*:—*Reid. Fuller v. Newland* (1863), 27 J. P. 406. *Mentd. Evans v. Botterill* (1863), 3 B. & S. 787; *R. v. Jarrald & Ost* (1863), L. C. & Ca. 301; *Shuttleworth v. Grange* (1867), 31 J. P. 280.

**1296. —.]**—A dispute having arisen in a workingmen's society, on the ground that L., one of the members, was working for K., who employed men not qualified, by the rules of the society, to do the work, O., one of the members, said he would use his influence to have L. turned out of the society, if he did not leave his employ. L. still continuing his work, a meeting was called, to which he was summoned. The business of the meeting was, whether L. would leave K.'s, or remain in his employ & be turned out of the society & O., being in the chair, G., another of the members, reported what had occurred at an interview which he, as a deputation from the society, had had with K. & O. then asked L. whether he intended to remain an honourable member & leave K.'s shop or stay at the shop, be despised by the club, & have his name sent round all over the country in the report of the society, & be put to all sorts of unpleasantness:—*Held*: this was evidence on which O. might be convicted of unlawfully, by threats & intimidation, endeavouring to force L. to depart from his hiring under 6 Geo. 4, c. 129 s. 3; but against G. the evidence was not sufficient.—*O'NEILL v. LONGMAN* (1863), 4 B. & S. 376; 1 New Rep. 427; 32 L. J. M. C. 259; 8 L. T. 657; 27 J. P. 452; 10 Jur. N. S. 74; 11 W. R. 947; 9 Cox, C. C. 360; 122 E. R. 500.

*Annotation*:—*Mentd. Wood v. Bowron* (1866), 7 B. & S. 93

—*QUICK v. COX* (1902), 21 N. Z. L. J. 584.—*N.Z.*

### PART XIII. SECT. 2, SUB-SECT. 6.—A

**1294 i. To quash conviction.]**—The jurisdiction of the K. B. Div. in Ireland is confined to affirming or quashing the order of Quarter Sessions.—*R. (KING v. COUNTY ANTRIM CHAIRMAN & JJ)* [1906] 2 I. R. 298.—*IR.*

**1297. No power to reduce penalty.]**—The High Ct. under Summary Jurisdiction Act, 1857 (c. 43), s. 6, has no power to reduce a penalty on a case stated by justices.—*EVANS v. HEMINGWAY* (1887), 52 J. P. 134, D. C.

*Annotation*:—*Mentd.* *Bowyer v. Percy Supper Club* (1893), 57 J. P. 470.

**1298. To make order that justices should have made—Case remitted to save defendant's right of appeal.]**—On the hearing of a complaint against a pawnbroker, under 39 & 40 Geo. 3, c. 99, s. 14, for refusing to deliver up a pledge to the owner on payment of the loan, it appeared that the pledge had been stolen in a burglary in the pawnbroker's house, he having left it for twenty-four hours without any one on the premises; the justices were of opinion that the robbery occurred through the negligence of the pawnbroker, & adjudged that he, not having shown reasonable cause for non-delivery, should deliver up the pledge or pay the value. On appeal:—*Held*: the case was not within s. 14 of the Act, for that sect. applied only to a refusal to deliver back a pledge when it remained in the pawnee's possession; but the justices were right in holding that the pledge was lost by the pawnbroker's neglect, & they ought, therefore, to have made an order under s. 24 of the same Act. *Semble* the ct. had power under Summary Jurisdiction Act, 1857 (c. 43), s. 6, to draw up an order under sect. 24.

But the ct. declined to do so, & remitted the case to the justices for re-hearing, with a view to sect. 24, in order not to deprive applt. of his appeal to quarter sessions, under s. 35 of the same Act.—*SHACKELL v. WEST* (1859), 2 E. & E. 326; 29 L. J. M. C. 45; 1 L. T. 28; 24 J. P. 22; 6 Jur. N. S. 95; 8 W. R. 22; 121 E. R. 123.

**1299. To remit case—For new trial—When exercised.]**—On a summons against the holder of a justices' license for suffering his premises to be used in contravention of Betting Act, 1853 (c. 119), the conviction of a bookmaker for using the premises on the occasion in question for the purpose of betting with persons resorting thereto is not admissible in evidence for the purpose of proving that betting took place on the premises. *Semble*: where the justices arrive at a wrong determination in point of law & decide upon a conviction, the High Ct. will not, on a case stated, remit the case to the justices for a new trial unless the justices adjourn the case & ask for directions or insert in the case stated a request that the case be remitted to them in the event of the ct.'s deciding that they were wrong in law.—*TAYLOR v.*

**1297 i. No power to reduce penalty.]**—The appellate ct., on a general appeal under Justices of the Peace Act, 1882, Title II., Part III., has no power to mitigate or increase the penalty imposed by the conviction appealed from.—*SEARL v. MCARDLE* (1897), 15 N. Z. L. R. 613.—N.Z.

**1297 ii. —.]**—*TAYLOR v. MARSACK* (1898), 17 N. Z. L. R. 153.—N.Z.

**g. To make order that justices should have made.]**—On review of the judgment illegally rendered for a debt, in a justice's ct., the same may not only be reversed, but judgment will be awarded for pltf. for the amount sought to be recovered.—*WATSON v. MARKS* (1845), 2 Kerr, 694.—CAN.

**1299 i. To remit case—For new trial—When exercised.]**—*R. v. L.* (1922), 69 D. L. R. 618; 38 Can. Crim. Cas. 242; 51 O. L. R. 575.—CAN.

#### PART XIII. SECT. 2, SUB-SECT. 6.—C.

**1301 i. General rule.]**—Where there any evidence in support of a con-

viction, the finding of the magistrate will not be interfered with, although the evidence may not be satisfactory in the opinion of the ct.—*R. v. HERRELL* (1898), 12 Man. L. R. 198.—CAN.

**1301 ii. —.]**—Where the decision of a magistrate is called in question, the superior ct. will not look at the evidence upon which the decision was based.—*Re R. v. WONG FONG SING* (1925), 44 Can. Crim. Cas. 133.—CAN.

**1301 iii. —.]**—The ct. will not, upon the points raised in a special case, review the decision of magistrates as to the sufficiency of the evidence to prove the charge.—*DOYLE v. MORRIS* (1860), 13 Ir. Jur. 60.—IR.

**1301 iv. —.]**—*LAFFEY v. MAGORIAN* (1903), 22 N. Z. L. R. 577.—N.Z.

**1301 v. —.]**—*KNAPP v. HEAPS* (1904), 23 N. Z. L. R. 757.—N.Z.

#### PART XIII. SECT. 2, SUB-SECT. 6.—D.

**1302 i. Cannot be taken on appeal.]**—The ct. of an application for a quashing

*WILSON* (1911), 106 L. T. 44; 76 J. P. 69; 28 T. L. R. 97; 22 Cox, C. C. 647, D. C.

**1300. Case remitted with opinion—Refusal of magistrate to act thereon—Enforcement by mandamus.]**—*R. v. CORSER* (1892), 8 T. L. R. 563, D. C.

*B. Magistrate's Decision a Finding of Fact. Particular decisions.]*—*See Titles passim.*

#### C. Existence of Evidence in Support of Magistrate's Decision.

**1301. General rule.]**—The question for us is not whether the justices came to a right conclusion, but whether there was any evidence to support that conclusion (LORD CAMPBELL, C.J.).—*GREEN v. PENSAM* (1858), 22 J. P. Jo. 737.

*Particular decisions.]*—*See Titles passim.*

#### D. Objections Not Raised before Magistrates.

**1302. Cannot be taken on appeal.]**—Upon the argument of a case stated by justices under Summary Jurisdiction Act, 1857 (c. 43), no objection can be relied upon which was not taken before the justices.—*MOTTERAM v. EASTERN COUNTIES RY. CO.* (1859), 7 C. B. N. S. 58; 29 L. J. M. C. 57; 1 L. T. 101; 24 J. P. 40; 6 Jur. N. S. 583; 8 W. R. 77; 141 E. R. 735.

*Annotations*:—*Mentd.* *Cox v. Hakes* (1890), 15 App. Cas. 506; *Robinson v. Gregory* (1905), 92 L. T. 171.

**1303. —.]**—Applt. was convicted before justices of knowingly permitting persons of bad character to assemble in his public-house. At the hearing, it was objected on his behalf that the persons assembled were there only for the purposes of refreshment. The justices being of opinion that there was no evidence to that effect, convicted applt. A case was stated for the opinion of the ct. whether, upon the facts there stated, the conviction was right or wrong. On appeal, it was contended that there was no evidence, on the facts stated, that applt. knowingly permitted the said persons to assemble:—*Held*: this objection, not having been raised before the justices, could not be raised upon appeal.—*PURKIS v. HUXTABLE* (1859), 1 E. & E. 780; 28 L. J. M. C. 221; 33 L. T. O. S. 106; 23 J. P. Jo. 293; 120 E. R. 1102; *sub nom.* *PURKIS v. CONSTABLE*, 5 Jur. N. S. 790.

*Annotations*:—*Distd.* *Ex p. Markham* (1869), 21 L. T. 748; *Knight v. Halliwell* (1874), L. R. 9 Q. B. 412. *Consd.* *Kates v. Jeffery*, [1914] 3 K. B. 160. *Refd.* *Motteram v. Eastern Counties Ry.* (1859), 7 C. B. N. S. 58.

**1304. —.]**—Upon the argument of an appeal from justices, no point can be urged which was not

order will not interfere when the objection relied upon as invalidating the conviction was not taken before the justices in cases where that objection is one which the justices had power to remedy.—*EBERHARDT v. CORNISH*, [1903] S. R. Q. 172.—AUS.

**1302 ii. —.]**—*CORMIER v. TIBIDEAU* (1841), 1 Kerr, 297.—CAN.

**1302 iii. —.]**—*SEAMAN'S LESSEE v. CAMPBELL* (1853), James, 94.—CAN.

**1302 iv. —.]**—A point cannot, on an appeal from a conviction on a case stated under Justices of the Peace Act, 1882, be taken on the argument which was not taken in the ct. below, & does not fairly arise upon the case as stated.—*WI PARATA v. CLIMIE* (1889), 8 N. Z. L. R. 7.—N.Z.

**1302 v. —.]**—*MARTIN v. CAMPBELL* (1892), 13 N. Z. L. R. 42.—N.Z.

**h. — Except upon question of law.]**—Points of law not raised before the justices may be considered by the ct. on a case stated.—*KAVANAGH v.*



**Sect. 2.—Appeal to High Court—Case stated: Subsect. 6, D.; sub-sects. 7 & 8, A., B., C. & D.]**

taken before them.—**MARSHALL v. SMITH** (1873), as reported in L. R. 8 C. P. 416.

**Annotations:—Mentd.** Rumball v. Schmidt (1882), 8 Q. B. D. 603; Reay v. Gateshead Corpn. (1886), 55 L. T. 92; Welsh v. West Ham Corpn., [1900] 1 Q. B. 324; Airey v. Smith (1907), 96 L. T. 691.

**1305. — Whether upon question of law—Arising out of facts stated.]—**The ct. will hear & determine questions of law arising on the facts stated by justices under Summary Jurisdiction Act, 1857 (c. 43), s. 6, although they were not taken before the justices, or expressly reserved for the consideration of the ct.—**KNIGHT v. HALLIWELL** (1874), L. R. 9 Q. B. 412; 43 L. J. M. C. 113; 30 L. T. 359; 38 J. P. 470; 22 W. R. 689.

**Annotations:—Expld.** Hepple v. Brumby (1896), 60 J. P. 792. **Apld.** London, Edinburgh & Glasgow Assce. v. Partington (1903), 88 L. T. 732. **Consd.** May v. Beeley, [1910] 2 K. B. 722. **Apld.** Kates v. Jeffery, [1914] 3 K. B. 160. **Distd.** Northern Theatres Co. v. Shillito, [1925] 2 K. B. 100. **Refd.** Hamilton v. Walker, [1892] 2 Q. B. 25; Barr, Mooring v. L. & N. W. Ry., [1905] 2 K. B. 113. **Mentd.** R. v. Brocklehurst (1891), 61 L. J. M. C. 48; R. v. Pink, etc. JJ., *Ex p.* Heal (1892), 61 L. J. M. C. 126; Bramble v. Lowe (1897), 66 L. J. Q. B. 243.

**1306. — — — — —.]—**On an application to the justices at a petty sessions for orders for the payment of the rates claimed the justices made the order asked for, but on the application of the owners stated a case for the opinion of the ct. The Div. Ct. held that there were ample materials on the facts stated from which an agreement to pay the ordinary charges for water supplied for domestic purposes could be inferred & dismissed the appeal. On appeal it was admitted that the question as to an implied agreement was not raised before the justices:—**Held**: it was not open to the Div. Ct. to deal with any question of agreement between the parties or with anything but the bare question of the right of the corpn. to rate.—**NORTHERN THEATRES CO. v. SHILLITO**, [1925] 2 K. B. 100; 94 L. J. K. B. 472; 133 L. T. 156; 89 J. P. 101; 69 Sol. Jo. 459; 23 L. G. R. 288, C. A.

**1307. — — — — — Jurisdiction of justices—Subject to costs.]—**Where a person, who has effected an insurance with an industrial assurance co. on the life of another person, afterwards claims the return of premiums paid under the policy, on the ground that the insurance never was a valid insurance, & the policy was void for want of insurable interest, the sect. [Collecting Societies & Industrial Assurance Companies Act, 1896 (c. 26), s. 7] does not apply, & the ct. of summary jurisdiction has no jurisdiction to determine such claim, as claimant's case then is that he never was insured with the co. at all, & therefore, he is estopped from saying that he is a person insured." In such case the objection that there is no jurisdiction in the justices can be taken before the Div. Ct., although such objection was not taken or raised before the justices, & no question as to it is left to the ct. by the justices; but the party so taking the objection may have to pay the costs thrown away by not taking the objection at the proper time.—**LONDON, EDINBURGH & GLASGOW ASSURANCE CO., LTD. v. PARTINGTON** (1903), 88 L. T. 732; 67 J. P. 255; 19 T. L. R. 389; 47 Sol. Jo. 419.

**Annotations:—Mentd.** Harse v. Pearl Life Assco. (1903), 72 L. J. K. B. 638; Kettlewell v. Refuge Assce. (1907), 97 L. T. 896.

**1308. — — — — — Which no evidence could alter.]**

**GLORNEY** (1876), L. R. 10 C. L. 210.—**IR.**

**k. — — — — —.]—**On an appeal by way of case stated under Justices of the Peace Act, 1882, s. 236, the ct. will hear & determine questions of law

arising on the facts stated by the justices though they were not taken before the justices or expressly reserved for the consideration of the ct.—**IRELAND v. CONNOLLY** (1901), 21 N. Z. L. R. 314.—**N.Z.**

—Upon the argument of an appeal from justices by way of case stated a point cannot be taken before the Div. Ct. upon the facts stated which was not taken before the justices, except upon a question of law which no evidence could alter.—**KATES v. JEFFERY**, [1914] 3 K. B. 160; 83 L. J. K. B. 1760; 111 L. T. 459; 78 J. P. 310; 12 L. G. R. 974; 24 Cox, C. C. 324, D. C.

**SUB-SECT. 7.—APPEAL TO COURT OF APPEAL.**

*See Part XVI., post.*

**SUB-SECT. 8.—COSTS.**

*A. In General.*

*See Summary Jurisdiction Act, 1857 (c. 43), s. 6.*

**1309. Costs follow event.]—**On an appeal, under Summary Jurisdiction Act, 1857 (c. 43), against a conviction by justices, the ct. quashed the conviction:—**Held**: the costs were to be paid by the party prosecuting.—**VENABLES v. HARDMAN** (1858), 1 E. & E. 79; 28 L. J. M. C. 33; 4 Jur. N. S. 1108; 120 E. R. 837.

**Annotation:—Refd.** R. v. Smith (1860), 8 W. R. 589

**1310. — — — — —.]—**(1) In cases stated for the opinion of the Ct. of Q. B., by justices of the peace, under Summary Jurisdiction Act, 1857 (c. 43), the general rule is, that the costs follow the judgment.

(2) When no one appears on behalf of resp., that rule will not be applied.—**LEE v. STRAIN** (1859), 28 L. J. M. C. 221; 5 Jur. N. S. 846; 7 W. R. 432.

**Annotation:—Dbtd.** Wednesbury L. B. of Health v. Stephenson (1864), 3 New Rep. 488.

**1311. — — — — —.]—**(1) An appeal lies under Summary Jurisdiction Act, 1857 (c. 43), where justices have dismissed the information or complaint.

In appeal upon cases stated by justices under Summary Jurisdiction Act, 1857 (c. 43), the costs of the appeal abide the event.—**DAVYS v. DOUGLAS** (1859), 4 H. & N. 180; 28 L. J. M. C. 193; 32 L. T. O. S. 283; 157 E. R. 806; *sub nom.* **DAVIS v. DOUGLAS**, 23 J. P. 135; 7 W. R. 327.

**Annotations:—Mentd.** Sewell v. Taylor (1859), 23 J. P. 792; Fredericks v. Payne (1862), 32 L. J. M. C. 14; Tarling v. Fredericks (1873), 28 L. T. 814.

**1312. Question raised fairly arguable—Costs not given to respondent.]—**(1) The ct. will not give resp. costs on dismissing an appeal against a decision of justices, where the question is a fairly arguable one.

(2) Nor will they listen to an application for that purpose in the term after the decision.—**CASWELL v. COOK** (1862), 12 C. B. N. S. 242; 142 E. R. 1136.

**Annotations:—As to (2) Foll.** Budenberg v. Roberts (1867), L. R. 2 C. P. 292. **Apld.** Cook v. Montague (1873), 28 L. T. 494.

**1313. Conviction quashed on objection not taken in court below.]—**Where, upon an appeal under Summary Jurisdiction Act, 1857 (c. 43), a conviction was quashed under an objection, which was not brought to the notice of the magistrates, costs were not given to the successful party.—**STINSON v. BROWNING** (1866), L. R. 1 C. P. 321; Har. & Ruth. 263; 35 L. J. M. C. 152; 13 L. T. 799; 30 J. P. 312; 12 Jur. N. S. 262; 14 W. R. 395.

**Annotations:—Mentd.** Horner v. Cadman (1886), 55 L. J. M. C. 110; Hill v. Somerset (1887), 51 J. P. 742;

**PART XIII. SECT. 2, SUB-SECT. 8.—A.**

**1309 i. Costs follow event.]—**When, upon a case stated, a conviction is reversed, the Div. Ct. have jurisdiction to award costs to applt.—

Brotherton v. Tittensor (1896), 60 J. P. 72; Mayhew v. Sutton (1901), 71 L. J. K. B. 46; Smith v. Perry (1905), 94 L. T. 140; Hinde v. Evans (1906), 70 J. P. 548.

**1314. No jurisdiction to state case.]**—DISS URBAN SANITARY AUTHORITY v. ALDRICH, No. 1182, *ante*.

**1315. Where Crown a party.]**—On an appeal under Summary Jurisdiction Act, 1857 (c. 43), against a conviction by two justices on an information for an offence against the excise laws, laid by an officer of excise prosecuting for the Queen by order of the comrs. of inland revenue, the ct. confirmed the decision of the magistrates, & ordered applt. to pay the costs of resp. Subsequently a rule *nisi* for amending the order of the ct. by striking out so much as related to costs was obtained on the ground that the information was at the suit of the Crown, & that the Crown did not pay, & therefore could not receive costs in such a case:—*Held*: by reason of sect. 4 the Crown must be taken to be expressly bound by the Act; & that as sect. 6 applied to all cases within the Act, the ct. was empowered to order costs to be paid on appeals to which the Crown might be a party.—MOORE v. SMITH (1859), 1 E. & E. 597; 28 L. J. M. C. 126; 32 L. T. O. S. 314; 23 J. P. 133; 5 Jur. N. S. 892; 7 W. R. 206; 120 E. R.

*Annotations*:—**Consd.** Thomas v. Pritchard, [1903] 1 K. B. 209. **Refd.** R. v. Canterbury (Archbp.), [1902] 2 K. B. 503; *Re* Letters Patent No. 139207, *Re* Carbonit Akt., [1924] 2 Ch. 53; Swift v. Board of Trade, [1926] 2 K. B. 131. **Mentd.** Bain v. A.-G., [1892] P. 217.

**1316. Where justices appear on appeal.]**—Resp. did not appear, but the magistrates did:—*Held*: costs in such a case could be given against them.—HEYWOOD v. WHITEHEAD (1897), 76 L. T. 781; 18 Cox, C. C. 615, D. C.

#### B. Where Respondent does not appear.

**1317. Whether appellant given costs.]**—LEE v. STRAIN, No. 1310, *ante*.

**1318. —.]**—S. being summoned before justices for non-payment of a rate, raised a legal objection, which the justices decided in his favour. On a case stated, the ct. reversed the decision of the justices with costs against S., who did not appear:—*Held*: there was no general rule as to costs in such a case but, in accordance with the usual practice on county ct. appeals, the costs were rightly given.—WEDNESBURY LOCAL BOARD OF HEALTH v. STEPHENSON (1864), 3 New Rep. 488; 33 L. J. M. C. 111; 10 Jur. N. S. 151; 12 W. R. 414.

**1319. — Criminal charge brought to assert a civil right.]**—This was a hard charge to make under the Larceny Act, & there was nothing to support the charge. The costs must therefore be given to applt. (LUSH, J.).—HALSE v. ALDER (1874), 38 J. P. 407.

**1320. —.]**—Costs of the successful applt. will be allowed by the High Ct., though resp. does not appear.—GREENBANK v. SANDERSON (1884), 49 J. P. 40, D. C.

**1321. —.]**—A successful applt. on a case stated by justices is entitled to his costs, though resp. does not appear to support the judgment of the justices.—SHEPHERD v. FOLLAND (1884), 49 J. P. 165, D. C.

**1322. — Law set in motion by respondent.]**—Clearly the justices' decision is wrong, & the

WALSH v.

—IR.

**1315 i. Where Crown a party.]**—On appeal from justices, either by way of quashing order or by special case under Justices Act, 1886, the ct. has jurisdiction to award costs to or against

the Crown in all cases where the Crown exercises its right to appear on the hearing of the appeal.—MOLLOY v. HALLAM, [1903] S. R. Q. 282.—AUS.

**1315 ii. —.]**—R. v. NUGENT (No. 2) (1904), 7 Terr. L. R. 239.—CAN.

1. Where case struck

conviction must be quashed. However, as the law has been set in motion by resp. with the object of obtaining a decision, he must pay the costs (LAWRANCE, J.).—GORDON v. CANN (1899), 68 L. J. Q. B. 434; 80 L. T. 20; 63 J. P. 324; 47 W. R. 269; 15 T. L. R. 165; 43 Sol. Jo. 225, D. C.

**1323. — Law set in motion by appellant.]**—Applt. put the law in motion. The rule is clear now, except in special circumstances. It is quite clear that when the person who puts the law in motion comes to the ct. to get the law put right & resp. does not appear, costs are not given to the successful applt. (LORD ALVERSTONE, C.J.).—LEE v. BARTON (1909), as reported in 101 L. T. 603, n., D. C.

*Annotation*:—**Mentd.** Ballard v. Horton's Estate (1926), 24 L. G. R. 449.

#### C. Time for Application.

**1324. General rule.]**—(1) The ct. will not entertain an application for costs of an appeal against a decision of a magistrate under Summary Jurisdiction Act, 1857 (c. 43), in the term after that in which the judgment is pronounced. (2) *Semble*: the application for costs should be made immediately upon the disposal of the case.—BUDENBERG v. ROBERTS (1867), L. R. 2 C. P. 292.

*Annotation*:—**Folld.** Cook v. Montague (1873), 28 L. T. 494.

**1325. Discretion of court.]**—COOK v. MONTAGUE, No.

**1326. Application too late—In term after appeal decided.]**—CASWELL v. COOK, No. 1312, *ante*.

**1327. —.]**—BUDENBERG v. ROBERTS, No. 1324, *ante*.

**1328. — Three terms after appeal decided.]**—Three terms after a decision of justices was reversed with costs upon a case stated under Summary Jurisdiction Act, 1857 (c. 43), applt. applied for his costs in the ct. below:—*Held*: although the ct. had by sect. 6, a discretion over such costs at the disposal of an appeal, it should be exercised only in a strong case of vexation or oppression: & such delay without fraud effectually precluded it.—COOK v. MONTAGUE (1873), 28 L. T. 494; 37 J. P. 694; 21 W. R. 670.

#### D. What Costs Ordered.

**1329. Costs of proceedings before justices—Whether allowed to successful party.]**—COOK v. MONTAGUE, No. 1328, *ante*.

**1330. —.]**—On a case stated by justices at petty sessions, the ct. does not give costs before the justices to the successful party.—SLAUGHTER v. SUNDERLAND CORPN. (1891), as reported in 55 J. P. 519, D. C.

*Annotations*:—**Mentd.** Foster v. Fraser, [1893] 3 Ch. 158; Boyce v. Paddington B. C., [1903] 1 Ch. 109.

**1331. Costs of preparing & amending case.]**—On an appeal from justices under Summary Jurisdiction Act, 1857 (c. 43), the case was sent back to be re-stated, & ultimately judgment was given for applt. with costs. On the taxation, the master allowed to applt. the costs of preparing the case beyond the fees allowed to the clerk of the justices by sect. 3 & Sched. A, & also the costs of amending the case:—*Held*: the taxation was right.—GLOVER v. BOOTH (1862), 2 B. & S. 807; 31 L. J. M. C. 270; 9 Jur. N. S. 76; 121 E. R. 1272.

*Annotation*:—**Refd.** Manchester Corpn. v. Sugden, Gresham Life Assce. Soc. v. Bishop, [1903] 2 K. B. 171.

a case stated by magistrates was struck out, it not having been transmitted, & notice of it not having been served as required by the statute, the ct. refused to give costs against applt. CONWAY v. RICHARDSON (1863), 10 L. T. 853.—IR.



## SECT. 3.—MANDAMUS.

## SUB-SECT. 1.—THE PREROGATIVE WRIT.

See CROWN PRACTICE, Vol. XVI., pp. 276 *et seq.*

## SUB-SECT. 2.—ORDERS IN NATURE OF MANDAMUS.

See, generally, CROWN PRACTICE, Vol. XVI., p. 323, Nos. 1343, 1344.

**1332. Justices Protection Act, 1848 (c. 44), s. 5—Confined to refusal to act—Not when action erroneous.]—***Re CLEE & OSBORNE*, No. 646, *ante*.

**1333. — Confined to cases whose mandamus would lie.]—**A rule under above Act, s. 4, calling upon justices to do an act relating to the duties of their office, which they have refused to do, will not be granted unless *mandamus* to do the act would lie. When therefore magistrates had found facts in which they were prepared to commit as a rogue & vagabond, a person charged before them of an offence against Gaming Act, 1802 (c. 119), s. 2, if they had not been advised that by Vagrance Act, 1824 (c. 83), s. 21, the power to commit such an offender as a rogue & vagabond had been taken away, & on that ground they refused to commit: this ct. refused a rule *nisi* to them to convict & sentence, or to hear & determine.—*R. v. KING* (1853), 18 J. P. 41.

**1334. — Whether confined to cases where protection needed.]—**Under above sect. it is only where justices would need protection if they proceeded to do "any act relating to the duties of their office," that a rule, calling upon them to show cause why such act should not be done, can be granted. Therefore, where justices had refused to hear a summons against a person for having a board over his door, stating that he was licensed to retail beer, etc., he not being so licensed contrary to Licensing Act, 1872 (c. 74), s. 11, the ct. refused a rule against the justices under above Acts, but granted a rule for a *mandamus*.—*R. v. PERCY* (1873), L. R. 9 Q. B. 64; 43 L. J. M. C. 45; 22 W. R. 72; *sub nom. R. v. CUMBERLAND JJ.*, 38 J. P. 422.

*Annotations:—N.F. R. v. Biron* (1884), 54 L. J. M. C. 77; *R. v. Phillimore* (1884), 14 Q. B. D. 474, n.

**1335. — —.]—**An information having been laid against P. under Highway Act, 1864 (c. 101), s. 51, for encroaching on a highway, the justices decided on evidence given that a claim of right set up by P. to the land alleged to have been encroached upon by him was *bonâ fide* & thereupon refused to hear the case on the ground of want of jurisdiction. Complainant having applied under above sect., for a rule for the justices to show cause why they should not hear & determine the case:—*Held*: the application was properly made, the statute not being limited to cases in which the justices need protection in the performance of their duties.

*R. v. Percy*, No. 1334, *ante*, overd.—*R. v. PHILLIMORE* (1884), 14 Q. B. D. 474, n.; 51 L. T. 205; 48 J. P. 774; *sub nom. R. v. PILLING*, 32 W. R. 593, D. C.

*Annotation:—Folld. R. v. Biron* (1884), 14 Q. B. D. 474.

**1336. — —.]—**(1) A rule to a magistrate calling upon him to show cause why he should not hear & determine a matter, applied for under above sect. & a rule for a *mandamus* to him to hear & determine, are concurrent remedies & either may be granted in the discretion of the ct. A rule under above Act is not limited to cases where the magis-

trate needs protection in the performance of his duties.

(2) A rule under above Act may be granted to applt. in person.—*R. v. BIRON* (1884), 14 Q. B. D. 474; 54 L. J. M. C. 77; 51 L. T. 429; 49 J. P. 68; 1 T. L. R. 1, D. C.

**1337. — Whether applicable to doubtful cases.]—**On application to the ct. under above sect., for an order on the justices to issue the warrant, the ct. held the question too doubtful to justify them in acting under above Act, & left appcts. to move for a *mandamus*, or to try the question by having another rate made, against which A. might appeal.—*R. v. BROWNE* (1849), 13 Q. B. 654; 116 E. R. 1413; *sub nom. R. v. SHROPSHIRE JJ.*, 3 New Sess. Cas. 641, n.; 13 J. P. 315.

*Annotations:—Consd. Bletchington* (Surveyors of Highways) *v. Peyton* (1849), 6 Dow. & L. 288. *Expld. Re Hartley* (1862), 31 L. J. M. C. 232.

**1338. — —.]—**The school attendance committee of the Stamford union, which extends into the counties of Lincoln, Rutland, Northampton, & Huntingdon, applied to the justices of Northampton for a summons for breach of their bye-laws against the parent of a child in a parish in the county of Rutland. The summons having been refused by the justices on the ground of want of jurisdiction, application was made for a *mandamus*, but refused on the ground that the ct. will not grant a *mandamus* in cases where there is any doubt, & proceedings can be taken under above Act. Upon a rule granted under above sect.:—*Held*: Poor Law Amendment Act, 1867 (c. 106), s. 27, was applied to the Education Acts by Elementary Education Act, 1876 (c. 79), s. 34, & gave justices of any county included in a union jurisdiction, in cases arising under the Education Acts, over the whole of the union.—*R. v. EATON, ETC., NORTHAMPTON JJ.* (1881), 51 L. J. M. C. 31; 46 J. P. 231; 30 W. R. 335, D. C.

**1339. — Whether applicable to refusal to hear evidence.]—**A metropolitan police magistrate having declined to hear a charge preferred against E. under 11 & 12 Will. 3, c. 12, & Criminal Jurisdiction Act, 1802 (c. 85), s. 1:—*Held*: the application to the ct. should be for a *mandamus* to the magistrate to hear the evidence & not for a rule under above sect.—*R. v. EYRE* (1868), L. R. 3 Q. B. 487; 37 L. J. M. C. 159; 18 L. T. 511; 32 J. P. 518; 11 Cox, C. C. 162; *Finlason's Report* 1; *sub nom. R. v. VAUGHAN*, 9 B. & S. 329.

*Annotation:—Mentd. Mirais v. General Officer Commanding the lines of communication & A.-G. of Cape Colony* (1901), 71 L. J. P. C. 42.

**1340. — Costs—No cause shown.]—**Where no cause is shown against a rule under above sect., the ct. will not make the rule absolute with costs, unless asked for by the rule.—*LEAMINGTON PRIORS COMRS. v. MOULTRIE* (1849), 7 Dow. & L. 311.

**Summary Jurisdiction Act, 1857 (c. 43), s. 5.]—**See Sect. 2, *ante*.

## SUB-SECT. 3.—PURPOSES FOR WHICH WRIT AVAILABLE.

## A. In respect of Judicial Acts.

## (a) To Issue Summons.

**1341. Grounds for refusal insufficient.]—**Although justices have a discretion as to issuing a summons upon an information, yet if they decline to issue it for reasons which are insufficient, the court will interfere by *mandamus* to compel them.—*R. v. FAWCETT, ETC., DURHAM JJ.*, *Ex p.*

## PART XIII. SECT. 3, SUB-SECT. 3.—A. (a).

m. *Refusal to perform official acts.]—DUSTIN v. ELLIS* (1865), 11 N. B. R. (6 All.) 231.—CAN.  
n. —.]—*WATERBURY v. NIXON* (1878), 2 P. & B. 373.—CAN.

HODSON (1868), 19 L. T. 396; 32 J. P. 776; 11 Cox, C. O. 305.

*Annotation*:—*Refd.* R. v. Byrde & Pontypool Gas Co., *Ex p.* Williams (1890), 60 L. J. M. C. 17.

1342. —.]—R. v. ADAMSON, No. 1377, *post*.

1343. **Summons refused in exercise of discretion.**]

—R. v. BATHER, No. 416, *ante*.

1344. —.]—Where justices entertain an application for a summons for a criminal offence, & have considered the materials on which the application is based, & refused to hear more, or to grant the summons, the High Ct. will not interfere by *mandamus* to order them to hear it again.—*Ex p.* MACMAHON (1883), 48 J. P. 70, D. C.

1345. —.]—A *mandamus* will not be granted to interfere with the discretion of a magistrate who has refused to issue a summons for perjury on an information setting forth facts upon which no jury could convict.—*Ex p.* REID (1885), 49 J. P. 600, D. C.

1346. —.]—*Ex p.* LEWIS, No. 1366, *post*.

1347. —.]—*Ex p.* TRUEMAN (1914), 78 J. P. Jo. 77, D. C.

1348. **Justices declining jurisdiction.**]

—R. v. BYRDE & PONTYPOOL GAS CO., *Ex p.* WILLIAMS, No. 1388, *post*.

1349. **Improper exercise of discretion.**]

—R. v. BENNETT & BOND, *Ex p.* BENNET, No. 463, *ante*.

(b) *To Adjudicate and Rehear Complaints.*

i. *When Discretion has been exercised.*

See CROWN PRACTICE, Vol. XVI., pp. 311, 312, Nos. 1221–1230.

1350. **Court will not review decision.**]

I think that a writ of *mandamus* ought not to issue in this case, because the magistrates have already done more than we could order them to do. If the law requires a certain thing to be done, we may order it to be done by the party upon whom the obligation of doing it is imposed. If he is to act according to his discretion, & he will not act or even consider the matter, we may compel him to put himself in motion to do the thing, but we cannot control his discretion (BEST, J.).—R. v. NORTH RIDING OF YORKSHIRE JJ. (1823), 2 B. & C. 286; 3 Dow. & Ry. K. B. 510; 2 Dow. & Ry. M. C. 155; 2 L. J. O. S. K. B. 43; 107 E. R. 390.

1351. —.]—Where a magistrate has exercised his discretion by refusing to convict on the evidence adduced before him, in support of an information, the ct. will not compel him to rehear the case, or return the proceedings which had taken place before him.—*Ex p.* BRITISH & FOREIGN PATENT INVENTION CO. (1839), 7 Dowl. 614; 2 Will. Woll. & H. 57.

1352. —.]—Where an information is informally laid under a penal statute & the justices dismiss the complaint, the ct. will not grant a *mandamus*.—*Ex p.* WILLIAMS (1839), 4 Jur. 171.

1353. —.]—Rule *nisi* for *mandamus* to justices to hear, as by adjournment, an application for an order in bastardy, the application for which, it was alleged, they had dismissed on the ground that the father of the mother of the bastard child was able to maintain his daughter, was obtained. Cause was shown against this rule, & the affidavits of the justices denied that such had been the ground on which they had refused the application, for that they had not been satisfied with the evidence of the chargeability, & believed the relief to have been colourable, & therefore had refused

to entertain the application. It appeared, however, that the justices had questioned the mother of the bastard child as to the ability of her father to maintain her, & that this was one ground, the child itself being still an infant in arms, why they had been induced to decide that the chargeability was not made out. Witnesses, who were not heard, were in attendance to prove the chargeability, & corroborate the testimony of the mother; but the affidavits in support of the rule did not state that they were tendered:—*Held*: as the justices had exercised their jurisdiction, the ct. would not call on them to do so again; but as they had led those present to believe that they had decided on the ground alleged, the rule must be discharged without costs.—R. v. MARSHALL (1843), 2 L. T. O. S. 169; 7 J. P. 722.

1354. —.]—Where magistrates neither neglect nor refuse to take the examination of a pauper, & do not peremptorily decline to enter into the consideration of the case, but on the contrary actually take the examination, though they refuse to make the order of removal, this ct. will not grant a *mandamus* commanding them to grant such order, for the ct. will presume that, if the magistrates have entered on their duty, they will have performed it in a satisfactory manner.—LLANFIHANGEL RHYDITHON (INHABITANTS) v. ROGERS, ETC., RADNORSHIRE JJ. (1843), 7 Jur. 375.

1355. —.]—The refusal to hear evidence & argument on facts admitted by the party who desires to adduce the evidence, & argue on its effect, is not a refusal to hear a case on its merits, & a writ of *mandamus* will not on that ground lie, to compel a fresh hearing.

On an application for an order of removal, two justices, decided, misconstruing Poor Removal Act, 1846 (c. 66), s. 1, that the pauper was not, under the circumstances of his residence in the complaining parish, removable from it:—*Held*: this decision was one on the merits, & therefore as the magistrates had exercised their jurisdiction, this ct. would not interfere to compel them again to entertain the application. *Semble*: since Poor Removal Act, 1846 (c. 66), a writ of *mandamus* will lie to compel magistrates who have declined jurisdiction, to hear & adjudicate, as by adjournment, on an application for an order for the removal of a pauper.—R. v. BLANSHARD (1849), 13 Q. B. 318; 3 New Mag. Cas. 94; 3 New Sess. Cas. 418; 18 L. J. M. C. 110; 12 L. T. O. S. 448; 13 J. P. 104; 116 E. R. 1285.

*Annotation*:—*Refd.* R. v. Goodrich (1850), 4 New Mag. Cas. 101.

1356. — **Unless case stated.**]

—R. v. LEICESTER (DEPUTIES OF THE FREEMEN), No. 1381, *post*.

1357. — **Wrongful construction of Act of Parliament.**]

A complaint was made before justices against N. for keeping an illegal lottery, & it was alleged that the facts proved brought him within Gaming Act, 1802 (c. 119), s. 2, & rendered him liable to be punished as a rogue & a vagabond; but the magistrates thought, wrongly as it was suggested, that the provision as to such punishment was repealed, & that no punishment now existed for the offence:—*Held*: however erroneous the decision of the magistrates, this ct. could not review it either on *mandamus* or rule under Justices Protection Act, 1848 (c. 44), s. 5.

We cannot grant a *mandamus* to compel magistrates to put a right construction on an Act of

PART XIII. SECT. 3, SUB-SECT. 3.—

A. (b) i.

1350 i. **Court will not review decision.**]

—LEDDEN v. RUSSELL (1837), 2 Ber. 350.—CAN.

1350 ii. —.]—R. v. SHORTIS (1879),

13 N. S. R. (1 R. & G.) 70.—CAN.

1350 iii. —.]—R. v. WUNG TUNG

(1916), 33 W. L. R. 903; 10 W. W. R.

15.—CAN.

o. *Where jurisdiction of justice lost*

—*May be restored by order.*]

—R. v. WARNER, [1924] 4 D. L. R. 916;

[1924] 3 W. W. R. 512; 43 Can. Crim.

Cas. 78; 20 Alta. L. R. 545.—CAN.



*Sect. 3.—Mandamus: Sub-sect. 3, A. (b) i. & ii.]*

Parliament (LORD CAMPBELL, C.J.).—*R. v. BRISTOL JJ.* (1854), 22 L. T. O. S. 213; 18 Jur. 426, n.; *sub nom. Re BRISTOL JJ. & KING*, 2 W. R. 154.

*Annotation:—Refd.* *R. v. Worcestershire JJ.* (1854), 3 E. & B. 477.

**1358.** —.]—*R. v. GLOUCESTERSHIRE JJ.* (1856), 27 L. T. O. S. 185.

**1359.** —.]—After cause shown against a rule, under Justices Protection Act, 1848 (c. 44), s. 5, calling on the magistrate to show cause why he should not hear & adjudicate:—*Held*: the magistrate had heard & determined & therefore the ct. could not interfere.—*R. v. DAYMAN* (1857), 7 E. & B. 672; 26 L. J. M. C. 128; 29 L. T. O. S. 125; 22 J. P. 39; 3 Jur. N. S. 744; 5 W. R. 578; 119 E. R. 1395.

*Annotations:—Distd.* *R. v. Nunneley* (1858), E. B. & E. 852. *Refd.* *R. v. Brown* (1857), 7 E. & B. 757; *Pease v. Chaytor* (1863), 3 B. & S. 620; *R. v. Allen* (1866), 7 B. & S. 902; *R. v. Llanfillo, Brecknockshire JJ.* (1866), 15 L. T. 277; *Ex p. Vaughan* (1866), L. R. 2 Q. B. 114; *R. v. Sheil* (1884), 50 L. T. 590. *Mentd.* *Luton L. B. of Health v. Davis* (1860), 6 Jur. N. S. 580; *Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221; *St. Mary, Islington v. Barrett* (1874), 30 L. T. 11; *Dryden v. Putney Overseers* (1876), 1 Ex. D. 223; *Maude v. Baildon L. B.* (1883), 10 Q. B. D. 394; *Portsmouth Corpn. v. Smith* (1883), 13 Q. B. D. 184; *Richards v. Kessick* (1888), 59 L. T. 318.

**1360.** —.]—A magistrate, upon a complaint regularly heard before him, gave his opinion against complainant, but at the request of complainant he refused to adjudicate for the purpose of enabling complainant to take the opinion of the ct. Deft. objected, & wished the magistrate to adjudicate & dismiss the complaint:—*Held*: there was no such refusal to adjudicate as to entitle the complainant to a rule, under Justices Protection Act, 1848 (c. 44), s. 5.—*R. v. PAYNTER* (1857), 7 E. & B. 328; 26 L. J. M. C. 102; 28 L. T. O. S. 303; 21 J. P. 626; 3 Jur. N. S. 511; 5 W. R. 267; 119 E. R. 1268.

**1361.** —.]—Where justices have heard an information & dismissed it, on the ground that they had no jurisdiction, at the same time offering to grant a case, this ct. refused to grant a rule desiring them to hear & determine.—*Ex p. McLEOD* (1861), 3 L. T. 700; 25 J. P. Jo. 84.

**1362.** —.]—*R. v. FAWCETT, ETC., DURHAM JJ., Ex p. HODSON*, No. 1341, *ante*.

**1363.** —.]—*Ex p. CONEY* (1873), 37 J. P. Jo. 277.

**1364.** —.]—B., a licensed victualler, applied to the licensing justices for a renewal of his license. A written notice of opposition on the ground of a previous conviction of an offence was given, but no one supported it. No other opposition was offered, & the superintendent of police said there was no complaint since the previous conviction. The justices having refused the renewal:—*Held*: a *mandamus* to the justices to hear the application would not be granted, as they had a discretion, & had already exercised it by refusing the renewal.—*Ex p. BENDALL* (1877), 42 J. P. 88, D. C.

**1365.** —.]—*Ex p. MACMAHON*, No. 1344, *ante*.

**1366.** —.]—Where a magistrate has refused a summons on the ground that the information does not disclose an indictable offence, the High Ct. of justice has no jurisdiction to review his decision, either as to law or as to fact, & therefore in such a case a rule, under Justices Protection Act, 1848 (c. 44), s. 5, calling upon the magistrate to show cause why he should not hear & determine the application for a summons, will not be granted.—*Ex p. LEWIS* (1888), 21 Q. B. D. 191; 57 L. J. M. C. 108; 59 L. T. 338; 52 J. P. 773; 37

W. R. 13; 4 T. L. R. 649; 16 Cox, C. C. 449, D. C.

*Annotations:—Distd.* *R. v. Byrde, etc., JJ. & Gas Co., Ex p. Williams* (1890), 60 L. J. M. C. 17. *R. v. Bridge* (Metropolitan Police Magistrate) (1889), 5 T. L. R. 687; *R. v. Kennedy* (1902), 86 L. T. 753; *Burden v. Rigler* (1910), 27 T. L. R. 140.

**1367.** —.]—*R. v. BRIDGE* (1889), 5 T. L. R. 687, D. C.

**1368.** —.]—*R. v. DERBYSHIRE JJ., Ex p. HARRISON* (1892), 8 T. L. R. 211, D. C.

**1369.** —.]—Upon a rule *nisi* for a *mandamus* to command a metropolitan magistrate to hear & determine an application for a summons for an offence under Roman Catholic Relief Act, 1829 (c. 7), s. 29:—*Held*: though the information disclosed a *prima facie* case that the offence was committed, nevertheless the magistrate was entitled in the exercise of his discretion to refuse to issue a summons, & if he did so, the ct. had no jurisdiction to compel him to review his decision unless the discretion was exercised on improper & extraneous grounds.—*R. v. KENNEDY* (1902), 86 L. T. 753; 50 W. R. 633; 18 T. L. R. 557; 20 Cox, C. C. 230, D. C.

*Annotation:—Mentd.* *Re Smith, Johnson v. Bright-Smith*, [1914] 1 Ch. 937.

**1370.** —.]—A magistrate granted a warrant against a mother for conspiring with others to abduct her child out of the custody of its guardians. One of the persons was convicted of conspiracy, but the mother had not been arrested. On an application to the magistrate to withdraw the warrant against the mother, he declined to do so, on the ground that it had not been decided that the mother had not committed an offence against the law:—*Held*: the ct. would not interfere, as the magistrate had exercised a judicial discretion.—*R. v. CROSSMAN, Ex p. CHETWYND* (1908), 98 L. T. 760; 72 J. P. 250; 24 T. L. R. 517; 21 Cox, C. C. 605, D. C.

**1371.** — *Justices equally divided.*—*R. v. ASHPLEANT* (1888), 52 J. P. Jo. 474, D. C.

*Annotations:—Expld.* *R. v. Hertfordshire JJ., Ex p. Larsen*. [1926] 1 K. B. 191. *Refd.* *R. v. Wardle, etc. JJ. & Harton Coal Co., Ex p. Burrows* (1898), 14 T. L. R. 424. *Mentd.* *Kinnis v. Graves* (1898), 67 L. J. Q. B. 583.

*Compare* No. 560, *ante*.

**1372. Justices exceeding jurisdiction.**—Where an indoor beer license which had been renewed since 1869 was refused to be renewed by the licensing justices, on the ground that though the house was of sufficient annual value when the application was heard at the adjourned annual meeting, yet it had not been so on Aug. 25, the date of the original general annual meeting, the value having been increased during the interval:—*Held*: the justices had exceeded their jurisdiction, & a rule for *mandamus* was made absolute.—*R. v. MONTAGU* (1884), 49 J. P. 55, D. C.

## ii. Refusal to Hear Complaints.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 311, 312, Nos. 1221–1230.

**1373. Discretion not exercised.**—On complaint against a party as a vagrant, for refusing to maintain his wife, the party charged, being called upon by the justices in petty sessions to show cause for his refusal, denied being married to the woman, & produced some evidence in support of such denial: & he threatened the magistrates with an action if they committed him. Complainants offered evidence of a Gretna Green marriage; but the justices refused to hear it, & dismissed the summons, saying that they would not, on this application, try a disputed marriage, alleged to have taken place out of the country, & that the

parties ought to try it in the Ecclesiastical Ct. :—*Held*: the justices could not, under these circumstances, refuse to hear the case through; & a *mandamus* was granted, requiring them to hear the complaint.—*R. v. CUMBERLAND JJ.* (1836), 4 Ad. & El. 695; 111 E. R. 949.

*Annotations*:—*Distd.* *R. v. Marshall* (1843), 2 L. T. O. S. 169. *Consd.* *R. v. Blanshard* (1849), 13 Q. B. 318. *Dbtd.* *R. v. Leicester Deputies of Freemen* (1850), 15 Q. B. 671. *Consd.* *R. v. Fawcett, etc. Durham JJ., Ex p. Hodson* (1868), 19 L. T. 396. *Refd.* *R. v. Salop JJ.* (1837), 7 L. J. M. C. 3; *R. v. Canterbury (Archbp.)* (1848), 11 Q. B. 483. *Mentd.* *Ex p. Broseley* (1837), 7 Ad. & El. 423.

**1374.** —.]—*R. v. NEWENT JJ.* (1845), 4 L. T. O. S. 289; 9 J. P. 211.

**1375.** —.]—The justices who hear an application under Poor Law Amendment Act, 1844 (c. 101), for an order on the putative father of a bastard child, have no power to adjudicate finally against the mother; & if they dismiss the application, that dismissal is not a ground for dismissing a second application in the same matter, but is in the nature of a nonsuit in a civil action. This ct., therefore, will by writ of *mandamus*, or rule, compel justices to hear & determine an application for an order in bastardy, which they have refused to hear on the ground that it had been made after a former application in the same matter had been dismissed. *Semble*: the justices may dismiss the second application if on hearing it they are of opinion that the merits were fully inquired into & determined on the previous application.—*R. v. GLOUCESTERSHIRE JJ.* (1849), 3 New Mag. Cas. 108; 13 L. T. O. S. 507; 13 J. P. 535; *sub nom.* *R. v. GLOUCESTERSHIRE JJ., Re WHITE*, 13 Jur. 765.

**1376.** —.]—Where due notice, under 9 Geo. 4, c. 61, had been given to justices of an intention to apply for a licence to sell excisable liquors, & the justices had refused to hear such application, the ct. granted a rule absolute in the first instance, under C. L. P. Act, 1854 (c. 125), s. 76, for a *mandamus* to the justices to hear the application.—*R. v. WALSALL JJ.* (1854), 3 C. L. R. 100; 24 L. T. O. S. 111; 3 W. R. 69; 18 J. P. Jo. 757. *Annotation*:—*Refd.* *Sharpe v. Wakefield* (1888), 21 Q. B. D. 66.

**1377.** —.]—Upon an application to justices for summonses against certain persons to answer a charge of conspiracy to break the peace & do grievous bodily harm at a public meeting, evidence was given that a disturbance had arisen at the meeting in which defts. took part, & that one or other of them had previously offered money to different persons if they would commit acts of violence at the meeting. The justices, after hearing the evidence, declined to issue the summonses, & a rule *nisi* for a *mandamus* having been obtained, they stated in their affidavit that upon the facts brought before them they did not feel justified in granting the application, but did not say that they thought the witnesses unworthy of credit:—*Held*: the rule must be made absolute, for although under Indictable Offences Act, 1848 (c. 42), s. 9, the justices are to issue their summons "if they shall think fit," it was here evident that they had not exercised a discretion.—*R. v. ADAMSON* (1875), 1 Q. B. D. 201; 45 L. J. M. C. 46; 24 W. R. 250; *sub nom.* *R. v. TYNEMOUTH JJ.*, 33 L. T. 840; 40 J. P. 182.

*Annotations*:—*Distd.* *Ex p. Macmahon* (1883), 48 J. P. 70. *Apld.* *R. v. Evans* (1890), 62 L. T. 570. *Consd.* *R. v. Byrde & Pontypool Gas Co., Ex p. Williams* (1890), 60 L. J. M. C. 17; *R. v. St. Pancras, Vestry* (1890), 62 L. T. 440; *R. v. Edlin* (1891), 65 L. T. 83. *Apld.* *R. v. Bowman*, [1898] 1 Q. B. 663. *Consd.* *R. v. Kennedy* (1902), 86 L. T. 753. *Apld.* *R. v. Board of Education*, [1910] 2 K. B. 165; *R. v. Mead, Ex p. National Health Insec. Comrs.* (1916),

85 L. J. K. B. 1065. *Refd.* *Ex p. Reid* (1885), 49 J. P. 600; *Ex p. Lewis* (1888), 21 Q. B. D. 191; *Ex p. Lewis v. Vaughan, Matthews & Warren* (1888), 4 T. L. R. 649; *R. v. London (Bp.)* (1889), 24 Q. B. D. 213; *R. v. Pownall* (1890), 63 L. T. 418; *R. v. Huggins & Humphreys* (1891), 60 L. J. M. C. 139; *R. v. Southampton JJ., Ex p. Lebern* (1907), 96 L. T. 697; *R. v. Bennett & Bond, Ex p. Bennet* (1908), 72 J. P. 362; *R. v. Garrett, Ex p. De Dryver* (1917), 87 L. J. K. B. 129; *Roberts v. Hopwood*, [1925] A. C. 578; *Peagram v. Peagram*, [1926] 2 K. B. 165; *Short v. Poole Corpn.*, [1926] Ch. 66.

**1378.** —.]—It is an established rule of this ct. that the discretion of magistrates must be exercised upon fitting materials & if a decision or possibly a determination has been come to on grounds not fitting & outside those which by law a magistrate is entitled to consider, there the ct. will look at the matter as if the discretion had not been exercised at all & will by *mandamus* compel the magistrate to exercise that discretion which he has in truth & in contemplation of law not exercised (LORD COLERIDGE, C.J.).—*R. v. EVANS* (1890), 62 L. T. 570; 54 J. P. 471; 6 T. L. R. 248; 17 Cox, C. C. 81, D. C.

*Annotations*:—*Consd.* *R. v. Southampton JJ., Ex p. Lebern* (1907), 96 L. T. 697; *R. v. Bennett & Bond, Ex p. Bennet* (1908), 72 J. P. 362.

**1379.** —.]—*R. v. BENNETT & BOND, Ex p. BENNET*, No. 463, *ante*.

**1380. Jurisdiction declined.**—*R. v. BLANSHARD*, No. 1355, *ante*.

, upon a mistaken view of the law, in reference to a point upon which its jurisdiction depends, an inferior tribunal refuses to hear, this ct. will compel it to hear by *mandamus*.

Whenever the justices or the inferior tribunal have refused to hear on a mistaken view of the law in reference to a point upon which their jurisdiction depends, this ct. will interfere & grant a *mandamus* to compel them to hear. When they have heard, we cannot review their decision unless they state a case for our opinion, but we may compel them to hear when they have improperly refused (LORD CAMPBELL, C.J.).—*R. v. LEICESTER (DEPUTIES OF THE FREEMEN)* (1850), 15 Q. B. 671; 117 E. R. 613; *sub nom.* *R. v. GOODRICH*, 4 New Mag. Cas. 101; 19 L. J. Q. B. 413; 15 L. T. O. S. 248; 14 J. P. 415; 14 Jur. 914.

*Annotations*:—*Apld.* *R. v. Monmouth (Mayor), R. v. Bolton (Mayor)* (1870), L. R. 5 Q. B. 251. *Refd.* *R. v. Liverpool Recorder* (1850), 1 L. M. & P. 682. *Mentd.* *R. v. Pawlett* (1873), L. R. 8 Q. B. 491; *Ex p. Portingell*, [1892] 1 Q. B. 15; *R. v. Somerset JJ.* (1900), 16 T. L. R. 166.

**1382.** —.]—On an information, under 18 & 19 Vict. c. 108, against one of several joint owners of a colliery, for disobedience of the rules in sect. 4, after evidence had been gone into on the merits, the justices dismissed the complaint on an objection taken by deft., that the proceedings should have been against all the joint owners:—*Held*: (1) the decision was wrong; (2) it was on a point going to the magistrates' jurisdiction only, & this ct. could, therefore, rule them to hear & adjudicate.—*R. v. BROWN* (1857), 7 E. & B. 757; 26 L. J. M. C. 183; 29 L. T. O. S. 160; 22 J. P. 54; 3 Jur. N. S. 745; 5 W. R. 625; 119 E. R. 1427.

*Annotations*:—*As to* (2) *Folld.* *R. v. Essex JJ.* (1883), 49 L. T. 177. *Refd.* *Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221.

**1383.** —.]—*Ex p. MACKWORTH* (1857), 21 J. P. Jo. 756.

**1384.** —.]—*R. v. FAWCETT, ETC., DURHAM JJ., Ex p. HODSON*, No. 1341, *ante*.

**1385.** —.]—*LONDON (MAYOR) v. ELLISSEN* (1868), cited 41 L. T. at p. 506.

*Annotations*:—*Refd.* *R. v. Carden* (1879), 5 Q. B. D. 1; *Ex p. Bottomley*, [1909] 2 K. B. 14.



*Sect. 3.—Mandamus: Sub-sect. 3, A. (b) ii. & (c), B. (a).]*

**1386.** —.]—*Ex p.* WOOLF (1871), cited in 24 W. R. at p. 251.

*Annotation:—Refd.* R. v. Adamson, etc., Tynemouth JJ. & Spence (1875), 24 W. R. 250.

**1387.** —.]—An information was laid against one T. for having unlawfully released certain cows, heifers, & bullocks which had been lawfully seized for the purpose of being impounded. The justices, holding that the bullocks, etc., were not included in the words "other beast or cattle" in Pound-breach Act, 1843 (c. 30), s. 1, dismissed the complaint, on the ground of their want of jurisdiction. A rule *nisi* for a *mandamus* ordering them to hear & determine the matter having been obtained:—*Held*: it must be made absolute, as the justices had improperly declined jurisdiction under the statute in question.—R. v. GEE (1885), 49 J. P. 212; 1 T. L. R. 388, D. C.

**1388.** —.]—Where, in their refusal to issue a summons, it appeared that the justices had merely declined jurisdiction & had not exercised their discretion, on an application for a *mandamus*:—*Held*: a rule would be granted ordering them to consider the evidence & decide whether the summons ought or ought not to issue.—R. v. BYRDE & PONTPOOL GAS CO., *Ex p.* WILLIAMS (1890), 60 L. J. M. C. 17; 63 L. T. 645; 55 J. P. 310; 39 W. R. 171; 17 Cox, C. C. 187; *sub nom.* Re MONMOUTHSHIRE JJ., *Ex p.* WILLIAMS, 7 T. L. R. 79, D. C.

*Annotation:—Consd.* R. v. Kennedy (1902), 86 L. T. 753.

**1389.** —.]—Upon the hearing of a summons under Metropolis Management Amendment Act, 1862 (c. 102), s. 77, taken out by a district board against the owner of a house in a new street to enforce payment of the apportioned expenses incurred in executing paving works in such street under Metropolis Management Act, 1855 (c. 120), s. 105, the magistrate is bound to inquire & receive evidence on the questions whether the sum alleged to have been expended has been actually expended, & expended solely on paving works; & a refusal to enter upon such an inquiry & to receive evidence therein amounts to a declining of jurisdiction on his part in respect of which the ct. will grant a *mandamus*.—R. v. MARSHAM, [1892] 1 Q. B. 371; 61 L. J. M. C. 52; 65 L. T. 778; 56 J. P. 164; 40 W. R. 84; 8 T. L. R. 3; 36 Sol. Jo. 11, C. A.

*Annotations:—Expld.* Stroud v. Wandsworth District Board of Works, [1894] 2 Q. B. 1. *Consd.* R. v. Cheshire JJ., *Ex p.* Heaver (1912), 108 L. T. 374. *Refd.* Davis v. Greenwich Board of Works (1895), 64 L. J. M. C. 257; Met. Dist. Ry. v. Fulham Parish Vestry, [1895] 2 Q. B. 443; R. v. Stepney B. C. (1901), 71 L. J. K. B. 238; Ballard v. Wandsworth B. C. (1906), 95 L. T. 118; Bower v. Caistor R. D. C. (1911), 75 J. P. 186; R. v. Offlow General Income Tax Comrs. (1911), 27 T. L. R. 353.

**1390.** —.]—R. v. PLOWDEN, *Re* INDUSTRIAL SCHOOLS ACTS (1895), 11 T. L. R. 181, D. C.

**1391.** —.]—*Ex p.* FITZGERALD (1897), 41 Sol. Jo. 188, D. C.

**1392.** —.]—Application was made to a Metropolitan magistrate for a summons against an employer for failing to pay certain contributions in respect of his domestic servants pursuant to National Insurance Act, 1911 (c. 55), & the magistrate refused to grant the same unless the National Insurance Comrs. at the same time took proceedings against the domestic servants, who were just as much liable to process under the Act as the employer. A rule *nisi* for *mandamus* was therefore granted against him:—*Held*: the magistrate in declining to exercise his jurisdiction had acted upon something extraneous & extrajudicial which ought not to have affected his

decision, & had thereby declined jurisdiction, & the rule *nisi* must be made absolute.—R. v. MEAD, *Ex p.* NATIONAL HEALTH INSURANCE COMRS. (1916), 85 L. J. K. B. 1065; 114 L. T. 1172; 80 J. P. 332; 14 L. G. R. 688, D. C.

**1393.** —.]—F. was charged under Defence of the Realm Regulations, Reg. 45 (ccc.) with having in his possession on May 23, 1918, without lawful authority or excuse, a document, a birth certificate, so nearly resembling a certificate issued by a foreign Govt. as to be calculated to deceive. The case had been referred to the competent military authority, who gave a certificate that the offence was "one which could adequately be dealt with by a ct. of summary jurisdiction." Reg. 45 (ccc.) enumerates various documents which might be the subject matter of a charge, & the certificate did not define the particular offence for which the prosecution was to be commenced, & there being thus no direct evidence that the charge on the charge sheet was the offence which had been investigated, the magistrate was not satisfied that he had jurisdiction, & dismissed the summons on the ground that the form of the certificate was wrong, as not specifying in the manner in which the offence would be specified in an information, summons or count, the charge in respect of which the prosecution had been commenced:—*Held*: the certificate was *prima facie* evidence that the magistrate had jurisdiction to deal with any charge under the regulation, & therefore the magistrate, having wrongly declined jurisdiction, the rule for a *mandamus* would be made absolute.—R. v. MEAD & FOX, *Ex p.* PUBLIC PROSECUTIONS DIRECTOR, [1918] 2 K. B. 866; 88 L. J. K. B. 98; 119 L. T. 314; 83 J. P. 1; 35 T. L. R. 4; 62 Sol. Jo. 763; 16 L. G. R. 830, D. C.

**1394. Refusal to enable High Court to decide case.]**—Upon an information for keeping open a beerhouse until eleven at night, contrary to Beerhouse Act, 1840 (c. 61), s. 15, it appeared that the house was situated in the township of C., which contained, according to the last Parliamentary census, less than two thousand five hundred inhabitants; that it was also situated in a place called H., which comprised parts of three townships, C. being one, & was an aggregation of houses & inhabitants under a distinct name, containing more than two thousand five hundred inhabitants, but having no local rights peculiar to itself, & it was not included in the Parliamentary census. The application for the beer license described appct. as "dwelling in a house in H., in the township of C." The certificate of character was signed by six "inhabitants of the township of C."; & the certificate of the overseer was signed by the description, overseer "of the township of C." The license was to keep open the house until ten o'clock at night. The justices having in order to obtain the opinion of this ct., refused to adjudicate. On a rule under Justices Protection Act, 1848 (c. 44), s. 5, requiring the justices to do so:—*Held*: as the justices had only refused to adjudicate in order to raise the point in a convenient form for the opinion of this ct., & as the facts were stated on which they so refused, this ct. would decide whether they had done right in refusing to convict.—R. v. CHARLESWORTH (1851), 2 L. M. & P. 117; 4 New Sess. Cas. 554; 20 L. J. M. C. 181; *sub nom.* R. v. CHARLESWORTH, *Re* HEARNshaw, 16 L. T. O. S. 395; *sub nom.* R. v. WEST RIDING OF YORKSHIRE JJ., 15 J. P. 163; 15 Jur. 178.

*Annotations:—Refd.* R. v. Dayman (1857), 29 L. T. O. S. 125; R. v. Paynter (1857), 7 E. & B. 328. *Mentd.* Washington v. Scott, Smith v. Redding, Windsor v. Jeffery (1865), 6 B. & S. 617; Smith v. Redding (1866), L. R. 1 Q. B. 489; Rice v. Slec (1872), L. R. 7 C. P. 378.

## (c) To Admit and Hear Evidence.

See, generally, CROWN PRACTICE, Vol. XVI., p. 312, Nos. 1237–1239.

**1395. Mandamus will not issue.]**—When an information is laid before justices of the peace for an indictable misdemeanour, it is in the discretion of the justices to hear it, or refuse to hear & leave the complaining party to originate his prosecution before a grand jury. The ct., therefore, refused to compel justices by *mandamus* to hear evidence on an information, with a view to prosecution by indictment, for an alleged perjury in depositions before the Ecclesiastical Ct., when it appeared that the suit in which the depositions had been made was still depending, & that the justices had therefore held it improper to proceed on the information.—*R. v. INGHAM* (1849), 14 Q. B. 396; 4 New Mag. Cas. 14; 3 New Sess. Cas. 689; 19 L. J. M. C. 69; 14 L. T. O. S. 220; 14 Jur. 223; 13 J. P. Jo. 760; 117 E. R. 156.

*Annotations:—Distd. R. v. Fawcett, etc., Durham JJ., Ex p. Hodson* (1868), 19 L. T. 396. *Consd. R. v. Byrde & Pontypool Gas Co., Ex p. Williams* (1890), 60 L. J. M. C. 17. *Refd. Ex p. Lewis* (1888), 21 Q. B. D. 191; *R. v. Kennedy* (1902), 86 L. T. 753. *Mentd. R. v. Garrett, Ex p. De Dryver* (1917), 34 T. L. R. 13.

**1396. —.]**—*R. v. HULL LICENSING JJ.* (1883), 47 J. P. Jo. 820.

**1397. — Rejection of evidence properly admissible.]**—The ct. will not direct a *mandamus* to issue to compel justices to hear & determine a case upon which, after hearing evidence they have adjudicated, though at the hearing they had rejected certain evidence which was properly admissible.—*R. v. YORKSHIRE JJ., Ex p. GILL* (1885), 53 L. T. 728; 34 W. R. 108; 2 T. L. R. 48, D. C.

*Annotation:—Apld. R. v. Offlow General Income Tax Comrs.* (1911), 27 T. L. R. 353.

## B. In respect of Ministerial Acts.

## (a) Issue of Distress Warrant.

Distress generally, see DISTRESS, Vol. XVIII., pp. 260 *et seq.*

See Justices Protection Act, 1848 (c. 44), s. 5.

**Whether ministerial act.]**—See DISTRESS, Vol. XVIII., pp. 398, 399, Nos. 1389–1396.

**1398. Whether mandamus will issue.]**—A *mandamus* will lie against a justice, a trustee of a school, for refusing to grant a distress warrant for levying the poor rate on the lands from which the school is supported, if the lands are legally liable, although he may believe that they are legally exempt.—*R. v. ELLIS & GREENWOOD* (1842), 2 Dowl. N. S. 361; 12 L. J. M. C. 20; 7 J. P. 179; 7 Jur. 108.

**1399. —.]**—A local Act for paving, lighting, watching, & improving the town of B., empowered, in one sect., the comrs. for carrying it into execution, to “rate & assess, & to make an equal rate or assessment, upon the tenants or occupiers of all houses, shops, coachhouses, stables, brewhouses, etc., within the said town, that are or shall be in, or adjoining, or contiguous to any street, lane, court, passage, or other place within the said town, or wholly or in part within the said town, &

within the distance of 100 yards in a direct line from any lamp or public light, now or hereafter to be affixed or put up under the powers of this Act,” etc. In another it declared, “that for all & every the purposes of this Act, the town of B. shall comprise & be deemed to extend over all these parts of the several tithings in the parish of B., called, etc., which shall lie within the circumference of one mile in a straight direction from the centre of the said town of B., a certain messuage, called the Swan Inn, being considered & taken as such centre. A rule for a *mandamus* commanding a magistrate to issue a distress warrant for levying the amount of a rate upon the goods & premises of a gentleman, whose house was included within the one mile from the centre of B., as above described, but not within 100 yards in a direct line from any lamp or public light, was refused with costs; & that, though an indemnity was offered & ready to be given to the magistrate.—*R. v. BROWNE* (1843), 1 L. T. O. S. 255; 7 J. P. 528.

**1400. —.]**—*R. v. BROWN* (1844), 8 J. P. Jo. 389.

**1401. —.]**—*R. v. KENT JJ.* (1844), 3 L. T. O. S. 60, 186; 8 J. P. Jo. 311, 500.

**1402. —.]**—Two justices for the county of O., after hearing the grounds of exemption, which appeared to be substantial, refused to issue their distress warrant for levying the amount of such rate. The ct. granted a rule, under Justices Protection Act, 1848 (c. 44), s. 5, to compel them, notwithstanding such exemption appeared to be valid.—*BLETCHINGDON SURVEYORS OF HIGHWAYS v. PEYTON* (1849), 6 Dow. & L. 288; *sub nom. R. v. OXFORDSHIRE JJ.*, 18 L. J. M. C. 222; 14 Jur. 575; 13 J. P. Jo. 445; *sub nom. R. v. PEYTON*, 14 L. T. O. S. 66.

**1403. —.]**—*R. v. HULL JJ.* (1849), 14 L. T. O. S. 201; *previous proceedings, sub nom. R. v. KINGSTON-UPON-HULL JJ.*, 13 J. P. Jo. 745.

**1404. —.]**—*R. v. SUTCLIFFE, ETC., BATH JJ.* (1850), 14 L. T. O. S. 355, 396; 14 J. P. Jo. 68; *previous proceedings* (1849), 13 J. P. Jo. 760.

**1405. —.]**—*R. v. NEWBURY JJ.* (1851), 15 J. P. Jo. 321.

**1406. —.]**—*R. v. ANTROBUS* (1853), 17 J. P. Jo. 325.

**1407. —.]**—Where magistrates have convicted of penalties on matters within their jurisdiction, & the convictions are regular in form, & there is no legal reason shown why the parties convicted have not paid the penalties, the ct. will feel bound to grant a rule under Justices Protection Act, 1848 (c. 44), s. 5, to the magistrates to issue warrants to levy the amounts, & have no discretion to refuse to do so on the ground of some supposed hardship in the number of the convictions or the amount of the costs.—*Re HARTLEY* (1862), 31 L. J. M. C. 232.

*Annotation:—Mentd. Milnes v. Bale, Milnes v. Lea* (1875), L. R. 10 C. P. 591.

**1408. —.]**—Although this ct. will not interfere with the justices in the exercise of their discretion; yet where they have exercised that

## PART XIII. SECT. 3, SUB-SECT. 3.—

## A. (a).

**1395 i. Mandamus will not issue.]**—When a prosecution before justices is still proceeding, the full ct. had no power under Justices of the Peace Act, 1887, No. 953, s. 163, to make a mandatory order upon the justices to compel them to receive certain evidence tendered for the prosecution & ruled by them to be inadmissible.—*R. v. BIRKETT* (1890), 16 V. L. R. 398.—**AUS.**

**p. — Where other remedy available.]**—Where a magistrate commenced the examination of a criminal charge, but refused to proceed because he thought that the only witness offered to prove a material fact was not competent; the ct. refused on the application of a private prosecutor, to grant a *mandamus* to compel him to proceed, there being another remedy by bill of indictment before the grand jury.—*R. v. DUVANEY* (1869), 1 Han. 581.—**CAN.**

**q. — Evidence given before special committee of House of Commons.]**—At the hearing of a criminal charge before a county judge, sitting as police magistrate, evidence given before a special committee of the House of Commons, & taken by stenographers, was tendered before the magistrate & refused by him:—*Held*: the ct. had no power to grant a *mandamus* to the county judge directing him to receive such evidence.—*R. v. CONNOLLY* (1891), 22 O. R. 220.—**CAN.**



**Sect. 3.—Mandamus: Sub-sect. 3, B. (a) & (b), & C.; sub-sect. 4. Sect. 4.]**

discretion by declining to execute a provision in an Act of Parliament, upon grounds manifestly unsound, this ct. will interfere.

An order of a board of guardians was made upon an overseer for contribution, which he refused to comply with, & upon an application to justices for a warrant of distress, they refused to grant it:—*Held*: this ct. would review & control their discretion.—*Ex p. BRIDGEND & COWBRIDGE GUARDIANS* (1864), 9 L. T. 720.

**1409.** —.]—Where, by an Act of Parliament, power is conferred upon justices to issue a distress warrant, "if they shall think fit," they must not refuse to issue it merely because they think the Act of Parliament does an injustice in giving such power in the particular case. Therefore, where the overseer of a parish, which had been an extra-parochial place but had been duly annexed to a union, was ordered by the board of guardians of the union to pay certain money towards the common fund & he refused to pay such money:—*Held*: justices could not refuse to issue their warrant, under Poor Rate Act, 1839 (c. 84), s. 1, to distrain the goods of the overseer, merely because they thought it unjust that such extra-parochial place should be compelled to contribute to the common fund of the union.—*R. v. BOTELER* (1864), 4 B. & S. 959; 3 New Rep. 505; 33 L. J. M. C. 101; 28 J. P. 453; 10 Jur. N. S. 798; 12 W. R. 466; 122 E. R. 718.

*Annotations:—Distd. R. v. Adamson* (1875), 1 Q. B. D. 201. *Refd. R. v. Bros* (1901), 85 L. T. 581. *Mentd. R. v. Oxford* (Bp.) (1879), 4 Q. B. D. 525; *Davies v. Evans* (1882), 9 Q. B. D. 238; *R. v. London* (Bp.) (1889), 24 Q. B. D. 213; *Sharp v. Wakefield*, [1891] A. C. 173; *R. v. Local Government Board, Ex p. Hackney B. C.*, etc. (1908), 8 L. G. R. 665.

—.]—*Ex p. NEATH GUARDIANS* (1875), 39 J. P. Jo. 85.

**1411.** —.]—A member of a friendly society became insane & chargeable to the union, & was sent to the county lunatic asylum. The guardians applied to justices under Divided Parishes & Poor Law Amendment Act, 1876 (c. 61), s. 23, for an order on the trustees to pay out of the arrears of his annuity the cost of his maintenance in relief of the union. The trustees opposed the order on the ground that the rules forbade them to so apply these funds, & the annuity was needed for the member's family. The justices made the order, but refused to issue a distress warrant:—*Held*: the justices were bound to issue the warrant, for the trustees ought to have appealed or applied to quash the order; & it was now no defence, that the order was invalid or made without jurisdiction.—*R. v. SWINDON JJ.* (1878), 42 J. P. 407, D. C.

*Annotation:—Consd. R. v. Lancashire JJ., Ex p. Tyrer*, [1925] 1 K. B. 200.

**1412.** —.]—L., a metropolitan ratepayer, being assessed by a new valuation at a much higher sum, gave notice of appeal. On application, a judge in chambers, by consent, made an order on L. to pay on the old valuation till a special case should be stated:—*Held*: the magistrate was bound to issue a distress warrant, & a rule by way of *mandamus* under Justices Protection Act, 1848 (c. 44), s. 4, was properly made ordering him to issue such warrant accordingly.—*R. v. MARSHAM* (1883), 50 L. T. 142; 48 J. P. 308; 32 W. R. 157, C. A.

**PART XIII. SECT. 3, SUB-SECT. 3.—**  
**B. (b).**

*r. To certify non-payment of costs.]*  
—The ct. having granted a pro-

hibition against proceeding further with an appeal from a conviction, refused a *mandamus* to the clerk of the peace to certify the non-payment of costs under C. S. U. C., c. 103, s. 67.—

**1413.** —.]—J. was rated as occupier of premises in the D. parish, & also in G. parish, & paid the rates to D. He did not appeal against the rate made by G. parish, & on an application by the G. overseers for distress warrant, the justices having declined & a rule being moved for by way of *mandamus* under Justices Protection Act, 1848 (c. 44), s. 5:—*Held*: the rule must be made absolute, but without costs.

Inasmuch as the duty of the magistrates is always considered to be a mere ministerial duty, when it is once shown that the rate is a good rate on the face of it, & it has not been appealed against, the almost universal course that the magistrates have adopted has been to issue a warrant (*WILLIAMS, J.*).—*R. v. JEFFERSON* (1884), 48 J. P. 393.

**1414.** —.]—Where an affiliation order has been made which is not appealed against, or where there has been an appeal to quarter sessions against the order & the appeal has been dismissed, & subsequently an application is made to justices to enforce the order by the issue of a distress warrant, the justices have no jurisdiction to enter into any inquiry as to the validity of the original order.—*R. v. LANCASHIRE JJ., Ex p. TYRER*, [1925] 1 K. B. 200; 94 L. J. K. B. 331; 132 L. T. 382; 89 J. P. 17; 41 T. L. R. 103; 69 Sol. Jo. 194; 23 L. G. R. 32; 27 Cox, C. C. 711, D. C.

**1415. Where rate invalid.]**—Justices Protection Act, 1848 (c. 44), s. 4, does not protect a justice if he acts without jurisdiction. Sect. 5 was not intended to be acted upon in a case in which there is not a substantial point in issue. Where, therefore, overseers made a rate, & included in it property never before rated, & which property, by a great body of evidence appeared to be extra-parochial, & the justices refused to issue their warrant of distress to levy the rate, the ct. refused to compel them, under Justices Protection Act, 1848 (c. 44), s. 5, to do so.—*R. v. GREAT YARMOUTH JJ.* (1850), 4 New Sess. Cas. 313; 16 L. T. O. S. 175; 14 J. P. Jo. 769; *subsequent proceedings* (1851), 15 J. P. Jo. 417.

**1416. Where order invalid.]**—This Court will inquire into the validity of an order of justices before compelling them under Justices Protection Act, 1848 (c. 44), s. 5, to issue a distress warrant to enforce such order, & will refuse a rule for that purpose where the order appears to be invalid.

A party upon appearing before two justices upon a summons for non-payment of a church-rate, under 53 Geo. 3, c. 127, s. 7, stated to the justices that he disputed the validity of that rate, & specified several objections. Whereupon the justices adjourned the hearing, to admit of the party in the meantime taking steps to dispute the rate. On the day of adjournment, no such steps having been taken, the justices made an order for the payment of the amount claimed; but afterwards declined to issue a distress warrant to enforce that order:—*Held*: the order was made without jurisdiction, & therefore a rule under Justices Protection Act, 1848 (c. 44), s. 5, to compel the issuing of a distress warrant to enforce it could not be granted.—*R. v. COLLINS* (1852), 21 L. J. M. C. 73; 18 L. T. O. S. 239; 16 J. P. 230; 16 Jur. 422.

(b) Other Cases.

**1417. Forcible entry.]**—A *mandamus* lies to justices to inquire of a forcible entry.—*CALY v.*

*Re COLEMAN* (1864), 23 U. C. R. 615.—**CAN.**

*t. To issue warrant.]*—*R. v. HICKS* (1886), 19 R. & G. 89; 7 C. L. T. 143.—**CAN.**

HARDY, ETC., IPSWICH JJ. (1704), 6 Mod. Rep. 164; Holt, K. B. 407; 87 E. R. 921; *sub nom.* ANON., 6 Mod. Rep. 139.

1418. —.]—*R. v. MONTAGUE* (1728), 1 Barn. K. B. 72; 94 E. R. 50.

1419. **To enforce invalid order.**]—A *mandamus* to compel a magistrate to enforce a conviction for pltf., refused, where he had returned that deft. was convicted of the penalty before him but that the said conviction was invalid in law & there was not an offence for which the said penalty was payable or could legally be levied.—*R. v. ROBINSON* (1805), 2 Smith, K. B. 274.

1420. —.]—By a local improvement Act, comrs. were authorised to order the removal of nuisances, subject to an appeal to sessions. Penalties were imposed for disobeying the comrs.' orders, & the penalties were to be recovered by summary proceeding before magistrates. The comrs. having made an order, invalid upon the face of it, & that order having been disobeyed by deft., application was made to justices to convict him in the penalty provided by the statute; but they refused to convict, on the ground that the obstruction ordered to be removed was not a nuisance:—*Held*: that was not an exercising of the jurisdiction entrusted to them; but as the order of the comrs. was bad, a *mandamus* ought not to go to compel them to hear a complaint founded upon the disobedience of it.—*R. v. MILLS, ETC., LAN-CASHIRE JJ.* (1851), 17 L. T. O. S. 164; 15 J. P. 435.

1421. **To produce documents—Depositions.**]—A *mandamus* will not lie to compel a magistrate to produce depositions taken before him on a charge of felony, for the purpose of founding an indictment of perjury against the deponents; the magistrate may be subpoenaed to produce the depositions which may be read in evidence before the grand jury.—*Re BEDFORD COUNTY JUSTICE* (1819), 1 Chit. 627.

Annotation:—*Reid. R. v. Browne* (1849), 4 Cox, C. C. 1.

1422. — **Information on which warrant issued.**]—*Ex p. WEST* (1865), 29 J. P. Jo. 310.

1423. — **Copy of conviction.**]—*Ex p. HUNTLEY* (1869), 33 J. P. Jo. 775.

1424. **To allow & sign rate.**]—Parochial Assessments Act, 1836 (c. 96), s. 1, which enacts, that no rate for the relief of the poor shall be allowed by any justices which shall not be made upon an estimate of the net annual value of the hereditaments rated thereunto, gives the justices a ministerial & not a judicial power, & therefore, if they refuse to sign a rate, *mandamus* will lie to compel them.—*R. v. YARBOROUGH (EARL)* (1840), 12 Ad. & El. 416; 3 Per. & Dav. 491; 9 L. J. M. C. 62; 4 J. P. 539; 4 Jur. 627; 113 E. R. 869.

Annotations:—*Consd. R. v. Godolphin & Cotton* (1844), 8 Jur. 574; *Fox v. Davies* (1848), 6 C. B. 11. *Reid. Baker v. Locke* (1864), 18 C. B. N. S. 52.

1425. —.]—If a poor rate be good on the face of it, justices cannot enter into the question of the

validity of such rate, for the allowance of a rate by justices is an act purely ministerial.

A poor rate had been made by the two overseers of a parish only, in a parish where there were two churchwardens who had not been sworn in; & two justices having refused to allow the rate, inasmuch as it was not made by the majority of the parish officers, this ct. directed a *mandamus* to the justices to allow the rate.—*R. v. GODOLPHIN (LORD)* (1844), 1 New Sess. Cas. 1; 13 L. J. M. C. 57; 8 J. P. 521; 8 Jur. 574.

#### C. Particular Instances.

**To licensing justices.**]—See INTOXICATING LIQUORS, Vol. XXX., pp. 66–68, Nos. 515–534.

**To enforce rates.**]—See RATES & RATING.

#### SUB-SECT. 4.—PRACTICE AND PROCEDURE.

Procedure generally, see CROWN PRACTICE, Vol. XVI., pp. 323 *et seq.*

**Application for order nisi—How made.**]—See PRACTICE, Vol. XVI., p. 324, Nos. 1366–

**Time for.**]—See CROWN PRACTICE, Vol. XVI., pp. 325, 326, Nos. 1379–1389.

**Showing cause against order nisi.**]—See CROWN PRACTICE, Vol. XVI., pp. 330, 331, Nos. 1456, 1457, 1464, 1466, 1467.

**Order absolute.**]—See CROWN PRACTICE, Vol. XVI., p. 331, Nos. 1469–1484.

**Amendment of defective writ.**]—See CROWN PRACTICE, Vol. XVI., p. 336, No. 1552.

**Return to writ.**]—See CROWN PRACTICE, Vol. XVI., pp. 337, 341, Nos. 1569, 1639–1642.

**Amendment of return.**]—See CROWN PRACTICE, Vol. XVI., p. 342, Nos. 1653, 1654.

**Pleading to return.**]—See CROWN PRACTICE, Vol. XVI., pp. 343, 344, Nos. 1672, 1673.

**Enforcement of obedience.**]—See CROWN PRACTICE, Vol. XVI., p. 346, No. 1729.

**Costs.**]—See CROWN PRACTICE, Vol. XVI., pp. 348–350, 352, Nos. 1760, 1761, 1779, 1784, 1785, 1817.

#### SECT. 4.—CERTIORARI.

See, generally, CROWN PRACTICE, Vol. XVI., p. 398, Nos. 2419 *et seq.*

1426. **Order of justices quashed—Order of sessions falls of course.**]—If order of justices be quashed, order of sessions falls of course.—ANON. (1701), 12 Mod. Rep. 548; 88 E. R. 1510.

1427. **To quash magistrates' decision—Evidence sufficient to convict—No contradictory evidence.**]—If justices of the peace acquit deft., against whom an information is laid before them for a penalty, this ct. cannot reverse the judgment, though the justices state, on a return to a *certiorari* to remove

#### PART XIII. SECT. 3, SUB-SECT. 3.—C.

a. **To hear appeal.**]—*R. v. SMITH* (1874), 35 U. C. R. 518.—CAN.

b. **To take recognisance.**]—*R. v. EGAN* (1896), 11 Man. L. R. 134.—CAN.

#### PART XIII. SECT. 4.

c. **General rule.**]—A magistrate's decision should not be reversed unless after a rehearsing the ct. is satisfied that the conviction is one which should be reversed, or it is apparent on the face of the proceedings that the conviction is an illegal one.—*MCCABE v. MCCABE* (1906), 3 E. L. R. 56.—CAN.

d. —.]—An order for the re-

moval of a case from the magistrate's ct. to the Supreme Ct. ought to be made when a consideration of all the circumstances of the case points out that it is desirable that the case should rather be heard in the Supreme Ct. than in the magistrate's ct. & the fact that difficult questions will arise ought not to be the sole ground.—*RAMSAY v. OLDHAM* (1903), 23 N. Z. L. R. 8.—N.Z.

e. **To quash magistrate's decision.**]—On applications to quash, the convicting justice must be made a party to the rule.—*R. v. LAW & GILL* (1868), 27 U. C. R. 260.—CAN.

f. —.]—An order dismissing a complaint under Summary Convic-

tions Act may be quashed on *certiorari*.—*R. v. RITCHIE, Ex p. SANDALL* (1905), 37 N. B. R. 206.—CAN.

g. —.]—*R. v. HAZELWOOD* (1911), 19 W. L. R. 706; 1 W. W. R. 324; 20 Can. Crim. Cas. 488.—CAN.

h. —.]—*R. v. MAHONEY* (1911), 18 W. L. R. 74.—CAN.

k. —.]—*R. v. BOND* (1911), 19 W. L. R. 348; 21 Man. L. R. 366; 19 Can. Crim. Cas. 96.—CAN.

l. —.]—*R. v. BOOTH* (1914), 31 O. L. R. 539; 23 Can. Crim. Cas. 224; 6 O. W. N. 549, 675.—CAN.

m. **To quash for want of jurisdiction.**]—*Certiorari* is by Canada Tem-



**Sect. 4.—Certiorari. Sect. 5, 6 & 7.]**

the proceedings here, evidence which *prima facie* is sufficient to convict, & no contradictory or explanatory evidence.—*R. v. REASON* (1795), 6 Term Rep. 375; 101 E. R. 603.

**1428. — Evidence on both sides—Court of opinion that magistrates' decision wrong.]—***R. v. ALLEN*, No. 1116, *ante*.

**1429. To quash for want of jurisdiction—Jurisdiction to enter into question.]—**When a justice had jurisdiction to enter into a question, he has jurisdiction to decide upon it; & this ct. will not in such a case interfere with his decision.—*Ex p. CHADWICK* (1853), 20 L. T. O. S. 239.

**1430. To quash warrant—Issued on charge subsequently found to be false.]—**Where a person has been taken into custody, & subsequently remanded, on a charge which turns out to be false, the ct. will not grant a *certiorari* for the purpose of quashing the warrant under which he was remanded, preliminary to his bringing an action either against the parties giving him into custody,

or against the justices signing the warrant; for the former are entitled to whatever protection the warrant can afford them, & in an action against the latter the validity of the warrant will be tried.—*R. v. ISLE OF ELY JJ., Ex p. GILLING* (1855), 26 L. T. O. S. 60; 4 W. R. 13.

**1431. Discretion to grant writ—Failure to direct justices' attention to want of jurisdiction.]—**A dispute as to the payment of money having arisen between the representative of a member & the secretary of a friendly society, whose rules did not direct disputes to be referred to justices, there being a rule that such disputes should be finally decided by arbitrators appointed by the society, the secretary of the society was summoned before a magistrate to answer the complaint of having unlawfully refused to pay the money. The rules of the society were put in evidence, but the magistrate's attention was not called to the fact that the rules did not direct disputes to be referred to justices, & an order was made for the payment of the money. A rule *nisi* having been obtained for a *certiorari* to quash the magistrate's

perance Act, 1878, taken away in all cases where the magistrate has jurisdiction.—*Ex p. ORR* (1880), 20 N. B. R. (4 P. & B.) 67.—CAN.

**n. —.]—**Canada Temperance Act, 1878, does not take away *certiorari* where the magistrate acts without jurisdiction or in excess of it.—*Ex p. RUSSELL* (1881), 20 N. B. R. (4 P. & B.) 536.—CAN.

**o. —.]—***R. v. MALCOLM* (1883), 2 O. R. 511.—CAN.

**p. —.]—**When a justice exceeds his jurisdiction in prosecutions under Indian Act, a *certiorari* is not taken away by sect. 97, or by 47 Vict. c. 27, s. 15.—*Ex p. GOODINE* (1885), 25 N. B. R. 151.—CAN.

**q. —.]—***Ex p. ROY* (1888), 27 N. B. R. 202.—CAN.

**r. —.]—***Ex p. LEGERE* (1888), 27 N. B. R. 292.—CAN.

**t. —.]—***R. v. GROVER* (1892), 23 O. R. 92.—CAN.

**a. —.]—***R. v. COULSON* (1896), 27 O. R. 59.—CAN.

**b. — Improper arrest.]—**The fact that deft. was arrested & brought before the magistrate who made the conviction, by a constable who was not qualified is no ground for a *certiorari* under Liquor License Act, 1896. The improper arrest does not go to the jurisdiction of the convicting magistrate.—*Ex p. GIBBERSON* (1898), 34 N. B. R. 538.—CAN.

**c. —.]—***R. v. DELEGARDE, Ex p. COWAN* (1904), 36 N. B. Eq. Rep. 503.—CAN.

**d. —.]—***R. v. O'BRIEN, Ex p. ROY* (1907), 3 E. L. R. 425; 38 N. B. R. 109.—CAN.

**e. —.]—***R. v. CANADIAN NORTHERN RY. Co. (Sask.)* (1908), 8 W. L. R. 889.—CAN.

**f. —.]—***R. v. CANADIAN PACIFIC RY. Co. (Sask.)* (1908), 8 W. L. R. 899.—CAN.

**g. —.]—**There is no *certiorari* in respect of proceedings before a magistrate except where there is want of jurisdiction.—*R. v. ALLEN, Ex p. GORMAN* (1911), 10 E. L. R. 214; 40 N. B. R. 459.—CAN.

**h. —.]—***R. v. LAUGHTON* (1912), 22 W. L. R. 199; 6 D. L. R. 47; 22 Man. L. R. 520.—CAN.

**k. —.]—***R. v. WILSON, Ex p. CRONKHITE* (1916), 44 N. B. R. 69.—CAN.

**l. —.]—***R. v. COLLIER* (1920), 46 O. L. R. 351; 50 D. L. R. 735; 32 Can. Crim. Cas. 327.—CAN.

**m. —.]—***R. v. RYAN*, [1925] 1 D. L. R. 877; 43 Can. Crim. Cas. 223; 52 N. B. R. 104.—CAN.

**aa. —.]—**Want of jurisdiction in a magistrate & irregularities in procedure which touch the substantial rights of appct. constitute those exceptional circumstances which justify relief by way of *certiorari*, even though appct. has a right of appeal.—*OKREY v. SPANGLER*, [1925] 1 D. L. R. 859; [1925] 1 W. W. R. 518; 19 Sask. L. R. 256.—CAN.

**bb. —.]—**Where *certiorari* is taken away by statute a conviction may still be quashed if it appears to have been entirely without jurisdiction.—*Re COLLETT* (1897), 15 N. Z. L. R. 425.—N.Z.

**cc. Grounds for granting or refusing—Appeal alternative remedy.]—***R. v. MURRAY, Ex p. DAMBOISE* (1909), 7 E. L. R. 167.—CAN.

**dd. —.]—**A motion to quash a conviction by a magistrate for trespass to land, in contravention of Petty Trespass Act, was dismissed upon the ground that deft. had an adequate remedy by appeal.—*R. v. CHAPPUIS* (1917), 38 O. L. R. 576; *affd.* 39 O. L. R. 329; 12 O. W. N. 121; 38 Can. Crim. Cas. 157.—CAN.

**ee. —.]—***R. v. DURNO* (1921), 51 O. L. R. 357; 67 D. L. R. 322; 38 Can. Crim. Cas. 311.—CAN.

**ff. —.]—***R. v. STONEHOUSE (Ont.)* (1922), 38 Can. Crim. Cas. 57.—CAN.

**g. —.]—***Re R. v. WOOD* (1924), 43 Can. Crim. Cas. 382.—CAN.

**hh. —.]—***Re FOLEY v. WALLACE, Ex p. WALLACE* (1897), 15 N. Z. L. R. 501.—N.Z.

**kk. — Appeal dismissed.]—**Upon a motion to quash a conviction:—*Held*: the dismissal of the appeal was no bar to the hearing of the motion.—*TOOMAN v. TREANOR* (1899), 17 N. Z. L. R. 467.—N.Z.

**ll. To determine justices' jurisdiction.]—***HESPELER v. SHAW* (1858), 16 U. C. R. 104.—CAN.

**mm. Necessity for notice.]—***R. v. HARSHMAN* (1868), N. B. Dig. 482.—CAN.

**nn. —.]—***Re LAKE* (1877), 42 U. C. R. 206.—CAN.

**oo. —.]—**On an application for a *habeas corpus*, under R. S. O. 1877, c. 70, a *certiorari* had issued, & in obedience to it the conviction had been returned, the conviction was quashed on motion, though there had been no notice to the magistrate or recognis-

ance.—*R. v. WEHLAN* (1880), 45 U. C. R. 396.—CAN.

**pp. —.]—***McDONALD v. RONAN* (1886), 19 R. & G. 25.—CAN.

**qq. —.]—***R. v. VROOMAN* (1886), 3 Man. L. R. 509.—CAN.

**rr. —.]—***R. v. WOODYATT* (1895), 27 O. R. 113.—CAN.

**tt. —.]—***Re ELLIOTT* (1914), 30 O. L. R. 589; 23 Can. Crim. Cas. 163.—CAN.

**aaa. —.]—***R. v. BROOKE*, 1 J. R. 104.—N.Z.

**bbb. Conviction confirmed on appeal.]—***R. v. JOHNSON* (1870), 30 U. C. R. 423.—CAN.

**ccc. —.]—***McLELLAN v. MCKINNON* (1882), 1 O. R. 219.—CAN.

**ddd. To what court applicable.]—**It is improper to call on the ct. of general sessions to show cause to a rule for a *certiorari*.—*Re NASH & MCCracken* (1873), 33 U. C. R. 181.—CAN.

**eee. Appeal from order to quash—Recognisances—Necessity for.]—***R. v. CROUCH* (1874), 35 U. C. R. 433.—CAN.

**fff. Costs.]—**It is not the practice to give costs in quashing a conviction.—*R. v. JOHNSTON* (1876), 38 U. C. R. 549.—CAN.

**ggg. —.]—***Qu.*: whether deft. should not get the costs of quashing a conviction made to test the law.—*R. v. JAMIESON* (1884), 7 O. R. 149.—CAN.

**hhh. —.]—**A conviction was quashed without costs where it appeared that deft. had attempted to tamper with the informant.—*R. v. RYAN* (1886), 10 O. R. 254.—CAN.

**kkk. —.]—***R. v. ARMSTRONG* (1889), 13 P. R. 306.—CAN.

**lll. —.]—***R. v. SIMPSON* (1898), 3 Terr. L. R. 475.—CAN.

**mmm. —.]—**In a motion to quash a conviction, such conviction being in a criminal matter, & not merely for a penalty imposed by or under provincial legislation, no jurisdiction is conferred on the High Ct. to give costs to appct. against prosecutor or magistrate.—*R. v. BENNETT* (1902), 22 C. L. T. 290; 4 O. L. R. 205; 1 O. W. R. 360.—CAN.

**nnn. —.]—***TURNER v. MOCKLER* (1903), 36 N. B. R. 245.—CAN.

**ooo. —.]—***R. v. ROY* (1911), 18 W. L. R. 464.—CAN.

**ppp. Effect of appeal.]—***R. v. SLAVEN* (1876), 38 U. C. R. 557.—CAN.

**—.]—**The fact that deft. has commenced proceedings by way of

order on the ground of want of jurisdiction :—*Held* : the conduct of applt. in not directing the magistrate's attention to the absence of any rule directing disputes to be referred to justices, distintituled him to the discretionary writ of *certiorari*, & the rule was discharged with costs.—*Re WEST LONDON PHILANTHROPIC BURIAL SOCIETY, CORDERY v. GREAVES* (1869), 20 L. T. 972.

**Certiorari lies to justices.]—**See CROWN PRACTICE, Vol. XVI., p. 401, No. 2458.

**Whether granted as of right.]—**See CROWN PRACTICE, Vol. XVI., pp. 402–404, Nos. 2467–2498.

**Not granted where case may be stated.]—**See CROWN PRACTICE, Vol. XVI., p. 398, No. 2422.

**In respect of what acts or proceedings.]—**See CROWN PRACTICE, Vol. XVI., pp. 412–417, Nos. 2709–2762.

**Grounds for granting or refusing.]—**See CROWN PRACTICE, Vol. XVI., pp. 417 *et seq.*, Nos. 2763 *et seq.*

**Statutory restrictions on grant of writ.]—**See CROWN PRACTICE, Vol. XVI., pp. 436 *et seq.*, Nos. 3003 *et seq.*

**Stage of proceedings at which granted.]—**See

*certiorari* is no reason why he should not appeal in the ordinary way to the District Ct. If he first appeals & then moves for *certiorari* in all probability the ct. will dismiss his motion for *certiorari*, but even then it is in the exercise of a judicial discretion & not by reason of any infallible rule.—*R. v. DOMINION DRUG STORES, LTD., R. v. CANADIAN NORTHERN RY. CO. (Alta.)*, [1919] 1 W. W. R. 285 ; 44 D. L. R. 382.—CAN.

**l. Power to consider evidence.]—**The ct. will not quash a conviction upon the weight or upon a conflict of evidence, but there must be reasonable evidence to support it, such as would be sufficient to go to the jury upon a trial.—*R. v. HOWARTH* (1873), 33 U. C. R. 537.—CAN.

**m. —.]—***R. v. LEVY* (1878), 12 N. S. R. (3 R. & C.) 51.—CAN.

**n. —.]—***R. v. RICHARDSON* (1885), 8 O. R. 651.—CAN.

**o. —.]—***R. v. GREEN* (1888), 12 P. R. 373.—CAN.

**p. —.]—***R. v. WALSH* (1897), 29 N. S. R. (17 R. & G.) 521.—CAN.

**q. —.]—***R. v. MARCINKO* (1912), 22 O. W. R. 846 ; 3 O. W. N. 1626 ; 19 Can. Crim. Cas. 388.—CAN.

**r. —.]—***McPHERSON v. MORRISON* (1915), 32 W. L. R. 385 ; 9 W. W. R. 613 ; 8 Sask. L. R. 412.—CAN.

**t. —.]—**Where there is no legal evidence at all to support a finding, the ct. may quash the conviction on *certiorari*.—*R. v. McPHERSON* (1915), 33 W. L. R. 21 ; 9 W. W. R. 613 ; 8 Sask. L. R. 412.—CAN.

**a. —.]—**Absence of any evidence of the offence is not a sufficient ground for quashing a conviction on *certiorari*.—*R. v. CARTER* (1916), 34 W. L. R. 448 ; 10 W. W. R. 602.—CAN.

**b. —.]—***R. v. GRASSI* (1917), 40 O. L. R. 359.—CAN.

**c. — Evidence wrongly admitted.]—***R. v. ANTHONY* (1921), 36 Can. Crim. Cas. 192 ; 55 N. S. R. 77.—CAN.

**d. —.]—***R. v. SHAW* (Ont.) (1921), 36 Can. Crim. Cas. 169.—CAN.

**e. —.]—***Re JAY SET*, [1921] 3 W. W. R. 847 ; 66 D. L. R. 520 ; 36 Can. Crim. Cas. 250 ; 30 B. C. R. 349.—CAN.

**f. —.]—***R. v. LEE WAH DAI* (1923), 41 Can. Crim. Cas. 152.—CAN.

**g. —.]—***R. v. OAKES* (Alta.) (1923), 39 Can. Crim. Cas. 329 ; [1923] 1

W. W. R. 1220.—CAN.

**h. —.]—**The magistrate having heard the evidence & determined the question of fact :—*Held* : there was no jurisdiction to review his determination, & *certiorari* was refused.—*R. (DARCY) v. COUNTY CARLOW JJ.*, [1916] 2 I. R. 313.—IR.

**k. Enforcement of conviction.]—**Where a conviction under the second part of Canada Temperance Act has been removed by *certiorari* & afterwards confirmed, a *procedendo* will issue to carry back the record of the proceedings to the magistrate in order that he may enforce the conviction.—*R. v. GRIMMER* (1886), 25 N. B. R. 480.—CAN.

**aa. Motion to quash—Before whom made.]—***Qu.* : whether a single judge has power to hear a motion to quash a conviction. If he has power his decision is final, & not appealable. If he has no power, then his action is of no avail, & still unappealable.—*R. v. MCAULEY* (1887), 14 O. R. 643.—CAN.

**—.]—***R. v. BEEMER* (1888), 15 O. R. 266.—CAN.

**cc. —.]—**On a return of an order *nisi* to quash a conviction the ct. was composed of two of the judges thereof, the third judge being absent attending to other pressing judicial work :—*Held* : the ct. was properly constituted to dispose of the order.—*R. v. RUNCHY* (1889), 18 O. R. 478.—CAN.

**dd. — Power to rehear.]—**The jurisdiction of the full ct. to rehear motions to quash convictions has not been taken away by Judicature Act, but still exists in the divisional cts.—*R. v. FEE* (1887), 13 O. R. 590.—CAN.

**ee. — Recognisances.]—***R. v. RICHARDSON, R. v. ADDISON* (1889), 17 O. R. 729.—CAN.

**ff. —.]—***R. v. ASHCROFT* (1899), 4 Terr. L. R. 119.—CAN.

**gg. —.]—***R. v. WEDDERBURN, Ex p. SPRAGUE* (1903), 36 N. B. R. 213.—CAN.

**hh. —.]—**A judge may not in an *ex p.* application grant leave to an appt. to move to quash a conviction without furnishing any security.—*Re ADAMSON* (1916), 33 W. L. R. 566 ; 9 W. W. R. 1130.—CAN.

**kk. — Certiorari pending.]—**Pending the determination of the question whether an order for a *certiorari* to remove a conviction can be sustained, or not, a motion will not be heard to quash the conviction.—*R. v. HURLBERT* (1893), 26 N. S. R.

CROWN PRACTICE, Vol. XVI., pp. 445 *et seq.*, Nos. 3117 *et seq.*

**Procedure generally.]—**See CROWN PRACTICE, Vol. XVI., pp. 458 *et seq.*, Nos. 3332 *et seq.*

**In bastardy proceedings.]—**See BASTARDY, Vol. III., pp. 392, 393, 406, 407, Nos. 302, 303, 306, 400–405.

**Decisions of licensing justices.]—**See INTOXICATING LIQUORS, Vol. XXX., pp. 68, 69, Nos. 542, 544.

## SECT. 5.—PROHIBITION.

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## SECT. 6.—HABEAS CORPUS.

See CROWN PRACTICE, Vol. XVI., pp. 248 *et seq.* ; EXTRADITION, Vol. XXIV., pp. 886 *et seq.*

## SECT. 7.—OTHER CASES.

See Cases *infra*.

123.—CAN.

**ll. — Death of prosecutor.]—**The death of prosecutor, who is also informant, after a summary conviction, before the service on him of a rule *nisi* to quash, does not prevent the ct. from dealing with the matter & from quashing the conviction.—*R. v. FITZGERALD* (1898), 29 O. R. 203.—CAN.

**mm. — Doubtful conviction affirmed.]—***R. v. HENNESSY, Ex p. PAILEN, Ex p. DURICK* (1907), 3 E. L. R. 427 ; 38 N. B. R. 103.—CAN.

**nn. —.]—***R. v. MONTGOMERIE* (1884), 3 N. Z. L. R. 140 (S. C.).—N.Z.

**oo. Amendment of conviction.]—**Where a conviction for an offence over which the magistrate had jurisdiction, is bad on its face, the ct. is to look at the evidence to determine whether an offence has been committed, & if so, it should amend the conviction.—*R. v. COULSON* (1893), 24 O. R. 246.

**pp. —.]—***R. v. MURDOCK* (1900), 20 C. L. T. 350 ; 27 A. R. 443.—CAN.

**qq. —.]—***R. v. O'BRIEN, Ex p. GREY* (1906), 37 N. B. R. 604.—CAN.

**rr. —.]—***R. v. FITZGERALD* (1911), 19 W. L. R. 462 ; 1 W. W. R. 109 ; 19 Can. Crim. Cas. 39.—CAN.

**tt. —.]—***Re MUSCHIK* (1915), 33 W. L. R. 468 ; 9 W. W. R. 1285.—CAN.

**aaa. —.]—***R. v. LITTLE (B. C.)* (1917), 27 Can. Crim. Cas. 422.—CAN.

**bbb. —.]—***R. v. VAN FLEET (Alta.)*, [1918] 1 W. W. R. 332 ; 38 D. L. R. 592 ; 29 Can. Crim. Cas. 218.—CAN.

**ccc. —.]—***R. v. NORWODSKY (Alta.)*, [1920] 3 W. W. R. 85.—CAN.

**ddd. —.]—***R. v. BEETHAM, Mac.* 1095.—N.Z.

**eee. Appeal from.]—**No appeal lies to the ct. of appeal for Ontario from an order of a div. ct. quashing a conviction by a police magistrate for breach of a municipal bye-law.—*R. v. CUSHING* (1899), 26 A. R. 248.—CAN.

**fff. Necessity for writ.]—***R. v. McDONALD* (1902), 35 N. S. R. 323.—CAN.

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**hhh. Review of judgment—Powers of court.]—**On the return of an order *nisi* to review the decision of justices, the ct. has power under Justices Act, 1880, s. 146, to amend a slip in the



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b. — *In lieu of certiorari.*—*Ex p. ABELL* (1879), 18 N. B. R. (2 P. & B.) 600.—**CAN.**

c. — *Judgment of police magistrate.*—There is a right of review to a judge from a conviction by the police magistrate of St. John.—*ST. JOHN CORPN. v. MASTERS* (1880), 19 N. B. R. (3 P. & B.) 585.—**CAN.**

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e. — *Nature of.*—The appeal to the Supreme Ct. under Justices Act, 1921, is a full appeal on the law & facts.—*ALMOND v. ALLCHURCH*, [1925] S. A. S. R. 53.—**AUS.**

f. — *When right exists.*—*CHESLEY v. GRASSIE* (1868), 7 N. S. R. 191.—**CAN.**

g. *Appeal bond—By town clerk—Not sufficient to bind municipality.*—Bond for security on an appeal given by town clerk does not bind council & is no security.—*GUILDFORD CORPN. v. TRAYLEN* (1908), 10 W. A. L. R. 32.—**AUS.**

h. — *Who may be surety.*—*MCNEIL v. MOREHOUSE* (1873), 9 N. S. R. 314.—**CAN.**

k. — *Action on—Costs.*—*R. v. MURRAY* (1875), 10 N. S. R. (1 R. & C.) 58.—**CAN.**

l. — *Form.*—The condition contained in bonds given on appeals to the county ct. from justices & the city civil court is that applt. shall abide by, & perform, the judgment of the county ct. to which such appeal is taken.—*HALIFAX PILOT COMRS. v. FARQUHAR* (1894), 26 N. S. R. 333.—**CAN.**

m. *Appeal to Full Court—In respect of ministerial acts.*—No appeal lies to the Full Ct. in respect of proceedings before justices under Municipal Corporations Act, 1906, s. 416, when the justices are acting ministerially.—*GUILDFORD MUNICIPALITY v. MORRISON* (1915), 17 W. A. L. R. 101.—**AUS.**

n. *Notice of appeal—Condition precedent to appeal.*—*HOMES v. THORPE*, [1924] S. A. S. R. 479.—**AUS.**

o. — *Time for giving.*—*R. v. MARR* (1911), 10 E. L. R. 13.—**CAN.**

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q. — —.—*R. v. RITTER*, [1922] 1 W. W. R. 1235; 63 D. L. R. 663; 37 Can. Crim. Cas. 81; 17 Alta. L. R. 394.—**CAN.**

r. — *Sufficiency of.*—*KEOHAN v. COOK* (1887), 1 Terr. L. R. 125.—**CAN.**

t. — —.—*Re COE v. COE* (1891), 21 O. R. 409.—**CAN.**

aa. — —.—*CRAGG v. LA-MARSH* (1898), 3 Terr. L. R. 91.—**CAN.**

bb. — —.—*HOSTETTER v. THOMAS* (1899), 4 Terr. L. R. 224.—**CAN.**

cc. — —.—*R. v. BRIMCOMBE* (N. W. T.) (1905), 2 W. L. R. 53.—**CAN.**

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ee. — —.—A statement in general terms that the decision appealed from is erroneous in point of fact & against the weight of evidence is not a compliance with Justices of the Peace Act, 1882, s. 249.—*PAYNE v. JOHNSTON* (1902), 22 N. Z. L. R. 176.—**N.Z.**

ff. — *Sufficiency of service.*—A

notice of appeal from a summary conviction (provincial) served upon the convicting magistrate is not invalid because it is not also addressed to & served upon resp.—*R. v. JORDAN* (1902), 22 C. L. T. 219; 9 B. C. R. 33.—**CAN.**

gg. — —.—Where a conviction for an offence against the Indian Act was made by two justices of the peace, & notice of appeal from the conviction was served upon only one of the justices:—*Held*: there was no jurisdiction to hear the appeal.—*R. v. EDELSTON* (1910), 15 W. L. R. 279.—**CAN.**

hh. — *To whom given.*—Notice of appeal from a magistrate's conviction may be given to a special sittings of a district ct. fixed by the judge, by virtue of authority given by District Courts Act (Sask.), s. 25.—*FAUCHAUX v. GEORGETT* (1915), 32 W. L. R. 863; 9 W. W. R. 458; 8 Sask. L. R. 325.—**CAN.**

kk. — *Appeal subsequently abandoned—By one of two appellants.*—*BROWN v. BOWDEN* (POLICE) (1900), 19 N. Z. L. R. 98.—**N.Z.**

ll. *Leave to appeal—When granted—Important principle of law or justice involved.*—*WANSTALL v. BURKE*, [1925] St. R. Qd. 295; 19 Q. J. P. 147.—**AUS.**

mm. — *When refused—Where special remedy given to appellant.*—*R. v. BURNS* (1901), 21 C. L. T. 202; 1 O. L. R. 336.—**CAN.**

nn. *Appeal involving question of law—Attitude of court.*—The ct. is very reluctant to disturb a justice's judgment on a strict rule of law, where the substantial justice of the case is in favour of the verdict.—*JORDAN v. COATES* (1850), 7 N. B. R. (2 All.) 107.—**CAN.**

oo. *Irregularity of proceedings—When objections should be taken.*—Objections by applt. to the regularity of proceedings before justices must be brought to the notice of the ct. during the first four days of the term, & before the cause comes on for trial.—*GRAHAM v. LAPIERRE* (1853), James, 139.—**CAN.**

objection of irregularity in the proceedings leading up to an appeal from the North West Territories cannot be taken at the argument of the appeal.—*STEELE v. RAMSAY, BRATT, CLAIMANT* (1885), 3 Man. L. R. 305; 1 Terr. L. R. 1.—**CAN.**

qq. *Affidavit by appellant—Necessity for—Waived by magistrate's conduct.*—Where one of the magistrates before whom a cause was tried stated that all the papers necessary for perfecting the appeal were filed, accepted the bond, telling the party it was alright:—*Held*: the appeal should be allowed, though no affidavit had been filed.—*McKAY v. McKAY* (1856), 2 Thom. 75.—**CAN.**

rr. — *Before whom made.*—The statute gives no authority to any magistrate to prepare the affidavit other than the one who has heard the cause.—*MOIR v. RAMSAY* (1885), 6 R. & G. 126.—**CAN.**

tt. — *Form.*—The affidavit did not negative both charges contained in the information:—*Held*: this was not necessary, deft. having been acquitted of one of the charges.—*R. v. JOHNSTON* (1894), 27 N. S. R. 298.—**CAN.**

aaa. *No right of appeal—From judgment of non-suit.*—The ct. will not allow an appeal from a judgment of non-suit in justices' ct. when no witnesses have been produced by pltf. on the trial below.—*McCULLY v. BARNEHILL* (1859), 4 N. S. R. (Coch.) 81.—**CAN.**

bbb. — *To nearest county—From temporary judicial district.*—*GIBSON v. McDONALD* (1885), 7 O. R. 401.—**CAN.**

ccc. — *From summary court in North West Territories.*—*R. v. PISONI, R. v. TAYLOR* (1906), 6 Terr. L. R. 238; 4 W. L. R. 527.—**CAN.**

ddd. — *From decision of summary court under Prohibition Act, 1900.*—*McMURRER v. JENKINS* (1907), 3 E. L. R. 149.—**CAN.**

eee. — *To Supreme Court of Canada—After case stated extra cursum curiae to Supreme Court of New Brunswick.*—*BLAINE v. JAMIESON*, (1908), 41 S. C. R. 25; 6 E. L. R. 71.—**CAN.**

fff. *New trial—When granted.*—Where a conviction has been affirmed by a jury on appeal to the quarter sessions, that ct. cannot grant a new trial.—*YEARKE v. BINGLEMAN* (1869), 28 U. C. R. 551.—**CAN.**

ggg. *Within what time appeal must be brought—Thirty days.*—Under Indian Act, 1876 (c. 18), s. 84 (D), an appeal must be brought before the appellate judge within thirty days from the conviction.—*Re HUNTER v. GRIFFITHS* (1877), 7 P. R. 86.—**CAN.**

hhh. — —.—*R. v. MCGAULEY* (1887), 12 P. R. 259.—**CAN.**

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lll. — —.—*COCHRAN v. LARSON* (1878), 12 N. S. R. (3 R. & C.) 480.—**CAN.**

mmm. — —.—*ROSE v. BURKE* (1879), 1 R. & G. 94.—**CAN.**

nnn. — —.—*MATHESON v. MCLEAN* (1881), 2 R. & G. 176; 1 C. L. T. 664.—**CAN.**

ooo. — —.—*McDONALD v. McCUISH* (1884), 5 R. & G. 1.—**CAN.**

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qqq. — —.—*R. v. LESLIE* (1893), 25 N. S. R. 163.—**CAN.**

rrr. — —.—*CAPE BRETON FISH & TRADING CO. v. MORRISON* (1894), 26 N. S. R. 487.—**CAN.**

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aaaa. — —.—*R. v. VERGE* (1923), 41 Can. Crim. Cas. 146; 57 N. S. R. 235.—**CAN.**

bbbbb. — *Powers of court.*—*Held*: a county ct. judge had power to amend an affidavit for appeal from the magistrates' ct. which was not headed in the cause, & had not the words "before me" in the *jurat*.—*WOODWORTH v. INNIS* (1883), 6 R. & G. 295.—**CAN.**

cccc. — —.—The judge of the county ct. has jurisdiction to take evidence to establish the question of jurisdiction.—*SLIPP v. MORRIS* (1906), 2 E. L. R. 218; 41 N. S. R. 87.—**CAN.**

—A county ct. judge, hearing an appeal from a summary conviction by a magistrate, has no power under the Criminal Code to state a case for the opinion of the Ct. of Appeal.—*R. v. MCINTOSH* (1910), 14 W. L. R. 548; 17 Can. Crim. Cas. 295.—**CAN.**

eeee. — *Costs—Against whom awarded—Person not party to proceedings.*—*Re BOLE* (1892), 2 B. C. R. 208.—**CAN.**

ffff. — —.—*What costs awarded.*—Under the Criminal Code, s. 880, the ct. may, on appeal, award such costs, including solr.'s fee, as it may deem proper.—*R. v. MCINTOSH* (1897), 28 O. R. 603.—**CAN.**

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hhhhh. — *When right exists—Conviction by two justices.*—An appeal lies to the county ct. from a conviction

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**k.** ———.—*R. v. SMITH* (1906), 11 O. L. R. 279; 7 O. W. R. 40.—**CAN.**

**BUCHANAN** (1913), 26 W. L. R. 447; 15 D. L. R. 232; 23 Man. L. R. 943.—**CAN.**

**m.** ———.—*Effect of.*—On appeal to the county ct. from the decision of the stipendiary magistrate:—*Held*: the effect of the appeal was to vacate the judgment appealed from, & the judge of the county ct. was required to try the case *de novo*.—*R. v. McNUTT* (1900), 33 N. S. R. 14.—**CAN.**

**n.** ———.—*Entry of appeal—Necessity for.*—*GIBSON v. ADAMS* (B. C.) (1905), 2 W. L. R. 72.—**CAN.**

**o.** ———.—*Offence must be committed within county.*—The place of the alleged offence was within the county of C.:—*Held*: an appeal from the conviction under B. C. Summary Convictions Act, 1911, c. 218, s. 72, did not lie to the county ct. of Y.—*R. v. BRADY* (1914), 28 W. L. R. 733; 11 W. W. R. 1307; 23 Can. Crim. Cas. 35.—**CAN.**

**p.** ———.—*Right of parties to raise several questions.*—On an appeal to the county ct. from a conviction under Summary Convictions Act, 1924, c. 245, it is open to the parties to confine the appeal to one or several questions.—*R. v. JORDAN*, [1925] 2 D. L. R. 1119; [1925] 1 W. W. R. 799; 44 Can. Crim. Cas. 23; 35 B. C. R. 1.—**CAN.**

**q.** ———.—*Proceedings originating in county court—Appeal by case reserved.*—There is no appeal in criminal trials before the judges of the county ct. except by way of case reserved.—*R. v. McINTYRE* (1898), 31 N. S. R. (19 R. & G.) 422.—**CAN.**

**r.** ———.—*Objections not raised before magistrate—May be taken on appeal.*—Where the ct. can see that substantial justice has been done in the proceedings before the justice, the decision will not be reversed on the ground which the parties themselves did not raise at the trial.—*R. v. ARCHIBALD* (1878), 2 P. & B. 250.—**CAN.**

**t.** ———.—*Dismissal of complaint—No right of appeal.*—The prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint.—*Re MURPHY & CORNISH* (1881), 8 P. R. 420.—**CAN.**

**a.** ———.—*Return of conviction—To appellate court.*—*R. v. RONDEAU* (1903), 5 Terr. L. R. 478.—**CAN.**

**b.** ———.—*R. v. WILLIAMSON* (1908), 7 W. L. R. 490.—**CAN.**

**c.** ———.—*The fact that the convicting justice has failed to transmit the conviction, deposit, etc., to the ct. prior to the hearing of the appeal does not affect its jurisdiction to hear it.*—*KOWALENKO v. LEWIS & LEFINE*, [1921] 3 W. W. R. 648; 65 D. L. R. 273; 36 Can. Crim. Cas. 119; 14 Sask. L. R. 531.—**CAN.**

**d.** ———.—*Appeal to district court—Reference to full court—Not without sufficient grounds.*—On appeal to a district ct. the judge of that ct. referred the matter to the Full Ct. There being no authority to warrant the reference & no jurisdiction in the ct. to entertain

it, the matter was not dealt with.—*R. v. MISCHOWSKY* (1909), 11 W. L. R. 290.—**CAN.**

**e.** ———.—*Recognisance—Duty of magistrate to file.*—*R. v. McKAY* (1913), 23 W. L. R. 369; 10 D. L. R. 820; 4 W. W. R. 128.—**CAN.**

**f.** ———.—*Entry of appeal—Validity.*—*R. v. GREGG* (1913), 25 W. L. R. 183; 4 W. W. R. 1345; 13 D. L. R. 770; 6 Alta. L. R. 231.—**CAN.**

**g.** ———.—*Powers of court.*—*R. v. HERRON*, [1922] 1 W. W. R. 838; 63 D. L. R. 163; 36 Can. Crim. Cas. 398; 15 Sask. L. R. 297.—**CAN.**

**h.** ———.—*When right exists.*—A district ct. judge has no jurisdiction to hear an appeal from the dismissal or conviction by a magistrate on a charge under a provincial statute or municipal bye-law.—*R. v. MACPHERSON* (Alta.), [1924] 1 W. W. R. 417; 42 Can. Crim. Cas. 99.—**CAN.**

**aa.** ———.—*A district ct. judge has no jurisdiction to hear an appeal from the dismissal or conviction by a magistrate on a charge under a provincial statute.*—*McCoy v. TAYLOR* (Alta.), [1924] 2 D. L. R. 803; [1924] 1 W. W. R. 440; 42 Can. Crim. Cas. 53.—**CAN.**

**bb.** ———.—*PRUDHUS v. JOHNSON*, [1924] 2 D. L. R. 1090; [1924] 2 W. W. R. 105; 42 Can. Crim. Cas. 83; 20 Alta. L. R. 367.—**CAN.**

**cc.** ———.—*Appeal to Court of Appeal—By case stated—When right exists.*—*R. v. HENRY* (1910), 15 O. W. R. 621; 20 O. L. R. 494.—**CAN.**

**dd.** ———.—*Saskatchewan.*—The Court of Appeal of Saskatchewan has jurisdiction to hear an appeal by way of a case stated by a justice of the peace.—*R. v. ALLEN*, [1922] 2 W. W. R. 606; 69 D. L. R. 500; 38 Can. Crim. Cas. 237; 15 Sask. L. R. 487.—**CAN.**

**ee.** ———.—*Powers of court.*—*R. (STONEBERG) v. PERRON* (B. C.), [1922] 3 W. W. R. 138; 68 D. L. R. 392; 38 Can. Crim. Cas. 121.—**CAN.**

**ff.** ———.—*R. v. BARTON* (N. B.), [1923] 3 D. L. R. 148; 40 Can. Crim. Cas. 169; 50 N. B. R. 327.—**CAN.**

**gg.** ———.—*Appeal after plea of guilty—Effect of plea—Respondent need not prove guilt.*—*Held*: under his plea of guilty applt. was estopped from calling upon resp. to produce evidence to establish that he was guilty of the offence.—*R. v. GILLIS* (Y. T.) (1914), 29 W. L. R. 129; 18 D. L. R. 461; 23 Can. Crim. Cas. 160.—**CAN.**

**hh.** ———.—*Recognisance for appeal—Necessity for.*—*R. v. MACK SING* (1915), 32 W. L. R. 649.—**CAN.**

**When received.**—Upon an appeal from a conviction, a recognisance cannot be received if it has not been filed in the office of the clerk of the ct. within the time limited for serving the notice of appeal.—*R. v. HEWA* (1915), 33 W. L. R. 29.—**CAN.**

**ii.** ———.—*Who must give—Crown.*—*R. v. WONG CHONG QUONG* (B. C.) (1923), 39 Can. Crim. Cas. 327; 32 B. C. R. 41; [1923] 1 W. W. R. 1350.—**CAN.**

**mm.** ———.—*Appeal from police magistrate—When right exists.*—The only appeal which lies from a conviction by a

police magistrate for theft, upon a summary trial under sect. 775 (5), is that given by sect. 1013 of the Code.—*R. v. SINCLAIR* (1916), 38 O. L. R. 149.—**CAN.**

**nn.** ———.—*R. v. BROWN* (1916), 34 W. L. R. 575; 10 W. W. R. 695.—**CAN.**

**oo.** ———.—*Date of appeal—Need not be endorsed on conviction.*—*R. v. MARTINSON* (B. C.), [1919] 3 W. W. R. 896.—**CAN.**

**pp.** ———.—*Appeal from taxing officer—Time for.*—*R. v. KERR* (1922), 15 Sask. L. R. 128; [1922] 1 W. W. R. 357.—**CAN.**

**qq.** ———.—*Costs of appeal—Where police a party.*—*R. (CURRY) v. BOWER* (Alta.), [1923] 1 W. W. R. 1104.—**CAN.**

**rr.** ———.—*Costs will be given against the police when they oppose an appeal.*—*FERGUSON v. FRETWELL* (1888), 6 N. Z. L. R. 430.—**N.Z.**

**tt.** ———.—*McBRIDE v. GAMBLE, NOLAN'S CASE* (1889), 7 N. Z. L. R. 396.—**N.Z.**

**aaa.** ———.—*Appeal successful.*—Where an information is dismissed on an untenable objection in point of law raised by deft., the informant is entitled to the costs of a successful appeal.—*HOWARD v. COXHEAD* (1891), 9 N. Z. L. R. 383.—**N.Z.**

**bbb.** ———.—*MARTIN v. FULTON* (1891), 9 N. Z. L. R. 313.—**N.Z.**

**ccc.** ———.—*General appeal—Powers of court.*—*SEARL v. MCARDLE* (1897), 15 N. Z. L. R. 613.—**N.Z.**

**ddd.** ———.—*SKIPPER v. CUMMINGS*, [1917] N. Z. L. R. 886.—**N.Z.**

**eee.** ———.—*Nature of.*—The procedure on the general appeal given by Justices of the Peace Act, 1882, s. 248, being in the nature of a retrial, the decision of the appellate ct. must be independent of the finding of the justices.—*HIGGINS v. MARSACK* (1898), 17 N. Z. L. R. 222.—**N.Z.**

**fff.** ———.—*Fresh evidence—Whether admissible.*—*BROWN v. BOWDEN* (POLICE) (1900), 19 N. Z. L. R. 98.—**N.Z.**

**ggg.** ———.—*YOUNG v. TASSEL* (No. 2), [1918] N. Z. L. R. 1051.—**N.Z.**

**hhh.** ———.—*Form.*—The form of appeal, upon a general appeal, to be delivered to applt. under Justices of the Peace Act, 1882, s. 251, should set out the charge as laid in the information, & should also set out the conviction.—*AR KAN v. COX, AH WING v. COX, TONG v. COX* (1902), 21 N. Z. L. R. 645.—**N.Z.**

**kkk.** ———.—*Appeal involving question of fact—What must be shown.*—Upon an appeal from a magistrate's decision upon a question of fact applt. must show that the magistrate's decision is demonstrably wrong.—*BIGGS v. ELIAS* (1901), 22 N. Z. L. R. 640.—**N.Z.**

**lll.** ———.—*BERG v. SEMELOFF* (1904), 21 N. Z. L. R. 522.—**N.Z.**

**mmm.** ———.—*Power of court to draw inferences from undisputed facts.*—*HANNAH v. GRACE, GRACE v. HANNAH*, [1919] N. Z. L. R. 481.—**N.Z.**

**nnn.** ———.—*Effect of death of appellant.*—*BEAUCHAMP v. JOHNSTON* (1903), 22 N. Z. L. R. 923.—**N.Z.**



## Part XIV.—Appeals from Quarter Sessions.

### SECT. 1.—TO COURT OF CRIMINAL APPEAL.

*See* Criminal Appeal Act, 1907 (c. 23), ss. 3–5, 7, 9, 13, 14, 20, & generally, CRIMINAL LAW, Vol. XIV., pp. 500–554.

**From conviction as incorrigible rogue.]—***See* CRIMINAL LAW, Vol. XIV., p. 503, Nos. 5534–5536.

**From special verdict of insanity.]—***See* CRIMINAL LAW, Vol. XIV., p. 503, Nos. 5529–5533.

### SECT. 2.—PROHIBITION.

*See, generally,* CROWN PRACTICE, Vol. XVI., pp. 372–397.

**Excess or absence of jurisdiction.]—***See* CROWN PRACTICE, Vol. XVI., p. 377, Nos. 2145 *et seq.*

**Proceedings partly within & partly without jurisdiction.]—***See* CROWN PRACTICE, Vol. XVI., p. 379, Nos. 2176 *et seq.*

### SECT. 3.—CERTIORARI.

#### SUB-SECT. 1.—IN GENERAL.

*See, generally,* CROWN PRACTICE, Vol. XVI., pp. 398–481.

**1432. Effect of statutory restrictions—Jurisdiction of High Court—Where decision subject to special case.]—**Where an Act of Parliament provides that the determination of the justices at quarter sessions shall be final & conclusive to all parties concerned, & shall not be removed or removable by *certiorari*, the Ct. of K. B. will have no jurisdiction over an order of sessions removed by *certiorari*, though such order has been made, subject to the opinion of that ct. upon a special case reserved.—*R. v. WYKEHAM* (1828), 6 L. J. O. S. M. C. 71.

**1433. — — —.]—**On one occasion two girls were seen in charge of the machinery at the vertical shaft of a pit, contrary to 5 & 6 Vict. c. 99, ss. 8, 13. There was no evidence that the contractor knew of their so acting, or ever allowed them so to act before; nor was any evidence given to negative his knowledge:—*Held*: (1) the evidence was not sufficient to justify a conviction of the contractor; (2) where a statute made the decision of quarter sessions final, & took away the writ of *certiorari*, nevertheless if quarter sessions decided the case subject to a special case to the Ct. of Q. B., this enabled the superior ct. to entertain the appeal.—*R. v. HANDLEY* (1864), 9 L. T. 827; *sub nom. HANDLEY v. ROPER*, 28 J. P. 245.

— *See, further,* CROWN PRACTICE, Vol. XVI., p. 402, Nos. 2480, 2481, & p. 436, Nos. 3011 *et seq.*

**Proceedings in nature of certiorari—Removal of indictments.]—***See* CROWN PRACTICE, Vol. XVI., p. 399, No. 2423.

— **Removal of orders.]—***See* CROWN PRACTICE, Vol. XVI., p. 399, Nos. 2426–2428.

**Stage of proceedings at which writ granted.]—***See* CROWN PRACTICE, Vol. XVI., p. 445, Nos. 3100 *et seq.*

#### SUB-SECT. 2.—REMOVAL FOR TRIAL.

##### A. Civil Actions.

*See, generally,* CROWN PRACTICE, Vol. XVI., p. 404, Nos. 2490–2509.

**1434. What proceedings removable—Validity of**

**distress warrant.]—***R. v. WOOD* (1854), 22 L. T. O. S. 223.

**1435. — Sufficiency of search for documents—To admit secondary evidence.]—**(1) This ct. has jurisdiction to review the decision of a ct. of quarter sessions as to whether sufficient search has been made for a document to render secondary evidence of it receivable.

(2) On a question of derivative settlement, it was alleged that the grandfather of the pauper had been bound as parish apprentice sixty-nine years before. In order to prove the indenture of apprenticeship executed by the parish officers, it was shown that ineffectual search for it had been made among the papers of the pauper:—*Held*: sufficient to render secondary evidence receivable, although no search had been made among the papers of the master.—*R. v. HINCKLEY OVERSEERS* (1863), 3 B. & S. 885; 2 New Rep. 67; 32 L. J. M. C. 158; 8 L. T. 270; 27 J. P. 823; 9 Jur. N. S. 1054; 11 W. R. 663; 122 E. R. 331.

##### B. Indictments.

*See, generally,* CROWN PRACTICE, Vol. XVI., pp. 405–412, 451–458.

**1436. Grounds for removal—Inability to secure fair trial—Local agitation.]—***R. v. DODDRELL* (1846), 10 J. P. Jo. 89.

— — —.]—*See* CROWN PRACTICE, Vol. XVI., pp. 407–409, Nos. 2542–2591.

**1437. — Difficult points of law arising.]—***R. v. DODDRELL* (1846), 10 J. P. Jo. 89.

— — —.]—*See* CROWN PRACTICE, Vol. XVI., p. 409, Nos. 2595–2652.

**1438. — Trial with special jury.]—***R. v. DODDRELL* (1846), 10 J. P. Jo. 89.

— — —.]—*See* CROWN PRACTICE, Vol. XVI., p. 411, Nos. 2653–2685.

— **View.]—***See* CROWN PRACTICE, Vol. XVI., p. 411, Nos. 2686–2692.

— **Other grounds.]—***See* CROWN PRACTICE, Vol. XVI., p. 406, Nos. 2539, 2540, & p. 412, Nos. 2693–2708.

**What proceedings removable.]—***See* CROWN PRACTICE, Vol. XVI., pp. 405, 406, Nos. 2510–2522.

**Removal to central criminal court.]—***See* CROWN PRACTICE, Vol. XVI., p. 406, Nos. 2525–2528.

**Who may apply.]—***See* CROWN PRACTICE, Vol. XVI., p. 451, No. 3205.

**Return.]—***See* CROWN PRACTICE, Vol. XVI., p. 454, Nos. 3256–3259.

**Effect of removal.]—***See* CROWN PRACTICE, Vol. XVI., p. 455, No. 3281.

**Costs.]—***See, generally,* CROWN PRACTICE, Vol. XVI., p. 455, Nos. 3289 *et seq.*

#### SUB-SECT. 3.—REMOVAL TO QUASH.

*See, generally,* CROWN PRACTICE, Vol. XVI., pp. 412–432.

**1439. Grounds for removal—Want of jurisdiction.]—***R. v. WALDESHAM, ETC. TOWNSHIP* (1718), 11 Mod. Rep. 280; 88 E. R. 1040.

**1440. — — —.]—**Rule for a *certiorari* granted to remove an order of justices in quarter sessions by which a commitment of an outgoing office under 5 & 6 Will. 4, c. 76, s. 60, for not deliverin

up books, etc., was treated as a summary conviction under s. 131, & quashed on appeal made under the latter section.—*R. v. WORCESTERSHIRE JJ.* (1838), 2 J. P. 232.

**1441.** ———.]—*R. v. WESTMORLAND JJ.* (1844), 3 L. T. O. S. 79; 8 J. P. Jo. 342.

**1442.** ———.]—No appeal lies against an order merely adjudicating the settlement of a lunatic pauper, though the settlement may be disputed on appeal against an order of maintenance reciting such adjudication.

Where sessions, on appeal against an order of adjudication, confirmed the order, but stated a case, raising the question whether or not sessions had jurisdiction to entertain the appeal, this ct., on motion to quash the order of adjudication & order of sessions, made the rule absolute to quash the latter order "for want of jurisdiction," but discharged the rule as to the original order.—*R. v. ST. PANCRAS (INHABITANTS)* (1849), 12 Q. B. 298; 13 L. T. O. S. 91; 116 E. R. 880; *sub nom. R. v. BANGOR (INHABITANTS)*, 13 J. P. Jo. 267.

**1443.** ———.]—*Re R. v. HOWELL* (1859), 23 J. P. Jo. 276.

**1444.** ——— **No excess of jurisdiction.**]—After the actual removal of a pauper to a parish, the parish entered & respited an appeal at the next, Midsummer, sessions: on Oct. 1, they gave notice of trying the appeal at the ensuing Oct. sessions: on Oct. 4, the order of removal was superseded by the justices who had made it: on Oct. 8, resps. served appls. with a copy of the *supersedeas* & a notice of abandonment of the order. Sessions commenced on Oct. 18, when the ct. quashed the order, though evidence of the *supersedeas* & abandonment was offered:—*Held*: sessions had jurisdiction to quash: & this ct. refused to quash the order of sessions on *certiorari*.—*R. v. BRIGHTHELMSTON GUARDIANS* (1842), 3 Q. B. 342; 2 Gal. & Dav. 88; 114 E. R. 537; *sub nom. R. v. BRIGHTON (INHABITANTS)*, 6 J. P. 523; 6 Jur. 536.

—.]—*See, further, CROWN PRACTICE*, Vol. XVI., pp. 420–424.

**1445.** ——— **Order too general.**]—*R. v. WALDERSHAM, ETC. TOWNSHIPS* (1718), 11 Mod. Rep. 280; 88 E. R. 1040.

**1446.** ——— **Interest of magistrates.**]—The ct. will grant a *certiorari* to remove an indictment from the sessions, where deft., being a magistrate of the county within which the indictment was found, sends round a statement of his case to his brother magistrates.—*R. v. GROVER* (1840), 8 Dowl. 325; *sub nom. ANON.*, 4 Jur. 151.

**1447.** ———.]—Where an order of quarter sessions confirming a conviction is void on the ground of interest in the justices, this ct. will grant a *certiorari* to bring up the order for the purpose of quashing it, with a view to a *mandamus* to enter continuances & hear the appeal.—*Ex p. HOPKINS* (1857), 4 Jur. N. S. 529; *subsequent proceedings, sub nom. Re HOPKINS* (1858), E. B. & E. 100.

— — —.]—*See, further, CROWN PRACTICE*, Vol. XVI., p. 427, Nos. 2862–2869.

— **Error on face of proceedings.**]—*See CROWN PRACTICE*, Vol. XVI., pp. 427–430, Nos. 2870–2908.

— **Fraud.**]—*See CROWN PRACTICE*, Vol. XVI., p. 430, Nos. 2909–2912.

— **Other grounds.**]—*See CROWN PRACTICE*, Vol. XVI., pp. 430, 431, Nos. 2913–1918.

**What proceedings removable.**]—*See CROWN PRACTICE*, Vol. XVI., pp. 412–416.

**Who may apply.**]—*See CROWN PRACTICE*, Vol. XVI., pp. 458–460, Nos. 3332–3344.

**1448. Time for application—Order under Highway Acts.**]—The justices in their final order for the formation of a highway district, fixed the first day of meeting of the highway board for Thursday after Mar. 25, & no day was specially fixed for the election of waywardens. According to the custom of the parishes, it had been usual to elect highway surveyors on Mar. 25, or within two or three days thereafter:—*Held*: (1) the order was not bad, though it did not provide for fourteen days elapsing after Mar. 25, but provided only for five clear days, though it would have been better to give more time; (2) when orders must be objected to within three months, it is sufficient to obtain a rule for *certiorari* within that time.—*R. v. LINDSEY JJ.* (1865), L. R. 1 Q. B. 68; 6 B. & S. 892; 35 L. J. M. C. 90; 13 L. T. 524; 30 J. P. 86; 12 Jur. N. S. 314; 14 W. R. 179; 122 E. R. 1422.

**1449.** ——— **Distinguished from mandamus.**]—The general rule that application for a writ of *mandamus* to the quarter sessions to enter continuances & hear an appeal must be made not later than the term following the sessions at which the refusal was made, does not apply to an application to remove into this ct. an order of sessions for the purpose of getting it quashed.—*R. v. BRECKNOCKSHIRE JJ.* (1873), 42 L. J. M. C. 135; 37 J. P. Jo. 404.

—.]—*See, further, CROWN PRACTICE*, Vol. XVI., pp. 402, 460 *et seq.*, Nos. 2479, 3345 *et seq.*

**Affidavits in support.**]—*See CROWN PRACTICE*, Vol. XVI., pp. 464–466, Nos. 3394–3432.

**Form & direction of rule.**]—*See CROWN PRACTICE*, Vol. XVI., p. 467, Nos. 3443–3447.

**Recognisances.**]—*See CROWN PRACTICE*, Vol. XVI., pp. 468, 469, Nos. 3468–3479.

**Form & service of writ.**]—*See CROWN PRACTICE*, Vol. XVI., pp. 469, 470, Nos. 3480–3493.

**Return.**]—*See CROWN PRACTICE*, Vol. XVI., pp. 470–472, Nos. 3494–3530.

**Costs.**]—*See CROWN PRACTICE*, Vol. XVI., pp. 477, 478, Nos. 3582–3597.

#### SUB-SECT. 4.—REMOVAL FOR EXECUTION OR COERCIVE PROCESS.

*See, generally, CROWN PRACTICE*, Vol. XVI., pp. 433, 434, 478, 479, Nos. 2934–2965, 3598–3608.

**1450. To enforce order of sessions—Necessity for certiorari.**]—Under Quarter Sessions Act, 1849 (c. 45), s. 18, a *certiorari* is unnecessary in order to bring up an order from quarter sessions to be enforced into the bail ct., the order of a judge alone being sufficient.—*R. v. FIELD* (1850), 4 New Mag. Cas. 167; 16 L. T. O. S. 130.

**1451.** ——— **When not obeyed within reasonable time.**]—*R. v. HUNTLEY*, No. 1153, *ante*.

#### SUB-SECT. 5.—REMOVAL FOR OTHER PURPOSES.

**Removal of orders on case stated.**]—*See CROWN PRACTICE*, Vol. XVI., pp. 434, 479–481, Nos. 2966–2969, 3609–3628.

**Removal for judgment on indictments.**]—*See CROWN PRACTICE*, Vol. XVI., pp. 432, 433, Nos. 2927–2933.

**Removal of record for use as evidence.**]—*See CROWN PRACTICE*, Vol. XVI., p. 435, Nos. 2983–2997.

**Removal for other purposes.**]—*See CROWN PRACTICE*, Vol. XVI., p. 436, Nos. 2998–3002.



## Part XIV.—Appeals from Quarter Sessions.

### SECT. 1.—TO COURT OF CRIMINAL APPEAL.

*See* Criminal Appeal Act, 1907 (c. 23), ss. 3-5, 7, 9, 13, 14, 20, & *generally*, CRIMINAL LAW, Vol. XIV., pp. 500-554.

**From conviction as incorrigible rogue.]—***See* CRIMINAL LAW, Vol. XIV., p. 503, Nos. 5534-5536.

**From special verdict of insanity.]—***See* CRIMINAL LAW, Vol. XIV., p. 503, Nos. 5529-5533.

### SECT. 2.—PROHIBITION.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 372-397.

**Excess or absence of jurisdiction.]—***See* CROWN PRACTICE, Vol. XVI., p. 377, Nos. 2145 *et seq.*

**Proceedings partly within & partly without jurisdiction.]—***See* CROWN PRACTICE, Vol. XVI., p. 379, Nos. 2176 *et seq.*

### SECT. 3.—CERTIORARI.

#### SUB-SECT. 1.—IN GENERAL.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 398-481.

**1432. Effect of statutory restrictions—Jurisdiction of High Court—Where decision subject to special case.]—**Where an Act of Parliament provides that the determination of the justices at quarter sessions shall be final & conclusive to all parties concerned, & shall not be removed or removable by *certiorari*, the Ct. of K. B. will have no jurisdiction over an order of sessions removed by *certiorari*, though such order has been made, subject to the opinion of that ct. upon a special case reserved.—*R. v. WYKEHAM* (1828), 6 L. J. O. S. M. C. 71.

**1433. ———.]—**On one occasion two girls were seen in charge of the machinery at the vertical shaft of a pit, contrary to 5 & 6 Vict. c. 99, ss. 8, 13. There was no evidence that the contractor knew of their so acting, or ever allowed them so to act before; nor was any evidence given to negative his knowledge:—*Held*: (1) the evidence was not sufficient to justify a conviction of the contractor; (2) where a statute made the decision of quarter sessions final, & took away the writ of *certiorari*, nevertheless if quarter sessions decided the case subject to a special case to the Ct. of Q. B., this enabled the superior ct. to entertain the appeal.—*R. v. HANDLEY* (1864), 9 L. T. 827; *sub nom.* HANDLEY *v.* ROPER, 28 J. P. 245.

— *See, further*, CROWN PRACTICE, Vol. XVI., p. 402, Nos. 2480, 2481, & p. 436, Nos. 3011 *et seq.*

**Proceedings in nature of certiorari—Removal of indictments.]—***See* CROWN PRACTICE, Vol. XVI., p. 399, No. 2423.

— **Removal of orders.]—***See* CROWN PRACTICE, Vol. XVI., p. 399, Nos. 2426-2428.

**Stage of proceedings at which writ granted.]—***See* CROWN PRACTICE, Vol. XVI., p. 445, Nos. 31 *et seq.*

#### SUB-SECT. 2.—REMOVAL FOR TRIAL.

##### A. Civil Actions.

*See, generally*, CROWN PRACTICE, Vol. XVI., p. 404, Nos. 2499-2509.

**1434. What proceedings removable—Validity of**

**distress warrant.]—***R. v. Wood* (1854), 22 L. T. O. S. 223.

**1435. ——— Sufficiency of search for documents—To admit secondary evidence.]—**(1) This ct. has jurisdiction to review the decision of a ct. of quarter sessions as to whether sufficient search has been made for a document to render secondary evidence of it receivable.

(2) On a question of derivative settlement, it was alleged that the grandfather of the pauper had been bound as parish apprentice sixty-nine years before. In order to prove the indenture of apprenticeship executed by the parish officers, it was shown that ineffectual search for it had been made among the papers of the pauper:—*Held*: sufficient to render secondary evidence receivable, although no search had been made among the papers of the master.—*R. v. HINCKLEY OVERSEERS* (1863), 3 B. & S. 885; 2 New Rep. 67; 32 L. J. M. C. 158; 8 L. T. 270; 27 J. P. 823; 9 Jur. N. S. 1054; 11 W. R. 663; 122 E. R. 331.

##### B. Indictments.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 405-412, 451-458.

**1436. Grounds for removal—Inability to secure fair trial—Local agitation.]—***R. v. DODDRELL* (1846), 10 J. P. Jo. 89.

— — —.]—*See* CROWN PRACTICE, Vol. XVI., pp. 407-409, Nos. 2512-2591.

**1437. ——— Difficult points of law arising.]—***R. v. DODDRELL* (1846), 10 J. P. Jo. 89.

— — —.]—*See* CROWN PRACTICE, Vol. XVI., p. 409, Nos. 2595-2652.

**1438. ——— Trial with special jury.]—***R. v. DODDRELL* (1846), 10 J. P. Jo. 89.

— — —.]—*See* CROWN PRACTICE, Vol. XVI., p. 411, Nos. 2653-2685.

— **View.]—***See* CROWN PRACTICE, Vol. XVI., p. 411, Nos. 2686-2692.

— **Other grounds.]—***See* CROWN PRACTICE, Vol. XVI., p. 406, Nos. 2539, 2540, & p. 412, Nos. 2693-2708.

**What proceedings removable.]—***See* CROWN PRACTICE, Vol. XVI., pp. 405, 406, Nos. 2510-2522.

**Removal to central criminal court.]—***See* CROWN PRACTICE, Vol. XVI., p. 406, Nos. 2525-2528.

**Who may apply.]—***See* CROWN PRACTICE, Vol. XVI., p. 451, No. 3205.

**Return.]—***See* CROWN PRACTICE, Vol. XVI., p. 454, Nos. 3256-3259.

**Effect of removal.]—***See* CROWN PRACTICE, Vol. XVI., p. 455, No. 3281.

**Costs.]—***See, generally*, CROWN PRACTICE, Vol. XVI., p. 455, Nos. 3289 *et seq.*

#### SUB-SECT. 3.—REMOVAL TO QUASH.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 412-432.

**1439. Grounds for removal—Want of jurisdiction.]—***R. v. WALDERSHAM, ETC. TOWNSHIPS* (1718), 11 Mod. Rep. 280; 88 E. R. 1040.

**1440. ———.]—**Rule for a *certiorari* granted, to remove an order of justices in quarter sessions, by which a commitment of an outgoing officer under 5 & 6 Will. 4, c. 76, s. 60, for not delivering

up books, etc., was treated as a summary conviction under s. 131, & quashed on appeal made under the latter section.—*R. v. WORCESTERSHIRE JJ.* (1838), 2 J. P. 232.

**1441.** ———.]—*R. v. WESTMORLAND JJ.* (1844), 3 L. T. O. S. 79; 8 J. P. Jo. 342.

**1442.** ———.]—No appeal lies against an order merely adjudicating the settlement of a lunatic pauper, though the settlement may be disputed on appeal against an order of maintenance reciting such adjudication.

Where sessions, on appeal against an order of adjudication, confirmed the order, but stated a case, raising the question whether or not sessions had jurisdiction to entertain the appeal, this ct., on motion to quash the order of adjudication & order of sessions, made the rule absolute to quash the latter order “for want of jurisdiction,” but discharged the rule as to the original order.—*R. v. ST. PANCRAZ (INHABITANTS)* (1849), 12 Q. B. 298; 13 L. T. O. S. 91; 116 E. R. 880; *sub nom. R. v. BANGOR (INHABITANTS)*, 13 J. P. Jo. 267.

**1443.** ———.]—*Re R. v. HOWELL* (1859), 23 J. P. Jo. 276.

**1444.** ———.]—**No excess of jurisdiction.**—After the actual removal of a pauper to a parish, the parish entered & respited an appeal at the next, Midsummer, sessions: on Oct. 1, they gave notice of trying the appeal at the ensuing Oct. sessions: on Oct. 4, the order of removal was superseded by the justices who had made it: on Oct. 8, resps. served appls. with a copy of the *supersedeas* & a notice of abandonment of the order. Sessions commenced on Oct. 18, when the ct. quashed the order, though evidence of the *supersedeas* & abandonment was offered:—*Held*: sessions had jurisdiction to quash: & this ct. refused to quash the order of sessions on *certiorari*.—*R. v. BRIGHTHELMSTON GUARDIANS* (1812), 3 Q. B. 312; 2 Gal. & Dav. 88; 114 E. R. 537; *sub nom. R. v. BRIGHTON (INHABITANTS)*, 6 J. P. 523; 6 Jur. 536.

; ———.]—*See, further, CROWN PRACTICE, Vol. XVI., pp. 420–424.*

**1445.** ———.]—**Order too general.**—*R. v. WALDERSHAM, ETC. TOWNSHIPS* (1718), 11 Mod. Rep. 280; 88 E. R. 1040.

**1446.** ———.]—**Interest of magistrates.**—The ct. will grant a *certiorari* to remove an indictment from the sessions, where deft., being a magistrate of the county within which the indictment was found, sends round a statement of his case to his brother magistrates.—*R. v. GROVER* (1840), 8 Dowl. 325; *sub nom. ANON.*, 4 Jur. 151.

**1447.** ———.]—Where an order of quarter sessions confirming a conviction is void on the ground of interest in the justices, this ct. will grant a *certiorari* to bring up the order for the purpose of quashing it, with a view to a *mandamus* to enter continuances & hear the appeal.—*Ex p. HOPKINS* (1857), 4 Jur. N. S. 529; *subsequent proceedings, sub nom. Re HOPKINS* (1858), E. B. & E. 100.

—.]—*See, further, CROWN PRACTICE, Vol. XVI., p. 427, Nos. 2862–2869.*

— **Error on face of proceedings.**—*See CROWN PRACTICE, Vol. XVI., pp. 427–430, Nos. 2870–2908.*

— **Fraud.**—*See CROWN PRACTICE, Vol. XVI., p. 430, Nos. 2909–2912.*

— **Other grounds.**—*See CROWN PRACTICE, Vol. XVI., pp. 430, 431, Nos. 2913–2918.*

**What proceedings removable.**—*See CROWN PRACTICE, Vol. XVI., pp. 412–416.*

**Who may apply.**—*See CROWN PRACTICE, Vol. XVI., pp. 458–460, Nos. 3332–3344.*

**1448. Time for application—Order under Highway Acts.**—The justices in their final order for the formation of a highway district, fixed the first day of meeting of the highway board for Thursday after Mar. 25, & no day was specially fixed for the election of waywardens. According to the custom of the parishes, it had been usual to elect highway surveyors on Mar. 25, or within two or three days thereafter:—*Held*: (1) the order was not bad, though it did not provide for fourteen days elapsing after Mar. 25, but provided only for five clear days, though it would have been better to give more time; (2) when orders must be objected to within three months, it is sufficient to obtain a rule for *certiorari* within that time.—*R. v. LINDSEY JJ.* (1865), L. R. 1 Q. B. 68; 6 B. & S. 892; 35 L. J. M. C. 90; 13 L. T. 524; 30 J. P. 86; 12 Jur. N. S. 314; 14 W. R. 179; 122 E. R. 1422.

**1449.** ———.]—**Distinguished from mandamus.**—The general rule that application for a writ of *mandamus* to the quarter sessions to enter continuances & hear an appeal must be made not later than the term following the sessions at which the refusal was made, does not apply to an application to remove into this ct. an order of sessions for the purpose of getting it quashed.—*R. v. BRECKNOCKSHIRE JJ.* (1873), 42 L. J. M. C. 135; 37 J. P. Jo. 404.

—.]—*See, further, CROWN PRACTICE, Vol. XVI., pp. 402, 460 et seq., Nos. 2479, 3345 et seq.*

**Affidavits in support.**—*See CROWN PRACTICE, Vol. XVI., pp. 461–466, Nos. 3391–3432.*

**Form & direction of rule.**—*See CROWN PRACTICE, Vol. XVI., p. 467, Nos. 3413–3447.*

**Recognisances.**—*See CROWN PRACTICE, Vol. XVI., pp. 468, 469, Nos. 3468–3479.*

**Form & service of writ.**—*See CROWN PRACTICE, Vol. XVI., pp. 469, 470, Nos. 3480–3493.*

**Return.**—*See CROWN PRACTICE, Vol. XVI., pp. 470–472, Nos. 3491–3530.*

**Costs.**—*See CROWN PRACTICE, Vol. XVI., pp. 477, 478, Nos. 3582–3597.*

#### SUB-SECT. 4.—REMOVAL FOR EXECUTION OR COERCIVE PROCESS.

*See, generally, CROWN PRACTICE, Vol. XVI., pp. 433, 434, 478, 479, Nos. 2931–2965, 3598–3608.*

**1450. To enforce order of sessions—Necessity for certiorari.**—Under Quarter Sessions Act, 1849 (c. 45), s. 18, a *certiorari* is unnecessary in order to bring up an order from quarter sessions to be enforced into the bail ct., the order of a judge alone being sufficient.—*R. v. FIELD* (1850), 4 New Mag. Cas. 167; 16 L. T. O. S. 130.

**1451.** ———.]—**When not obeyed within reasonable time.**—*R. v. HUNTLEY*, No. 1153, *ante*.

#### SUB-SECT. 5.—REMOVAL FOR OTHER PURPOSES.

**Removal of orders on case stated.**—*See CROWN PRACTICE, Vol. XVI., pp. 434, 479–481, Nos. 2966–2969, 3609–3628.*

**Removal for judgment on indictments.**—*See CROWN PRACTICE, Vol. XVI., pp. 432, 433, Nos. 2927–2933.*

**Removal of record for use as evidence.**—*See CROWN PRACTICE, Vol. XVI., p. 435, Nos. 2983–2997.*

**Removal for other purposes.**—*See CROWN PRACTICE, Vol. XVI., p. 436, Nos. 2998–3002.*



**Sect 4.—Mandamus: Sub-sect. 1, C. (c) & (d), & D.]**

of the Cinque Ports, & not naming any particular justices:—*Held*: such notice was insufficient, as not being in compliance with Licensing Act, 1872 (c. 94), s. 52, which directs that notice of appeal should be given to the "ct. of summary jurisdiction," that is, "the convicting justices."—*Ex p. CURTIS* (1877), 3 Q. B. D. 13; 47 L. J. M. C. 35; 26 W. R. 210; *sub nom. CURTIS v. BUSS*, 37 L. T. 533; 42 J. P. 87, D. C.

*Annotations*:—*Folld. Lockhart v. St. Albans Corp.* (1888), 57 L. J. M. C. 118. *Refd. South Staffordshire Waterworks Co. v. Stone* (1887), 56 L. J. M. C. 122; *Westmore v. Paine* (1891), 39 W. R. 463; *R. v. Glamorganshire JJ.*, *Ex p. Applegate, Same v. Same, Ex p. Evans* (1892), 36 Sol. Jo. 232.

**1533.** —.]—*R. v. LANCASHIRE JJ.*, No. 1030, *ante*.

**1534.** —.]—P., the licensee of a beer house, was served with notice of opposition to the renewal of his license by the superintendent of police, who appeared to oppose & was heard, & the justices refused the renewal. The owners of the house appealed to quarter sessions, & served notice of appeal only on the justices & not on the superintendent, & quarter sessions refused to hear the appeal:—*Held*: a writ of *mandamus* could not be granted against quarter sessions as the superintendent was "the other party" within Summary Jurisdiction Act, 1879 (c. 49), s. 31 (2), & entitled to notice.—*R. v. BRISTOL LICENSING JJ.*, *R. v. GLOUCESTERSHIRE JJ.* (1893), 68 L. T. 225; 57 J. P. 486; 41 W. R. 379; 9 T. L. R. 273; 37 Sol. Jo. 269; 5 R. 276, D. C.

*Annotation*:—*Apprvd. R. v. Kent JJ.*, [1896] 2 Q. B. 306.

**1535. Objection to sufficiency of grounds of appeal.**—(1) A ground of appeal was stated to be that resp. parish acknowledged the pauper to be an inhabitant of & legally settled in their parish, by relieving him & his family during the last six years out of the parish, & particularly during the years 1839 & 1840, while he & his family resided at L.:—*Held*: to be sufficiently explicit, the facts stated being more within the knowledge of resps. than of appls.

(2) The Ct. of Q. B. will issue a *mandamus* to hear an appeal, if sessions have refused to hear upon an erroneous decision as to the sufficiency of the grounds of appeal.—*R. v. CARNARVONSHIRE JJ.* (1841), 2 Q. B. 325; 1 Gal. & Dav. 423; 11 L. J. M. C. 3; 5 J. P. 798; 114 E. R. 127.

*Annotations*:—*As to (2) N.F. R. v. Kesteven JJ.* (1844), 3 Q. B. 810. *Refd. R. v. Charlbury & Walcott* (1843), 3 Q. B. 378; *R. v. West Riding JJ.* (1844), 1 New Sess. Cas.

**1536.** —.]—If quarter sessions refuse to go into an appeal because they think the grounds of appeal insufficient, that is a hearing by them, & this ct. will not review their decision by *mandamus*.—*R. v. CORNWALL JJ.* (1844), 1 New Sess. Cas. 161, n.; 3 L. T. O. S. 101, 130; 8 J. P. Jo. 310.

**1537.** —.]—Where sessions have put a particular construction upon a ground of appeal, if it will bear that construction, this ct. will not review their decision.

On appeal against a poor rate, resps. objected, that in respect of one of the grounds of appeal, it was necessary, under 41 Geo. 3, c. 23, s. 6, that notice of the appeal should have been given to the persons therein named. Appls. denied that the ground of appeal came within that sect. Sessions, however, decided that a notice was necessary to be given under the statute. Appls. then offered to abandon that ground of appeal, & proceed with others in respect of which no notice at all was required. Sessions refused to permit them to do so, & dismissed the appeal. On motion for a

*mandamus*:—*Held*: sessions had power to decide whether they would permit appls. to abandon that particular ground of appeal, & proceed with the others; & having done so, the ct. would not interfere to review their decision.—*R. v. CAMBRIDGESHIRE JJ.* (1850), 1 L. M. & P. 47; 4 New Mag. Cas. 42; 19 L. J. M. C. 130; 14 L. T. O. S. 401; 14 J. P. Jo. 141.

*Annotation*:—*Consd. R. v. Kent JJ.* (1870), L. R. 6 Q. B. 132

**1538.** —.]—At the trial of an appeal against a conviction under Vagrancy Act, 1824 (c. 83), sessions, after Quarter Sessions Act, 1849 (c. 45), refused to amend the direction of the notice of appeal, on the ground that there were fatal objections to the statement of the grounds of appeal, & dismissed the appeal:—*Held*: on showing cause against a rule for a *mandamus* to hear, the decision of sessions was final.—*R. v. SANDWICH RECORDER* (1850), 16 L. T. O. S. 213; 14 J. P. 754.

**1539.** —.]—Where quarter sessions decided that the grounds of appeal were insufficiently stated in the notice of appeal, & therefore, dismissed the appeal:—*Held*: there was no power to issue a *mandamus* to them to hear the appeal.—*R. v. DURHAM JJ.* (1891), 7 T. L. R. 453; 55 J. P. Jo. 277, D. C.

**1540. Objection to sufficiency of recognisance.**—Where the ct. of general quarter sessions refused to hear an appeal against the decision of the special sessions, on the ground that the recognisance entered into by appls., as required by Parochial Assessment Act, 1836 (c. 96), was invalid, as not having been signed by the magistrate before whom taken; the ct. will grant a writ of *mandamus* to enter continuances & hear the appeal.—*R. v. HERTFORDSHIRE JJ.* (1838), 2 J. P. 808; 2 Jur. 1087.

**1541. Objection to examinations in order of removal—As not containing evidence of chargeability.**—Upon an appeal against an order of removal coming on to be tried, resps. admitted that the examinations were defective, as not containing evidence of chargeability. The objection had been pointed out by one of the grounds of appeal. Appls. stated that they waived the objection, & applied to have the appeal heard on the merits; but sessions quashed the order, at the request of resps., with a special entry "for want of proof of chargeability in the examinations." An application, on the part of appls., for a *mandamus* to sessions, to hear the appeal, was refused by the ct.—*Ex p. WELLINGBOROUGH (INHABITANTS)* (1845), 8 Q. B. 123; 1 New Mag. Cas. 430; 15 L. J. M. C. 20; 10 J. P. 40; 9 Jur. 1056; 115 E. R. 820.

(d) *Refusal to Exercise.*

**1542. Sessions in belief that jurisdiction wanting—Mistaken belief.**—16 Car. 1, c. 4, s. 2, having continued 1 Jac. 1, c. 6, ss. 2, 3, in extension of 5 Eliz. c. 4, authorises the justices in sessions, with the sheriff, if he conveniently may, to rate the wages of any labourers, etc., or workmen whatsoever, etc.; this ct. granted a *mandamus* to the justices, etc. of Kent to hear an application of the journeymen millers of that county, praying them to make such a rate; which application the justices had refused to hear upon the merits; considering that they had no jurisdiction over other than the wages of servants in husbandry.—*R. v. KENT JJ.* (1811), 14 East, 395; 104 E. R. 653.

*Annotations*:—*Refd. R. v. Cumberland JJ.* (1813), 1 M. & S. 190. *Mentd. Hereford (Lord Bp.)* (1847), 5 Notes of Cases Supp. XVIII; *R. v. Canterbury (Archbp.)* (1848), 11 Q. B. 483.

of holding: Sub-sect. 3. Sect. 3:  
Sub-sects. 1 & 2. Sect. 4.]

applt. had exclusive occupation of the market place:—*Held*: the dedication of the highway must be regarded as subject to the user of the land as a market; the land so dedicated could legally be the subject of exclusive occupation & therefore the finding of exclusive occupation was conclusive against applt.—*WILLIAMS v. WEDNESBURY* (CHURCHWARDENS & OVERSEERS) & WEST BROMWICH UNION ASSESSMENT COMMITTEE (1890), Ryde Rat. App. (1886-90) 327; 54 J. P. Jo. 389, D. C.

—As defence to action for nuisance.]—See *HIGHWAYS*, Vol. XXVI., pp. 442, 443, Nos. 1591-1593.

—Streets adjoining market.]—See Nos. 45, 103, 104, *ante*.

Whether a nuisance.]—See, generally, *HIGHWAYS*, Vol. XXVI., p. 423.

Sale from caravan adjoining market.]—See *HIGHWAYS*, Vol. XXVI., p. 416, No. 1351.

Defences—Custom or usage.]—See *HIGHWAYS*, Vol. XXVI., p. 441, No. 1577.

Prescriptive right.]—See *HIGHWAYS*, Vol. XXVI., p. 441, No. 1581.

Dedication subject to market rights.]—See Nos. 45, 103, 104, *ante*; *HIGHWAYS*, Vol. XXVI., pp. 442, 443, Nos. 1591, 1593.

107. Liability of market owner—For nuisance—“Act, default, permission or sufferance”—Nuisance caused by sheep droppings.]—Applt. claiming to be the owner of markets & fairs held in the town of Crewkerne, erected a sheep pen in front of a house in the town & took toll for sheep exposed for sale therein. After the removal of the sheep their droppings & urine remained, & a complaint was lodged against applt. by resp., who was inspector of nuisances, in respect thereof. For fifty-five years & upwards the inhabitants of the houses before which the sheep were penned had been in the habit of clearing away the droppings, & applt.’s servants never cleared them away, except in cases where houses before which the pens were placed were unoccupied. The justices being of opinion that applt. was a person by whose “permission or sufferance” the nuisance was created, & the ground inclosed by applt. with hurdles for the aforesaid purpose was “land or tenement” within Nuisances Removal Act, 1855, & the nuisance was a recurring nuisance within the Act, issued their prohibition to applt.:—*Held*: the justices were right.—*DRAPER v. SPERRING* (1861), 10 C. B. N. S. 113; 30 L. J. M. C. 225; 4 L. T. 365; 25 J. P. 566; 9 W. R. 656; 142 E. R. 392.

108. —Whether temporary pens “land or tenement”—Within Nuisances Removal Act, 1855 (c. 121).]—*DRAPER v. SPERRING*, No. 107, *ante*.

Extension of market to adjoining streets.]—See Nos. 101-105, *ante*.

109. Existing market a nuisance—Whether a defence to action for disturbance.]—*GREAT EASTERN RY. CO. v. GOLDSMID*, No. 18, *ante*.

### SECT. 3.—RIGHT OF REMOVAL.

#### SUB-SECT. 1.—WITHIN LIMITS OF GRANT.

110. Incident to grant.]—*CURWEN v. SALKELD*, No. 89, *ante*.

#### PART IV. SECT. 3, SUB-SECT. 1.

110 i. Incident to grant.]—The patentees of fairs are justified in removing them to any place within the precinct

of their grant.—*MIDLETON (LORD) v. POWER* (1886), 19 L. R. Ir. 1.—*IR.*

1. Power to sell existing market place & establish elsewhere.]—*Held*:

111. —.]—Charles II., by charter granted to the corpn. of Walsall two fairs, to be holden annually within the borough & foreign, & confirmed to them all markets which they then held, with a reservation of the rights of the lord of the manor; it appeared that a market had been holden immemorially in the High street of Walsall until a very late period, when the corpn., finding it inconvenient, removed it out of the High street to another & more convenient place within the borough; the corpn. had exercised acts of ownership in pulling down an old market house & erecting a new one; the clerk of the markets, however, had been appointed by the lord of the manor, but he did not receive any toll from the persons frequenting it. Deft. having been indicted for a nuisance in erecting stalls in the High street after the removal of the market, the judge, upon the trial, left it to the jury to say whether the corpn. were owners of this market; adding, that if they were, the right of removal was incident to the grant. The jury having found in the affirmative, the ct. refused to grant a new trial.—*R. v. COTTERILL* (1817), 1 B. & Ald. 67; 106 E. R. 25.

*Annotations*:—*Conad. De Rutzen v. Lloyd* (1836), 5 Ad. & El. 456; *Ellis v. Bridgnorth Corpn.* (1863), 15 C. B. N. S. 52. *Refd. Gingell & Foskett v. Stepney B. C.*, [1906] 2 K. B. 468.

112. —Though site for original market hall granted by charter—New market hall built elsewhere by consent of inhabitants.]—*Semble*: proof of the general, though not universal, approbation of the parish is sufficient to justify the *bona fide* conduct of trustees, where they have a discretion to exercise, & the ct. will not interfere, where their acts have been so approved; & if in consequence of the decayed state of an old market house built originally on ground given by the charter for the purpose a new one be rebuilt by them, with such general consent, the trustees may remove it to any more convenient place, *infra villam*.—*Re CHERTSEY MARKET, Ex p. WALTHER* (1819), 6 Price, 261; 146 E. R. 803; *sub nom. Re CHERTSEY MARKET, Ex p. MATTHEW*, Dan. 174.

113. —Removal of whole or part.]—*WORTLEY v. NOTTINGHAM LOCAL BOARD*, No. 93, *ante*.

See, also, Nos. 86, 88, *ante*.

114. Effect of removal—On extension of borough—Whether ground of forfeiture.]—*DORCHESTER CORPN. v. ENSOR*, No. 94, *ante*.

115. Resort by public to former market—Trespass.]—*CURWEN v. SALKELD*, No. 89, *ante*.

Unless removal illegal.]—See Nos. 117, 119, *post*.

116. —Nuisance.]—*R. v. COTTERILL*, No. 111, *ante*.

#### SUB-SECT. 2.—ILLEGAL REMOVAL.

117. Removal to site not in possession of owner of market.]—Where the owner of a market toll free on removing it to another site within his manor, had demised the soil of the new market, with power to the lessees to impose rents or other sums on persons selling there:—*Held*: the new market did not afford the public the same accommodation as the old, & a person setting up stalls for the sale of goods in the old market place was not guilty of a nuisance. A *sci. fa.* is not necessary to repeal the grant of the market.—*R. v. STARKEY* (1837), 7 Ad. & El. 95; 2 Nev. & P. K. B. 169;

under 53 Vict. c. 80, s. 84, the city of Moncton could sell one market site & purchase another elsewhere.—*STEEVES v. MONCTON* (1914), 14 E. L. R. 321; 17 D. L. R. 560.—*CAN.*



Will. Woll. & Dav. 502; 6 L. J. K. B. 202; 1 J. P. 265; 1 Jur. 672; 112 E. R. 406.

*Annotations*:—*Folld. Ellis v. Bridgnorth Corpn.* (1863), 15 C. B. N. S. 52. *Mentd. Gingell v. Stepney B. C.* (1907), 77 L. J. K. B. 347.

**118. Removal interfering with existing rights—Imposition of new tolls.]—R. v. STARKEY, No. 117, ante.**

**119. — Right of adjoining occupiers to set up stalls—Presumption of grant.]—**The corpn. of B. were owners of an ancient market, & also lords of the manor in which the borough of B. was situate. The market had from time immemorial been held in & near the High Street. Pltf. had a house in that street, & he & the previous owners & occupiers of the house in which he lived, as well as several other occupiers of houses in the same street, had from time immemorial erected, on market days, stalls opposite their houses, & either used the stalls themselves, or let them to others. No tolls were ever taken in respect of the goods sold at these stalls, though they were formerly taken for similar produce exposed in the market elsewhere. In an action against the corpn. of B. for removing the market to another place within the borough:—*Held*: (1) the right to the stalls was a right which might reasonably be supposed to have been granted by the owners of the market to the owners & occupiers of the houses, & it was sufficiently connected with the enjoyment of the houses to be claimed as appurtenant thereto; (2) if the original grant were, presumably, to hold the market at any place within the borough, still the corpn. could not now remove it, as to do so would be in derogation of their own grant of the right now claimed; (3) the removal of the market was not justifiable under Public Health Act, 1858 (c. 63), or Local Government Act, 1858 (c. 98), inasmuch as the power conferred upon the local board by the latter Act, s. 50, was expressly qualified by the proviso that no market should be established so as to interfere with any rights enjoyed by any person, without his consent.—*ELLIS v. BRIDGNORTH CORPN.* (1863), 15 C. B. N. S. 52; 2 New Rep. 488; 32 L. J. C. P. 273; 8 L. T. 668; 9 Jur. N. S. 1078; 12 W. R. 56; 143 E. R. 702; *previous proceedings* (1861), 2 John. & H. 67.

*Annotations*:—*As to* (1) *Refd. Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *Edgar v. English Fisheries Special Comrs.* (1870), 23 L. T. 732; *Chesterfield v. Harris*, [1908] 2 Ch. 397. *As to* (3) *Refd. Ashworth v. Heyworth* (1869), 10 B. & S. 309.

**120. — Statutory restriction.]—ELLIS v. BRIDGNORTH CORPN., No. 119, ante.**

**121. Statutory power to remove—Removal to ground reserved by statute for special purpose.]—**The corpn. of S. were empowered by Act of Parliament to redeem certain waste lands, & to devote a portion to purposes of public recreation. They were also empowered to remove a cattle fair, from a place where it was then held, to such parts of the waste lands as to the corpn. should seem fit. The corpn. devoted a portion of the waste, known as the "cricket ground," for the purposes of recreation, & they afterwards, in the exercise of their discretion, removed the cattle fair to the cricket ground. Upon information filed by the A.-G.:—*Held*: the corpn. were contravening the Act of Parliament, & a perpetual injunction was granted to restrain them from so using the cricket ground.—*A.-G. v. SOUTHAMPTON CORPN.* (1859), 1 Giff. 363; 29 L. J. Ch. 282; 1 L. T. 155; 24 J. P. 131; 6 Jur. N. S. 36; 65 E. R. 957.

*Annotations*:—*Consd. A.-G. v. Teddington U. D. C.*, [1898] 1 Ch. 66. *Refd. A.-G. v. Hanwell U. D. C.*, [1900] 2 Ch. 377.

**122. Right of public to resort to old market.]—R. v. STARKEY, No. 117, ante.**

*Compare* No. 89, *ante*.

**123. Remedies of persons injured—Plea of illegal removal as defence to nuisance.]—R. v. STARKEY, No. 117, ante.**

**124. — Application for scire facias to repeal grant.]—R. v. STARKEY, No. 117, ante.**

**125. — Action for disturbance—Right of adjoining occupiers to set up stalls.]—ELLIS v. BRIDGNORTH CORPN., No. 119, ante.**

#### SECT. 4.—OFFENCES.

**126. Market or fair held without authority.]—**To set up a fair, market or leet is indictable.—*ANON.* (1704), 6 Mod. Rep. 183; 87 E. R. 939.

**127. Fair held on unauthorised site.]—A.-G. v. SOUTHAMPTON CORPN., No. 121, ante.**

**128. Nuisance caused by fair—Public nuisance—Sheep droppings.]—DRAPER v. SPERRING, No. 107, ante.**

**129. — To adjoining owners—Noise.]—**Pltfs. in this action were the trustees of the Bedford Estate, Leeds, & they sought an injunction against the Leeds Corpn. to restrain them from holding a certain annual feast known as Woodhouse Feast, which appeared to have been held on or in the neighbourhood of Woodhouse Moor for the past two hundred years, on the ground that the noise caused by the feast constituted a nuisance. They complained that their property, which adjoined the moor, had depreciated in value owing to the noise caused by switchbacks, shooting galleries, roundabouts, steam organs, etc., brought on to the moor. For defts. it was contended that the feast did not constitute a nuisance. It appeared in evidence that from 1908 to 1911 defts. leased the conduct of this feast to a contractor, & that during that time protests were lodged by pltfs. against the nuisance thereby occasioned, but it was subsequently agreed that pltfs. should accept compensation in respect of the feasts from 1908 to 1911 without prejudice to their rights thereafter. In the year 1912 the corpn. wrote to pltfs. threatening to again hold the feast on Woodhouse Moor; whereupon a writ was issued by pltfs. to restrain them by injunction:—*Held*: on the facts, (1) the feasts from 1908 to 1911 constituted a nuisance & there must be a declaration to that effect, & the corpn. must pay the costs of the action; (2) with regard to the year 1912, when the corpn. conducted the feast, there was no actionable nuisance which would justify the ct. in granting an injunction.—*BEDFORD v. LEEDS CORPN.* (1913), 77 J. P. 430.

**130. Fair held without licence—Required under local Act.]—COLLINS v. COOPER, No. 11, ante.**

**131. — Licence refused by one of two necessary authorities.]—WALKER v. MURPHY, No. 13, ante.**

**Unlicensed change of fair day.]—See** No. 176, *post*.

**Levying rival market.]—See** Part VII., Sect. 1, sub-sect. 3, *ante*.

**Illegal removal of market.]—See** Sect. 3, sub-sect. 2, *ante*.

**Markets on highways.]—See** Sect. 2, sub-sect. 3, *ante*.

## Part V.—Regulation of Markets and Fairs.

### SECT. 1.—IN GENERAL.

**132. Regulation by trustees—Validity of election.]**—The London Government Scheme (Southwark Borough Market) Confirmation Act, 1907 (c. xlv) by clause 1 (1), of the scheme set out in the first schedule, provided that there should be twenty-one trustees of the borough market, of whom five were to hold office *ex officio*, & sixteen by appointment, & for the retirement of four of such appointed trustees in each year. The scheme provided by clause 2 (1) that "the appointment of an appointed trustee shall not be made by the borough council except after the nomination of the councillors elected for the . . . St. Saviour's Ward: Provided that if in any case the councillors entitled to make such nomination . . . fail to exercise their power within the time specified in the schedule to this scheme, the borough council shall make the appointment without any such nomination." Clause 1 of the second schedule provided that "a meeting of the councillors of St. Saviour's Ward shall be held . . . (b) for the purpose of nominating trustees in the place of trustees retiring on the termination of their term of office in Feb. in each year," & by clause 2. "The meeting of the councillors of the St. Saviour's Ward for the purpose of nominating trustees before the day of the meeting." In view of the approaching retirement of four of the appointed trustees on Apr. 1, 1920, the town clerk of Southwark summoned a meeting of the councillors of the ward, for the purpose of nominating trustees in place of those retiring in Mar., for Mar. 15, 1920, but did not summon a meeting in Feb. The ward councillors on Mar. 15, nominated the four retiring trustees for re-election, but the borough council refused to elect them, & purported to elect four other persons:—*Held*: the words "fail to exercise their power," were to be construed as meaning "have not exercised their power" & not as implying that the non-exercise of the power must be due to a neglect or default of the councillors of St. Saviour's Ward themselves, & the election of trustees by the borough council was valid.—*R. v. SOUTHWARK BOROUGH COUNCIL, Ex p. SOUTHWARK BOROUGH MARKET TRUSTEES* (1921), 90 L. J. K. B. 359; 124 L. T. 623; 85 J. P. 105; 37 T. L. R. 357; 65 Sol. Jo. 292; 19 L. G. R. 79, C. A.

### SECT. 2.—BYE-LAWS.

#### SUB-SECT. 1.—IN GENERAL.

*See, generally, Markets & Fairs Clauses Act, 1847 (c. 14), ss. 42–49.*

**Power of urban authority to make.]**—*See Public Health Act, 1875 (c. 55), s. 167.*

**Power of rural district council to make.]**—*See Public Health Act, 1908 (c. 6).*

As to confirmation of bye-laws generally, *see PUBLIC HEALTH.*

#### PART V. SECT. 2, SUB-SECT. 2.

**m. Bye-law requiring leave or licence—How far valid.]**—A bye-law requiring everybody offering fresh meat for sale in the city to take out a licence:—*Held*: valid.—*O'MEARA v. OTTAWA CITY* (1888), 14 S. C. R. 742.—CAN.

**n. ———.]**—A bye-law made by the magistrates of a burgh provided

that no person should expose goods for sale on any of the stances without the permission of the "market officer," & no person should occupy more than the area of the stance allotted to him. An objection to the validity of the bye-law, on the ground that it was so unreasonable as to be *ultra vires* in that it conferred unlimited power upon a subordinate official, repelled.—

*M'CALL v. MITCHELL*, [1911] S. C. (J.) 1; 6 Adam, 303.—SCOT.

**o. Bye-law restricting place of sale of particular articles—Meat.]**—*PETERS v. PRESIDENT & BOARD OF POLICE OF LONDON* (1846), 2 U. C. R. 543.—CAN.

**p. ———.]**—A bye-law enacting "that no butcher or other person shall cut up or expose for sale any

### SUB-SECT. 2.—VALIDITY.

*See Public Health Act, 1875 (c. 55), s. 167; Public Health Act, 1908 (c. 6); Markets & Fairs Clauses Acts, 1847 (c. 14), s. 42; Public Health (Confirmation of Bye-Laws Act), 1884 (c. 12), ss. 3, 4; Diseases of Animals Act, 1894 (c. 57), s. 32.*

**133. Bye-law requiring leave or licence—How far valid—Frequenters of market unduly restricted.]**—*WORTLEY v. NOTTINGHAM LOCAL BOARD*, No. 93, *ante*.

**134. ——— Prohibitory effect on trade.]**—A harbour improvement co. were authorised by their private Act to establish a fish market. All fish, with some immaterial exceptions, which was landed at the port had, under a penalty, to be sold in the market. The co. had power, under their Act, to make bye-laws for "the regulation & government of the fish market & of the quay on which the same is established," & penalties were imposed on persons offending against any bye-law. One of the bye-laws made provided that "No person shall gut or cleanse any fish in the market except by the leave of the wharfmaster & in such place, if any, as may from time to time be appointed by the wharfmaster for that purpose." An order was made by the wharfmaster that, "owing to the impossibility of getting rid of the offal, no dog-fish, ray or skate, are to be gutted in the fish market." No adequate place for gutting dog-fish was to be found in the town, except the fish market. The fish were bought in the market mainly for sending away by rail, & dog-fish must be gutted as soon after they are landed as possible, as they largely consist of offal, & quickly decompose. A buyer of dog-fish, resp., gutted them in the market without obtaining leave from the wharfmaster. An information against him was dismissed on the ground that the bye-law was unreasonable, & therefore bad, as it would be impracticable to carry on the industry if buyers were prohibited from gutting fish in the market:—*Held*: as the effect of the bye-law was to prevent the landing of the dog-fish, or the sale of it in the fish market, where it must be sold according to the Act, without the leave of the wharfmaster, the bye-law was unreasonable & bad in law.—*SUTTON HARBOUR IMPROVEMENT CO. v. FOSTER* (1920), 89 L. J. K. B. 829; 36 T. L. R. 202; 18 L. G. R. 232, D. C.

*Annotation*:—*Consd. Sutton Harbour Improvement Co. v. Foster* (No. 2) (1920), 89 L. J. Ch. 540.

**135. ——— Restrictive effect on trade.]**—A co. incorporated by private Act of Parliament owned a fish market, where all fish landed in the district for sale had to be sold. Under their statutory powers of making bye-laws for the regulation of the market & preventing nuisances therein the co. passed a bye-law prohibiting the gutting of dog-fish in the market. Dog-fish contain an unusual amount of offal & have to be gutted soon after landing; & the co. had found great difficulty in getting rid of the offal, which



was a nuisance. The prohibition would have the effect of altering the conditions of the dog-fish industry, but would not put an end to it:—*Held*: the bye-law in the circumstances was reasonable & therefore valid.—*SUTTON HARBOUR IMPROVEMENT CO. v. FOSTER* (No. 2) (1920), 89 L. J. Ch. 540; 123 L. T. 549; 84 J. P. 217; 36 T. L. R. 590; 18 L. G. R. 557, C. A.

**136. — Erection of entertainment booths—Licence revocable on complaint of inhabitants.]—**Trespass for seizing & taking away pltf.'s booth. First plea: justifying under a bye-law, made by the corpn. of B., that no person should erect any booth, for the purpose of any show or public entertainment, in any public place within the borough, without the licence of the mayor, & that such licence should not be given for any other time than during the time of the annual fairs, if three inhabitants, householders residing within 100 yards of the place intended to be used should have previously memorialised the mayor, in writing, to withhold such licence: & that any such licence given for any other time than during the time of the said fairs should be revoked by the mayor, & become void, if, & so soon as, three inhabitant householders residing within 100 yards of the place for which such licence should be granted should memorialise the said mayor, in writing, to revoke the same:—*Held*: the bye-law was bad, as unreasonable & in restraint of trade.—*ELWOOD v. BULLOCK* (1844), 6 Q. B. 383; 13 L. J. Q. B. 330; 8 J. P. 473; 8 Jur. 1044; 115 E. R. 147.

*Annotations*:—*Refd.* *Simpson v. Wells* (1872), L. R. 7 Q. B. 214; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Mentd.* *Dawes v. Hawkins* (1860), 7 Jur. N. S. 262; *Gerring v. Barfield* (1864), 16 C. B. N. S. 597; *Arnold v. Blaker* (1871), L. R. 6 Q. B. 433; *Neeld v. Hendon* U. D. C. (1899), 81 L. T. 405.

**137. — Exposure of skins for sale.]—***WORTLEY v. NOTTINGHAM LOCAL BOARD*, No. 93, *ante*.

**138. — For gutting fish.]—***SUTTON HARBOUR IMPROVEMENT CO. v. FOSTER*, No. 134, *ante*.

**139. — —.]—***SUTTON HARBOUR IMPROVEMENT CO. v. FOSTER* (No. 2), No. 135, *ante*.

**140. — Sale by auction.]—***NICHOLLS v. TAVISTOCK URBAN DISTRICT COUNCIL*, No. 60, *ante*.

**141. Bye-law restricting place of sale of particular articles—Horses.]—**A local Act for the improvement of the town of P. incorporated Town Police Clauses Act, 1847 (c. 89), s. 21, which empowers comrs. to make orders for, among other things, preventing the obstruction of the streets in any case when the streets are thronged or liable to be thronged. The local Act excepted from its operation the holding of fairs & markets in the same places & in the same manner as the said fairs & markets then were accustomedly held, & persons exposing for sale any horses or beasts in such fairs or markets, etc. On an information for breach of an order made by the comrs. under the Act, requiring all dealers & jobbers to act in

fresh meat in any part of the city, except in the shops or stalls in the public markets, or at such places as the standing committee on public markets may appoint":—*Held*: good.—*Re KELLY & CITY OF TORONTO* (1864), 23 U. C. R. 425.—CAN.

**g. — —.]—***Re FENNEL & TOWN OF GUELPH* (1865), 24 U. C. R. 238.—CAN.

**r. — —.]—***Re SNELL & TOWN OF BELLEVILLE* (1870), 30 U. C. R. 81.—CAN.

**t. — —.]—***O'MEARA v. CITY OF OTTAWA* (1888), 14 S. C. R. 742.—CAN.

**a. — —.]—**A bye-law prohibiting any person bringing produce, articles, commodities, or things to a city market, from selling or offering the same for sale within the city limits, on their way to market, or without having paid market toll, & before offering such things for sale in the market:—*Held*: illegal, as beyond the power of the corpn.—*Re KINGGORN & CITY OF KINGSTON* (1866), 26 U. C. R. 130.—CAN.

**144 i. Bye-law restricting mode of sale—Sale by auction—Without leave of market officers.]—**Bye-laws enacted that all sales should take place by

conformity with certain regulations, of which one was, "That the Midgate be kept clear of all cattle, & that the horse market be held from the Crown Inn, Westgate, to the Eight Bells Inn":—*Held*: the regulation would be without jurisdiction if it interfered with the limits of the market, but it & the allegation of a breach of it were supported by evidence that Midgate was a main entrance & a narrow street, that for fifty years a horse market in Midgate had not been known, that until quite lately, horses had not been stationed there, & that the person informed against had, after such order, & with notice of it, persisted in running horses for sale up & down Midgate in P.—*Fox v. PALMER* (1858), 22 J. P. 449.

**142. — Meat—Bye-law modifying local Act.]—**A local Act prohibited the sale of goods in the public highways of the town of B., under a penalty, but provided that no person should be liable to this penalty for selling goods in such parts of the town as had been theretofore used for that purpose at the time of the usual fairs & markets. Markets & Fairs Clauses Act, 1847 (c. 14), s. 42, gives power, in those boroughs to which it applies, for regulating the use of the market place & fair, & the buildings, stalls, pens & standings therein, & for preventing nuisances or obstructions therein, or in the immediate approaches thereto. 16 & 17 Vict. c. 24, constituted a local board of health for the town of B., & repealed considerable portions of the local Act, but left the provisions of that Act above referred to unrepealed. These provisions of the local Act it incorporated, & it also conferred on the local board by reference to the Markets & Fairs Clauses Act, 1847 (c. 14), the same power of regulating the market as is conferred by that Act. The local board, acting under these provisions, made a bye-law that no meat should be sold in a particular part of the market held at B.:—*Held*: this was a valid bye-law which the local board had power to make, & for a breach of which a penalty might be enforced, notwithstanding the provision of exemption incorporated from the local Act.—*SAVAGE v. BROOK* (1863), 15 C. B. N. S. 264; 33 L. J. M. C. 42; 9 L. T. 334; 12 W. R. 81; 10 Jur. N. S. 587; 143 E. R. 785.

**143. Bye-law restricting mode of sale—Sale by auction—Sale of cattle before noon.]—**Where a corpn. made a bye-law under Markets & Fairs Clauses Act, 1847 (c. 14), that no auctioneer should sell cattle by auction in the market before 12 o'clock on the market day:—*Held*: the bye-law was good, & within the power given by the statute.—*COLLINS v. WELLS CORPN.* (1885), 1 T. L. R. 328, D. C.

*Annotation*:—*N.F. Nicholls v. Tavistock U. C.*, [1923] 2 Ch. 18. As I read *Scott v. Glasgow Corpn.*, [No. 146, *post*] the case of *Collins v. Wells Corpn.* is contrary to the principles there laid down, & in my opinion, that case, although not expressly, is in effect overruled by the decision of the House of Lords (*ROMER, J.*).

**144. — — Without leave of market officers.]—***NICHOLLS v. TAVISTOCK URBAN DISTRICT COUNCIL*, No. 60, *ante*.

auction & that no person should hold any sale in the market unless he was a duly licensed auctioneer & held the written authority of the council:—*Held*: as the bye-laws were introduced for fiscal purposes & not on the ground of public policy, sales concluded in contravention of their provisions were not void & could be enforced.—*BENONI PRODUCE & COAL CO., LTD. v. STODOWNIK*, [1919] T. P. D. 378.—S. AF.

**b. — —.]—***BOLLANDER v. OTTAWA CITY* (1900), 20 C. L. T. 296 27 A. R. 335.—CAN.

**c. — —.]—***Agents bidding for produce sold by themselves.]—*Where a

**Sect. 2.—Bye-laws: Sub-sect. 2. Sect. 3: Sub-sects. 1, 2, 3, 4, 5 & 6. Part VI. Sect. 1: Sub-sect. 1.]**

**145. — Sale by retail confined to part of market.]—**A bye-law duly made, & restricting the sale by retail of goods in a particular part of a market is not invalid by reason of its being in restraint of trade, or of its being unreasonable.—**STRIKE v. COLLINS** (1886), 55 L. T. 182; 50 J. P. 741; 34 W. R. 459; 2 T. L. R. 421, D. C.

**146. — Use of sale rings for private sales.]—**A local authority purporting to act in the exercise of the powers of Diseases of Animals Act, 1894 (c. 57), & Markets & Fairs Clauses Act, 1847 (c. 14), made a bye-law to the effect that sale rings at a public market belonging to it should not "be used for private sales, or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding or buying":—**Held**: the bye-law was not *ultra vires*.—**SCOTT v. GLASGOW CORPN.**, [1899] A. C. 470; 68 L. J. P. C. 98; 81 L. T. 302; 64 J. P. 132; 15 T. L. R. 498, H. L.

**Annotation:—****Apld.** **Nicholls v. Tavistock U. C.**, [1923] 2 Ch. 18.

**147. Bye-law restricting time of sale—Sale of cattle by auction before noon.]—****COLLINS v. WELLS CORPN.**, No. 143, *ante*.

**148. Bye-law restricting leaving carts unnecessary time.]—**A bye-law of the market of Y. imposed a penalty on all persons who left carts in the market place for a longer time than was necessary for loading or unloading. P., an inn-keeper, by direction of a carter who put up at his inn, left the cart in the market place for an hour, carts having for many years been so left there while the owners attended market:—**Held**: P. was liable to be convicted if he put the cart there.—**DE CAUX v. POWLEY** (1864), 28 J. P. 806.

**149. Bye-law imposing on public burdens thrown on market owner.]—****A.-G. OF DUCHY OF LANCASTER v. LIVERPOOL NEW CATTLE MARKET CO.**, No. 220, *post*.

### SECT. 3.—STATUTORY REGULATIONS.

#### SUB-SECT. 1.—PROVISION OF WEIGHTS AND MEASURES.

*See* Weights & Measures Act, 1878 (c. 49), ss. 69, 86, sched. VI., Part II.; Markets & Fairs Clauses Act, 1847 (c. 14), ss. 21–30, & generally, WEIGHTS & MEASURES.

#### SUB-SECT. 2.—FACILITIES FOR WEIGHING CATTLE.

*See* Markets & Fairs (Weighing of Cattle) Acts, 1887 (c. 27), & Markets & Fairs (Weighing of Cattle) Acts, 1891 (c. 70).

**150. Machine erected in market adjoining highway—Right of local authority to object as nuisance on highway—1887 Act (c. 27), s. 4.]—**In Dec. 1887, pltf., as the market authority under 1887 Act, took steps to provide under that Act a weighing machine for cattle upon a site in their market

place which, according to pltf.'s contention, consisted of two long & narrow strips in the market town separated by the highway. Defts. interfered, their contention being that the market place was not distinct from the highway; but that the entire space upon which the markets were held was a public highway dedicated to the use of the public, subject only to the right of the owner of the soil for the time being or his lessees to hold markets thereon; & that the market place, as a highway, was vested in them, defts., as an urban authority under the Public Health Act, 1875 (c. 55), & that the proposed weighing machine would be a public nuisance, & interfere with their rights in such highway & with the public right of passage thereon:—**Held**: above sect. was an imperative sect., & the market authority was not only at liberty, but was bound to provide a proper weighing machine for their market, which, according to the Act, must be a permanent structure & not a movable machine.—**MCINTOSH v. ROMFORD LOCAL BOARD** (1889), 61 L. T. 185; 5 T. L. R. 643.

**151. Compliance with statutory requirements—Cattle sale yard let exclusively to auctioneers—Weighbridge in market but outside sale yard—1887 Act (c. 27), s. 4, & 1891 Act (c. 70), s. 4.]—**A portion of a cattle market was let by the market authority to auctioneers for exclusive use by them as a sale yard, such portion consisting of a covered shed separated from the rest of the market. All animals sold in this yard had to pass through the market gates & to pay toll to the market authority. There were no weighing facilities provided at the yard, but a weighbridge was provided in the market at which cattle sold in the sale yard could be weighed. A summons having been taken out against the auctioneers for not having at their mart facilities for weighing cattle:—**Held**: there being within the market facilities for weighing cattle, there were sufficient facilities for weighing cattle in or near to the auctioneers' mart to satisfy the requirements of above sect., & the summons was properly dismissed.—**KNOTT v. STRIDE** (1913), 109 L. T. 181; 77 J. P. 222; 29 T. L. R. 418; 11 L. G. R. 534; 23 Cox, C. C. 505, D. C.

#### SUB-SECT. 3.—ACCOUNTS AND STATISTICAL RETURNS.

*See* Markets & Fairs Clauses Act, 1847 (c. 14), s. 50; Local Taxation Returns Acts, 1860 (c. 51), 1877 (c. 66); Markets & Fairs (Weighing of Cattle) Act, 1891 (c. 70), s. 3; Diseases of Animals Act, 1894 (c. 57), s. 32.

#### SUB-SECT. 4.—SALE OF HORSES.

*See* Sale of Stolen Horses Acts, 1555 (c. 7), & 1588–1589 (c. 12).

**152. False entry in toll book—Name of seller.]—**A *bond fide* purchase of a horse in market overt, changes the property.

If one takes my horse & sells it in market overt & toll paid for it, but he enters his name falsely

municipality was empowered by statute to "establish, alter, regulate & maintain markets & fairs" & to frame regulations for the proper working of the powers given by the Act:—*it was* regulation that "no market agent or seller shall be permitted to bid for any produce or goods which he is offering for sale" was reasonable & *intra vires*

—**HARTIGAN v. R.**, [1910] E. D. L. 428.—S. AF.

d. —.]—**R. v. GRAVELLE** (1886), 10 O. R. 735.—CAN.

**148 i. Bye-law restricting leaving carts unnecessary time.]—****Re BORTHWICK & CITY OF OTTAWA** (1885), 9 O. R. 114.—CAN.

e. *Bye-law restricting place of purchase of articles to be sold.]—***Re MOLEAN & TOWN OF ST. CATHARINES** (1868), 27 U. C. R. 603.—CAN.

f. *Bye-law passed in anticipation of statute—To be operative before date of operation of statute.]—***R. v. REED** (1886), 11 O. R. 242.—C.



in the toll book, yet the sale is clearly good & the property altered if there was no covin in the vendee: for the misnomer of the party is nothing to him when he buys it *bond fide* & is not conusant of the tortious taking (*per* CUR.).—WIKES v. MOREFOOTS (1588), Cro. Eliz. 86; 78 E. R. 344.

*Annotation*:—*Reid*. Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan (1866), 10 Moo. Ind. App. 540.

153. ———.]—G. brought an action upon the case upon trover & conversion of a gelding, which had been stolen by P. & sold by him unto deft. in open market, by the name of L., the false name being entered in the toll book:—*Held*: by that sale the property was not altered.—GIBBS CASE (1589), 1 Leon. 158; 74 E. R. 146.

154. ——— Fictitious person as reference for seller.]—BARKER v. REDDING (1627), Palm. 485; W. Jo. 163; 81 E. R. 1183.

*Annotations*:—*Reid*. Crane v. London Dock Co. (1864), 5 B. & S. 313; Moran v. Pitt (1873), 42 L. J. Q. B. 47. *Mentd.* R. v. Athos (1723), 8 Mod. Rep. 135; Ryall v. Rowles (1750), 1 Ves. Sen. 348.

155. Compliance with statutory formalities—Necessity for proof.]—Deft.'s mare, which he had turned out in a public park, was found out of the park, & was sold at public auction by the "pinner." After an intermediate sale she was sold in market overt to pltf., & was subsequently taken possession of by deft. There was no proof that the formalities which 31 Eliz. c. 12, requires upon the sale of horses at fairs & markets had been observed:—*Held*: in the absence of such proof, the ct. would not infer that such formalities had been observed, & pltf. could not maintain an action for the mare against deft., the true owner.—MORAN v. PITT (1873), 42 L. J. Q. B. 47; 28 L. T. 554; 21 W. R. 525.

Sale in market overt.]—See Part IX., Sect. 1, sub-sect. 5, *post*.

156. ——— Right of recovery—Warrant issued for arrest of thief.]—A complaint having been made to a magistrate by A. the owner, that his horse had been stolen by B.; an officer although armed with a warrant against B. is not justified

under 31 Eliz. c. 12, s. 4, in taking the horse out of the possession of a *bond fide* purchaser from B.—JOSEPHS v. ADKINS (1817), 2 Stark. 76, N. P. Regulation under bye-law.]—See No. 141, *ante*. Sales of animals generally.]—See ANIMALS, Vol. II., pp. 258 *et seq*.

#### SUB-SECT. 5.—PREVENTION OF DISEASES IN ANIMALS.

Sale in public market.]—See ANIMALS, Vol. II., p. 296, Nos. 663, 664.

Exposure in public place.]—See ANIMALS, Vol. II., p. 302, Nos. 701, 702.

—— Evidence.]—See ANIMALS, Vol. II., p. 303, No. 707.

Holding sale.]—See ANIMALS, Vol. II., p. 299, No. 686.

Seizure of suspected animals by inspector—Liability of local authority for negligence.]—See ANIMALS, Vol. II., p. 301, No. 700.

#### SUB-SECT. 6.—SALE OF UNWHOLESOME FOOD.

See Markets & Fairs Clauses Act, 1847 (c. 14), s. 15.

As offence at common law.]—See CRIMINAL LAW, Vol. XIV., p. 36, Nos. 60–62; Vol. XV., pp. 761, 996, Nos. 8183–8186, 11,146.

As statutory offence.]—See FOOD & DRUGS, Vol. XXV., pp. 108 *et seq*.

157. Custom of the market—Seizure & destruction by clerk of the market.]—A custom for the clerk of the market at Cambridge, to seize & destroy meat brought into the market, which should be unfit for human food, & should be adjudged & declared by him to be so, is a good valid custom, & such custom exists at Cambridge.—CLARK & PARISH v. TITTERTON (1840), 4 J. P. 238.

—— Warranty of soundness.]—See SALE OF GOODS.

## Part VI.—Tolls and Stallages.

### SECT. 1.—TOLLS.

#### SUB-SECT. 1.—NATURE OF TOLLS.

158. Relation to user & ownership of soil.]—NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL, No. 176, *post*.

159. ———.]—Where an open market is divided under the provisions of an Act of Parliament into parts, each of which is appropriated to a special purpose, such as potato stands, fruit market, & flower stands, & by the Act tolls or rents are reserved to the owner of the market from those who use the several divisions of the market, such tolls arise out of a use of the soil & are in the nature of stallage tolls, so as to be ratable for the relief of the poor.—BEDFORD (DUKE) v. ST. PAUL, COVENT GARDEN, OVERSEERS (1881), 51 L. J. M. C. 41; 30 W. R. 411; Ryde, Rat. App. (1871–85) 318; *sub nom.* R. v. BEDFORD (DUKE), BEDFORD

(DUKE) v. ST. PAUL'S, COVENT GARDEN, OVERSEERS, 45 L. T. 616; 46 J. P. 581.

*Annotations*:—*Consd.* Horner v. Stepney Assmt. Com. (1908), 98 L. T. 450. *Reid*. London Corp'n. v. Greenwich Union Assmt. Com. (1883), 48 L. T. 437; Newcastle v. Worksop U. D. C., [1902] 2 Ch. 145. *Mentd.* Sutton Harbour Improvement Co. v. Plymouth Town Grdns. (1890), 63 L. T. 772.

160. Whether stallage included.]—HICKMAN'S CASE (1599), Noy, 37; 2 Roll. Abr. 123; 74 E. R. 1006.

*Annotations*:—*Reid*. Bennington v. Taylor (1700), 2 Lut. 1517; Lockwood v. Wood (1841), 6 Q. B. 31.

161. ———.]—BENNINGTON v. TAYLOR (1700), 2 Lut. 1517; 125 E. R. 835.

*Annotations*:—*Consd.* Northampton Corp'n. v. Ward (1745), 1 Wils. 107; Tyson v. Smith (1839), 9 Ad. & El. 406; Lockwood v. Wood (1841), 6 Q. B. 31; Mercer v. Denne, [1904] 2 Ch. 534.

162. ———.]—COCK v. VIVIAN (1734), 2 Barn.

#### PART VI. SECT. 1, SUB-SECT. 1.

*g. Incorporeal hereditaments.*]—Tolls are incorporeal hereditaments.—FREDERICTON CITY v. MULLIGAN (1863), 5 All. 671.—CAN.

**Sect. 1.—Tolls: Sub-sects. 1 & 2, A. & B. (a) & (b).]**

K. B. 384; Kel. W. 203; 7 Mod. Rep. 203; 94 E. R. 569.

*Annotation*:—**Reid**. *Westover v. Perkins* (1859), 5 Jur. N. S. 1352.

**163.** ———.]—**NORTHAMPTON CORPN. v. WARD**, No. 246, *post*.

**164.** ———.]—**BEDFORD (DUKE) v. ST. PAUL, COVENT GARDEN, OVERSEERS**, No. 159, *ante*.

**165.** ———.]—**In Act of Parliament.**]—**BEDFORD (DUKE) v. EMMETT**, No. 195, *post*.

**166.** ———.]—**In exemption by grant.**]—**LOCKWOOD v. WOOD**, No. 273, *post*.

**167. Whether picage included.**]—**COCK v. VIVIAN** (1734), 2 Barn. K. B. 384; Kel. W. 203; 7 Mod. Rep. 203; 94 E. R. 569.

*Annotation*:—**Reid**. *Westover v. Perkins* (1859), 5 Jur. N. S. 1352.

**168.** ———.]—**BEDFORD (DUKE) v. EMMETT**, No. 195, *post*.

**169. Distinguished from stallage.**]—Tolls, authorised to be taken by an Act of Parliament, in respect of cattle brought into a market for sale, which become due as soon as the cattle are brought into the market place, & before the cattle are put into a pen or tied up, are mere market tolls, & not in the nature of stallage or tolls taken in respect of the use of the soil.—**R. v. CASSWELL** (1872), L. R. 7 Q. B. 328; 26 L. T. 574; 20 W. R. 624; *sub nom.* **CASWELL v. WOLVERHAMPTON OVERSEERS**, 41 L. J. M. C. 108; 36 J. P. 645.

*Annotations*:—**Consd.** *London Corpn. v. Greenwich Union Assmt. Com.* (1883), 48 L. T. 437; *Horner v. Stepney Assmt. Com.* (1908), 98 L. T. 450. **Reid**. *Sutton Harbour Improvement Co. v. Plymouth Grdns.* (1890), 63 L. T. 772; *Newcastle v. Worksop U. D. C.*, [1902] 2 Ch. 145.

**170.** ———.]—**NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL**, No. 176, *post*.

**For liability to rates.**]—See **RATES & RATING**.

**171. Turn-toll.**]—**R. v. MAIDENHEAD CORPN.** (1620), Palm. 76; 81 E. R. 986.

*Annotations*:—**Consd.** *Stamford Corpn. v. Pawlett* (1830), 1 Cr. & J. 57; *Lockwood v. Wood* (1841), 6 Q. B. 31. **Reid**. *Northampton Corpn. v. Ward* (1745), 1 Wils. 107; *Wright v. Bruister* (1832), 2 L. J. K. B. 6; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *Newcastle v. Worksop U. D. C.*, [1902] 2 Ch. 145. **Mentd.** *R. v. Cotton* (1751), Park. 112; *Weymouth Corpn. v. Nugent* (1865), 6 B. & S. 22.

**SUB-SECT. 2.—ORIGIN OF TOLLS.****A. In General.**

**172. Not incident to market or fair.**]—Toll not incident to a market.—**ANON.** (1702), 7 Mod. Rep. 12; 87 E. R. 1063.

**173.** ———.]—Toll is not incident to a fair.—**HOLLOWAY v. SMITH** (1742), 2 Stra. 1171; 93 E. R. 1106.

*Annotations*:—**Consd.** *Stamford Corpn. v. Pawlett* (1830), 1 Cr. & J. 57. **Reid**. *Lowden v. Hierons* (1818), 2 Moore, C. P. 102; *Tyson v. Smith* (1839), 9 Ad. & El. 406. **Mentd.** *Egremont v. Saul* (1837), 6 Ad. & El. 924.

**174.** ———.]—**BEDFORD (DUKE) v. EMMETT**, No. 195, *post*.

**175.** ———.]—**Claimable only by grant.**]—**HICKMAN'S CASE** (1599), Noy, 37; 74 E. R. 1006.

*Annotations*:—**Reid**. *Bennington v. Taylor* (1700), 2 Lut. 1517; *Lockwood v. Wood* (1841), 6 Q. B. 31.

**176.** ———.]—(1) The two franchises of fair & market are separate & distinct, & of equal dignity. There is no question between them of a greater & less estate, such as is essential to merger; & it is therefore possible for the two franchises to co-exist on the same day.

(2) Toll is not incident to a fair or market, but owes its origin to a separate grant, & exists as a subordinate franchise appurtenant to the fair or market, differing in this respect from the Ct. of Piepowder, which is incident to a market.

(3) Although it may be true that an unlicensed change of fair days does not *ipso facto* work a forfeiture of the fair franchise, but only constitutes a ground of forfeiture of which the Crown may, or may not, take advantage, yet an unlicensed change of fair days precludes a lord who is entitled by his subordinate franchise of toll to levy fair toll on the original fair days from levying such toll on the altered days.

(4) A fair toll is payable to the owner of a franchise of fair toll in respect of goods sold in his fair, or brought into his fair for sale, whether he be owner of the soil or not, & has nothing to do with the ownership of the soil. Stallage, on the contrary, is paid in respect of some usage of the soil, & can be exacted only by the owner of the soil.

(5) There is no rule of law against preferential market tolls. So long as the lord of the market toll does not exceed the maximum sum that he is entitled to demand, that is, a reasonable amount, where no sum is specified by his charter, he is entitled to remit the whole or any part of the toll to whomsoever he pleases.—**NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL**, [1902] 2 Ch. 145; 71 L. J. Ch. 487; 86 L. T. 405; 18 T. L. R. 472.

*Annotation*:—**Generally**. **Mentd.** *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

**177.** ———.]—**Or prescription.**]—Toll is not incident to a fair or market, & can only exist by special grant from the King, or by prescription; & if the toll be unreasonable, the grant will be void.

Where one has a fair by grant or prescription, whereto toll has usually been paid, which afterwards is forfeited to the King, & the King then grants, & *cum omnibus libertatibus ad hujusmodi feriam spectantibus*; by this grant the grantee shall have toll, for toll was formerly belonging thereto (**POPHAM, J.**).

The King cannot appoint a burdensome toll; but it ought to be a petty sum, as a penny or two pence, which are the smallest coins; or of lesser, but not of any greater value to charge the subject (**POPHAM, J.**).—**HEDDEY v. WELHOUSE** (1598), Moore, K. B. 474; Cro. Eliz. 558, 591; 78 E. R. 803, 834.

*Annotations*:—**Consd.** *R. v. Bell* (1816), 5 M. & S. 221; *Stamford Corpn. v. Pawlett* (1830), 1 Cr. & J. 57; *Wright v. Bruister* (1832), 4 B. & Ad. 116; *Northumberland v. Houghton* (1870), L. R. 5 Exch. 127; *Newcastle v. Worksop U. D. C.*, [1902] 2 Ch. 145. **Reid**. *Leight v. Pym* (1686), 2 Lut. 1329; *Northampton Corpn. v. Ward* (1745), 2 Stra. 1238; *Hill v. Smith* (1812), 4 Taunt. 520; *Lowden v. Hierons* (1818), 2 Moore, C. P. 102; *Evans v. Griffiths* (1832), 9 Bing. 311; *Egremont v. Saul* (1837), 6 Ad. & El. 924; *Lockwood v. Wood* (1841), 6 Q. B. 31; *Draper v. Sperring* (1861), 10 C. B. N. S. 113; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *Penryn Corpn. v. Best* (1878), 3 Ex. D. 292; *Saltash Corpn. v. Goodman* (1881), 29 W. R. 639. **Mentd.** *Young v. Thank* (1846), 6 L. T. O. S. 146; *Colchester Corpn. v. Brooke* (1846), 7 Q. B. 339; *Great Yarmouth Corpn. v. Groom*, *Great Yarmouth Corpn. v. Daniel* (1862), 32 L. J. Ex. 74.

**178.** ———.]—**NORTHAMPTON CORPN. v. WARD**, No. 246, *post*.

**179. Turn-toll—Claimable by prescription.**]—**GOODWIN v. BROOKS** (1682), T. Jo. 227; 84 E. R. 1230.

*Annotation*:—**Mentd.** *Austin v. Whittred* (1747), Willes, 623.

**PART VI. SECT. 1, SUB-SECT. 2.—A.**

**1721. Not incident to market or fair.**]—In the absence of express authority

to do so, the city council of the city of Fredericton has no power to impose tolls on the sale of articles in the market house, the market, by the grant,

being a free market.—**EDWARDS v. BURGONE** (1881), 21 N. B. R. 228.—**CAN.**



**180. Presumption of origin within legal memory—By dedication & reservation.]—LAWRENCE v. HITCH, No. 194, *post*.**

*B. By Grant.*

*(a) In General.*

**181. Whether amount of toll must be expressed.]—R. v. MAIDENHEAD CORPN. (1620), Palm. 76; 81 E. R. 986.**

*Annotations:—*Consd. Stamford Corpn. v. Pawlett (1830), 1 Cr. & J. 57. *Refd.* Northampton Corpn. v. Ward (1745), 1 Wils. 107; Wright v. Brulster (1832), 2 L. J. K. B. 6; Lockwood v. Wood (1841), 6 Q. B. 31; Weymouth Corpn. v. Nugent (1865), 6 B. & S. 22; Lawrence v. Hitch (1868), L. R. 3 Q. B. 521. *Mentd.* R. v. Cotton (1751), Park. 112; Newcastle v. Worksop U. D. C., [1902] 2 Ch. 145.

**182. — Grant of accustomed tolls.]—Qu.: if tolls can be claimed under a modern grant of a liberty to hold a market, etc., & to receive the accustomed dues & tolls, etc.; but to which grant no specific tolls are annexed.—LOWDEN v. HIERONS (1817), Holt, N. P. 647, N. P.; *subsequent proceedings* (1818), 2 Moore, C. P. 102.**

*Annotation:—*Consd. Stamford Corpn. v. Pawlett (1830), 1 Cr. & J. 57.

**183. —.]—HOLCROFT v. HEEL, No. 29, *ante*.**

*See, also, No. 192, post.*

**184. Where amount of toll expressed—Must be reasonable.]—HEDDEY v. WELHOUSE, No. 177, *ante*.**

*See, further, Sect. 1, sub-sect. 4, post.*

**185. —.]—If the lessee of tolls under a corpn. vary, by temporary agreement, the amount of toll claimed of individuals, it shall not affect the right to the tolls if it appears to have been a variation, not for the purpose of claiming more at one time than another, but for the convenience of both parties.**

With respect to the market toll, supposing there was no market before the charter of George III. then the toll will be a good one, although the word, confirm, is used in the charter, because it might be introduced only in case it should be requisite. It is said that the King cannot grant a new toll in an old market. But in this case you must be satisfied that there was a market of which the public was in the full enjoyment, without paying any toll, before this matter can come into question; but there does not seem any evidence of that. If there was an old market, at which the toll was received, there is an end of the question that way; & if there was not, then the charter of Geo. 3 grants a new one, which is good for a reasonable toll, according to those paid in other places in the county (TINDAL, C.J.).—LANCUM v. LOVELL (1832), 6 C. & P. 437, N. P.; *subsequent proceedings* (1833), 9 Bing. 465.

**186. Grant of new toll in old market—Whether valid—Market formerly toll free—Proportionate benefit to public necessary.]—NORTHAMPTON CASE (1598), 2 Co. Inst. 220.**

*Annotations:—*Refd. Northampton Corpn. v. Ward (1745), 2 Stra. 1238; Hill v. Smith (1812), 4 Taunt. 520; Evans v. Griffith (1832), 9 Bing. 311; Lockwood v. Wood (1841), 5 J. P. 543; Newcastle v. Worksop U. D. C., [1902] 2 Ch. 145.

**187. —.]—LANCUM v. LOVELL, No. 185, *ante*.**

**188. — Market formerly subject to toll.]—LANCUM v. LOVELL, No. 185, *ante*.**

*(b) Construction of Grant.*

**189. Effect of general words—Grant of market formerly subject to toll.]—HEDDEY v. WELHOUSE, No. 177, *ante*.**

**190. — Grant of new fair—In addition to customary fair subject to toll.]—HOLLOWAY v. SMITH (1742), 2 Stra. 1171; 93 E. R. 1106.**

*Annotations:—*Consd. Stamford Corpn. v. Pawlett (1830), 1 Cr. & J. 57. *Fold.* Egremont v. Saul (1837), 6 Ad. & El. 924. *Refd.* Lowden v. Hierons (1818), 2 Moore, C. P. 102; Tyson v. Smith (1838), 9 Ad. & El. 406.

**191. — Grant of new market.]—The grant of a fair *cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi feriam pertinentibus* does not give a right to take tolls. In an action for tolls at a fair, pltf. gave evidence of immemorial usage. Deft., in answer, produced a grant of the fair by Henry III., with the above words. The judge told the jury that *consuetudines* generally meant tolls, but that, if the context raised a doubt, the expression might be interpreted by usage. It was also a question at the trial whether the charter was the original grant, or only a confirmation, of which some probability appeared. A verdict being given for pltf., this ct. granted a new trial, on the ground that the jury, if they believed the charter to be the original grant, would have been misled as to its effect by the above direction.—EGREMONT (EARL) v. SAUL (1837), 6 Ad. & El. 924; 6 L. J. K. B. 205; 112 E. R. 353.**

*Annotations:—*Refd. Penryn Corpn. v. Best (1878), 3 Ex. D. 292; Newcastle v. Worksop U. C., [1902] 2 Ch. 145.

**192. Where amount of toll not specified—Reasonable toll implied.]—The grant of a fair or market *cum omnibus tolnetis, et aliis profimis predictis feriis sive nundinis pertinentibus et spectantibus* possess a reasonable toll to the grantee though the amount of toll be not specified.—PAWLETT v. STAMFORD CORPN. (1831), 1 Cr. & J. 400; 148 E. R. 1478; *sub nom.* STAMFORD CORPN. v. PAULETT, 1 Tyr. 291, Ex. Ch.**

*Annotations:—*Refd. Wright v. Bruister (1832), 2 L. J. K. B. 6; Brecon Markets Co. v. Neath & Brecon Ry. (1872), L. R. 7 C. P. 555; Newcastle v. Worksop U. C. [1902] 2 Ch. 145; A.-G. v. Horner (1912), 107 L. T. 547.

**193. —.]—NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL, No. 176, *ante*.**

*See, also, Nos. 181–183, ante.*

**194. Grant of market with toll within legal memory—Presumption of existence of toll from time immemorial.]—In 1220, the manor of Cheltenham, with a market & fair, was granted by Henry III. to the inhabitants for four years. Charles I. granted the manor in fee to persons through whom pltf. claimed, with all & singular the tolls due by reason of markets, etc., within the lordship. From time immemorial until 1786, there was a market house in the High Street of Cheltenham belonging to the lord of the manor, & 1d. per basket for butter sold there & 1d. per pot for butcher's meat hawked about the town was paid, & from 1s. 6d. to 2s. 6d. per day was paid to the occupiers of houses for stalls erected before the houses, & 1d. to the lord. From 1786 down to the present time, different local Acts have been passed under which a new market house has been erected; but in all the Acts the rights of the lords of the manor were strictly preserved. As long as living witnesses can remember, a board has been fixed in the market with the market tolls, & the tolls payable by all persons hawking about the town fish, fruit, vegetables, or other articles for which no toll has been taken in the market (*inter alia*), 1s. for every waggon, cart, horse, or ass load. These tolls were proved to have been collected regularly, as of right, since 1810 till 1863, when deft. refused to pay pltf., the present lessee of the tolls, the toll of 1s. for a cartload of vegetables & fruit brought into & hawked about the town. On a case in which the ct. were to draw inferences**

**Sect. 1.—Tolls: Sub-sect. 2, B. (b), & C.; sub-sect. 3, A., B., C., D. & E. (a) & (b).]**

of fact:—*Held*: (1) on the facts it ought to be presumed that the toll of 1s. had been taken from time immemorial, & if the doctrine of rankness applied, the other facts went to show that 1s. for a cartload of vegetables was not unreasonable in the time of Richard I.; (2) a lawful origin of the toll might be presumed within legal memory, by means of a dedication of the streets to the public & a contemporaneous reservation of this toll on the part of the Crown, between the time of Henry III. & Charles I.; (3) the claim might be sustained as a reasonable toll, which might vary in amount with the value of money.

A toll reasonable in amount, but varying from time to time according to the value of money, is valid in point of law (*KELLY, C.B.*).—*LAWRENCE v. HITCH* (1868), L. R. 3 Q. B. 521; 9 B. & S. 467; 37 L. J. Q. B. 209; 18 L. T. 483; 32 J. P. 451; 16 W. R. 813, Ex. Ch.; *reversé*. (1867), L. R. 2 Q. B. 184, n.

*Annotations*:—As to (1) *Consd.* *Bryant v. Foot* (1868), L. R. 3 Q. B. 497. *Refd.* *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. As to (3) *Dbtd.* *Mills v. Colchester Corp.* (1867), L. R. 2 C. P. 476. *Refd.* *A.-G. v. Simpson*, [1901] 2 Ch. 671.

**C. By Statute.**

**195. Grant of customary tolls.]**—An Act of Parliament, the preamble of which recited the grant of a market, & that it was expedient that provision should be made for the better regulating of the market, & for the more easy collection of the tolls & dues payable in the market, enacted, that it should be lawful for the owner of the market to take from all persons who should place, pitch, or expose for sale, within any part of the market, any fruits, etc., all such tolls as are usually collected or taken within the said market, or which are payable for or in respect of the same:—*Held*: the owner of the market, although not entitled at common law to any toll, might, under this clause of the Act, recover such tolls as, at the time of passing of this Act, were usually paid in any part of the said market; & although the tolls then usually paid in respect of the same articles were different in different parts of the market.

A mere market toll is payable by the buyer only, but in addition to this, other tolls are payable by the seller to the owner of the soil. Of this last are stallage & piccage, which are very distinguishable from a common market toll. . . . The Act not only transfers the toll [to] the seller [from] the buyer, but also imposes it on the seller, where there is no buyer. It goes further, therefore, than a mere market toll, & seems to me, to include the case of a stallage & piccage toll (*BAYLEY, J.*).—*BEDFORD (DUKE) v. EMMETT* (1820), 3 B. & Ald. 366; 106 E. R. 696.

*Annotations*:—*Consd.* *Manchester Corp. v. Peverley* (1876), 22 Ch. D. 294, n. *Appl.* *Newcastle v. Workson U. C.*, [1902] 2 Ch. 145. *Refd.* *Bedford v. St. Paul, Covent Garden, Overseers* (1881), 51 L. J. M. C. 41; *London Corp. v. Greenwich Union Assmt. Com.* (1883), 48 L. T. 437; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

**Statutory markets.]—See Markets & Fairs Clauses Act, 1847 (c. 14), ss. 31–41.**

**SUB-SECT. 3.—PAYMENT AND**

**A. On What Goods Payable.**

**196. General rule—Payable on live cattle only.]**

—(1) Toll is not incident to a fair at common law & nobody can have toll in a fair without grant or prescription.

(2) The Crown can grant toll with a new fair if the toll is reasonable & not excessive.

(3) Toll is payable by common law only for live cattle, not for food or other goods; for for these the lord is satisfied in the stallage & piccage.

(4) Stallage & piccage are incident to the soil.

(5) If the Crown grants a fair or market with certain toll to A. & his heirs to be held on land which is Borough English & the grantee dies, the heir at common law will have the fair or market & toll, but the younger son will have piccage & stallage with the soil by custom.

(6) Fairs, markets, tolls & freewarrens are not extinguished by the soil coming into the hands of the Crown with the liberties.—*HEDDEY v. WELHOUSE* (1598), as reported in Moore, K. B. 474; 72 E. R. 705.

*Annotations*:—As to (1) *Consd.* *Stamford Corp. v. Pawlett* (1830), 1 Cr. & J. 57; *Lockwood v. Wood* (1841), 6 Q. B. 31. *Refd.* *Egremont v. Saul* (1837), 6 Ad. & El. 92; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *Penryn Corp. v. Best* (1878), 3 Ex. D. 292. As to (2) *Consd.* *Wright v. Brulster* (1832), 4 B. & Ad. 116. *Refd.* *Lowden v. Hierons* (1818), 2 Moore, C. P. 102. As to (3) *Refd.* *Leight v. Pym* (1686), 2 Lut. 1329; *Hill v. Smith* (1812), 4 Taunt. 520. As to (4) *Refd.* *Great Yarmouth Corp. v. Groom, Great Yarmouth Corp. v. Daniel* (1862), 32 L. J. Ex. 74. As to (5) *Refd.* *Northampton Corp. v. Ward* (1745), 2 Stra. 1238; *R. v. Bell* (1816), 5 M. & S. 221; *Draper v. Sperring* (1861), 10 C. B. N. S. 113. As to (6) *Consd.* *Newcastle v. Workshop U. C.*, [1902] 2 Ch. 145. *Refd.* *Colchester Corp. v. Brooke* (1846), 7 Q. B. 339; *Northumberland v. Houghton* (1870), L. R. 5 Exch. 127; *Saltash Corp. v. Goodman* (1880), 5 C. P. D. 431. *Generally, Mentd.* *Evans v. Griffiths* (1832), 9 Bing. 311; *Young v. Thank* (1845), 6 L. T. O. S. 146.

**197. Whether claimable if goods not sold—General rule.]**—By law no toll is due, except for things sold, unless by special custom, which cannot exist where a corp. is set up within legal memory (*per CUR.*)

If goods be sold toll is payable by the purchaser & not by the seller (*per CUR.*).—*LEIGHT v. PYM* (1686), 2 Lut. 1329; 125 E. R. 735.

**198. — Claim by prescription.]**—*HICKMAN'S CASE* (1599), Noy, 37; 2 Roll. Abr. 123; 74 E. R. 1006.

*Annotations*:—*Consd.* *Bennington v. Taylor* (1700), 2 Lut. 1517. *Refd.* *Lockwood v. Wood* (1841), 6 Q. B. 31.

**199. — —.]**—*GOODWIN v. BROOKS* (1682), T. Jo. 227; 84 E. R. 1230.

*Annotation*:—*Refd.* *Austin v. Whettred* (1746), Willes, 623.

**200. — Claim by custom.]**—*HILL v. HAWKUR* (1614), Moore, K. B. 836; 72 E. R. 937.

**201. — —.]**—*LEIGHT v. PYM*, No. 197, *ante*.

**202. — Effect of local Act.]**—*BEDFORD (DUKE) v. EMMETT*, No. 195, *ante*.

**203. Whether claimable on goods not brought into the market.]**—*KERBY v. WHICHELOW* (1700), 2 Lut. 1498; 125 E. R. 825.

*Annotations*:—*Consd.* *Hill v. Smith* (1812), 4 Taunt. 520. *Appl.* *Wells v. Miles* (1821), 4 B. & Ald. 559.

**204. — Sale by sample.]**—An action on the case by the owners of a market, who had a

**PART VI. SECT. 1, SUB-SECT. 3.—A.**

**203 i. Whether claimable on goods not brought into the market.]**—The Municipal Council of Sydney have no power under Sydney Corporation Act, 1879, s. 139, to charge market fees on sheep or cattle brought by their owner to his own private yard in Sydney or within 14 miles thereof, & slaughtered **MUNICIPAL COUNCIL**

**v. AUSTRAL FREEZING WORKS, LTD.** (1905), 21 T. L. R. 295.—**AUS.**

**203 ii. —.]**—*R. v. MANCHESTER* (1908), 38 N. B. R. 424; 4 E. L. R. 638.—**CAN.**

**203 iii. —.]**—*Deft.* was a supplier of milk daily to certain customers in the City of L. The milk was dispatched from outside the city by *deft.*,

in his own carts & by his own servants, & it was sold within the city boundary to his customers. It was not sold in the market, & in respect of its sale *plffs.* did not render any services to *defts.*:—*Held*: *plffs.* were not entitled to charge the increased rate of toll under 8 & 9 Geo. 5, c. xxi., s. 239.—**LONDONDERBY CORPN. v. OSBORNE**, [1926] N. 58.—**EN.**



prescriptive right of toll on all corn brought into the market to be sold, & there sold, alleging that deft., intending to deprive them of their toll, fraudulently bought corn in the market by sample, knowing that the commodity was not there in bulk at the time of the sale, whereby plffs. were prevented from taking their toll, is not sustained by evidence of the mere fact of such purchase by sample in the market, though with knowledge of plffs.' claim of toll, coupled with the fact of not paying the toll on demand afterwards when the corn was delivered to deft. in the same borough, but out of the market: for *non constat* that the corn would otherwise have been brought into the market, or that deft. did any act to induce the owner of it not to bring it there in the first instance. Neither will the fact of such purchase by sample in the market, though coupled with the subsequent delivery out of the market, sustain a count for toll as for corn brought into the market & there sold.—**TEWKESBURY CORPN. v. DISTON** (1805), 6 East, 438; 2 Smith, K. B. 508; 102 E. R. 1355.

*Annotations*:—**Reid**. Moseley v. Walker (1827), 5 L. J. O. S. K. B. 358; Crane v. London Dock Co. (1864), 5 B. & S. 313. **Mentd.** Norfolk v. Myers (1819), 4 Madd. 83.

205. ———.] — **TEWKESBURY CORPN. v. BRICKNELL**, No. 297, *post*.

206. ———.] — A prescription for toll in respect of goods sold by sample in a market, & afterwards brought into the city to be delivered, cannot be supported. *Qu.*: whether toll of goods sold in a market can be due from the seller.—**HILL v. SMITH** (1812), 4 Taunt. 520; 128 E. R. 432, Ex. Ch.

*Annotations*:—**Apld.** Wells v. Miles (1821), 4 B. & Ald. 559. **Reid**. Brett v. Beales (1830), 10 B. & C. 508; Crane v. London Dock Co. (1864), 5 B. & S. 313; Hargreave v. Spink, [1892] 1 Q. B. 25; A.-G. v. Horner (1912), 107 L. T. 547.

207. ———.] — Where therefore in an action of debt for tolls of corn brought into a market plffs., a corporate body, proved that deft. sold forty-one quarters of wheat in the market place on a market day, by two sacks pitched in the market:—**Held**: not sufficient evidence to entitle plffs. to a verdict in their favour, as it did not appear that the bulk of the wheat was ever brought into or sold in the market.—**VINES v. READING CORPN.** (1826), 4 Bing. 8; 1 Y. & J. 4; 12 Moore, C. P. 201; 130 E. R. 670, Ex. Ch.

*Annotation*:—**Mentd.** Smyth v. Latham (1833), 1 Cr. & M. 547.

208. ———.] — **BRECON CORPN. v. EDWARDS**, No. 305, *post*.

209. ———.] — **Part of goods sold in market.**—A prescription for toll of corn brought into a town to be sold on a market day there, whereof any part is pitched within the market for sale, & which shall be there sold, is bad, inasmuch as there cannot be any toll in respect of goods not actually brought into the market.—**WELLS v. MILES** (1821), 4 B. & Ald. 559; 106 E. R. 1041.

210. ———.] — **Proof of claim.**—A claim of toll to be taken in specie for goods sold in a market is supported by evidence of a right to toll for goods brought into the market & there sold; without showing any right to toll for goods sold in the market without being brought there.—**MOSELEY v. PIERSON** (1790), 4 Term Rep. 104; 100 E. R. 918.

*Annotations*:—**Consd.** Tewkesbury Bailiffs v. Bricknell (1809), 2 Taunt. 120. **Reid**. Hill v. Smith (1812), 4 Taunt. 520; Wells v. Miles (1821), 4 B. & Ald. 559; Manchester Corpn. v. Lyons (1882), 47 L. T. 677.

#### B. By Whom Payable.

211. Whether by buyer or seller—General rule.] **v. PYM**, No. 197, *ante*.

212. ———.] — **HILL v. SMITH**, No. 206, *ante*.

213. ———.] — **A.-G. v. HORNER** (No. 2), No. 103, *ante*.

214. ———.] — **Under private Act.**—**BEDFORD (DUKE) v. EMMETT**, No. 195, *ante*.

**Sales—Shopkeepers.**—See Part VII., Sect. 1, sub-sect. 3, E., Sect. 2, sub-sect. 5, A., *post*.

#### C. Mode of Payment.

215. Whether payable in kind.] — **HICKMAN'S CASE** (1599), Noy, 37; 2 Roll. Abr. 123; 74 E. R. 1006.

*Annotations*:—**Reid**. Bennington v. Taylor (1700), 2 Lut. 1517; Lockwood v. Wood (1841), 6 Q. B. 31.

216. ———.] — **HILL v. HAWKUR** (1614), Moore, K. B. 836; 72 E. R. 937.

217. ———.] — **MOSELEY v. PIERSON**, No. 210, *ante*.

#### D. Amount.

218. Where amount not specified in grant — Reasonable amount presumed.] — **PAWLETT v. STAMFORD CORPN.**, No. 192, *ante*.

219. ———.] — **NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL**, No. 176, *ante*.

220. Where amount specified.] — No charge can be imposed in excess of the sums mentioned in the schedule for any use of the market to which the public are entitled under the Act. Nor can the co. by any bye-law throw upon the public who use the market any burden which by law ought to be borne by the co. itself. On the other hand, so long as the public using the market are not prejudiced, there is nothing to prevent the co. from agreeing to give special accommodation or facilities to those who desire to have them upon such terms as to payment as they may be willing to comply with (**LINDLEY, L.J.**).—**A.-G. OF DUCHY OF LANCASTER v. LIVERPOOL NEW CATTLE MARKET CO.** (1896), 12 T. L. R. 261, C. A.

221. Whether amount must be uniform — For different parts of market.] — **BEDFORD (DUKE) v. EMMETT**, No. 195, *ante*.

*Compare* No. 220, *ante*.

222. ———.] — **Right to vary from time to time — For convenience for parties—Not by way of additional burden.**—**LANCUM v. LOVELL**, No. 185, *ante*.

223. ———.] — **With value of money.**—**LAWRENCE v. HITCH**, No. 194, *ante*.

224. ———.] — **NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL**, No. 176, *ante*.

225. ———.] — **Right of owner to remit part.**—**NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL**, No. 176, *ante*.

226. Right to additional payment — For special accommodation or facilities.] — **A.-G. OF DUCHY OF LANCASTER v. LIVERPOOL NEW CATTLE MARKET CO.**, No. 220, *ante*.

*Compare* No. 195, *ante*.

**Whether toll reasonable.**—See Sect. 1, sub-sect. 4, *post*.

#### E. Recovery.

##### (a) By Distress.

See, generally, **DISTRESS**, Vol. XVIII., pp. 426, 427, Nos. 1641–1647.

##### (b) By Action.

227. General rule.] — **An indebitatus assumpsit** lies for tolls.—**COCK v. VIVIAN** (1734), 7 Mod. Rep. 203; 2 Barn. K. B. 384; Kel. W. 203; 87 E. R. 1191.

*Annotation*:—**Mentd.** Westover v. Perkins (1859), 5 Jur. N. S. 1352.

**1543.** ———.]—*Mandamus* issued to receive an appeal against overseer's account, though the allowance had not been previously made at a special sessions, under 50 Geo. 3, c. 49, s. 1.

We are quite satisfied that the sessions had jurisdiction, & that they ought to have heard the appeal. This rule must be absolute (*per* CUR.).—*R. v. COLCHESTER JJ.* (1822), 5 B. & Ald. 535; 1 Dow. & Ry. K. B. 146; 1 Dow. & Ry. M. C. 51; 106 E. R. 1286.

**1544.** ———.]—*R. v. LANCASHIRE JJ.*, No. 1556, *post*.

**1545.** ———.]—By general consent of the members of a friendly society, certain alterations were from time to time made in the original rules of the society, which had been regularly enrolled under 33 Geo. 3, c. 54. The alterations affected the rates of contribution & relief amongst the members, & had been acted upon; but they were made without the formalities required by the Act, & had never been enrolled. A member of the society who had received relief in accordance with the alterations made in the rules, but was afterwards refused same, summoned the stewards of the society before defts., & sought to compel payment of the allowance prescribed by the original enrolled rules, abandoning all claim under the subsequent alterations. Defts., however, decided that the alteration in the rules took away their jurisdiction & refused to hear the complaint:—*Held*: they were bound to hear & determine the matter of the complaint.—*R. v. COTTON* (1850), 15 Q. B. 569; 4 New Mag. Cas. 108; 4 New Sess. Cas. 291; 19 L. J. M. C. 233; 15 L. T. O. S. 276; 14 J. P. 543; 14 Jur. 788; 117 E. R. 575.

**1546.** ———.]—Where the recorder of a borough refused to hear an appeal, upon the ground merely that as the original order of removal was not filed (a copy had been filed), the ct. had no power to enter upon the appeal; the ct. granted a *mandamus* to him to enter continuances & hear the appeal.—*R. v. MANCHESTER RECORDER* (1851), 17 L. T. O. S. 170; 16 J. P. 73; 15 Jur. 729.

**1547.** ——— Sessions in fact having jurisdiction.]—On appeal against a county rate, the sessions dismissed the appeal, subject to a case. The *certiorari* directed the justices to send up the order of sessions with all things touching same. Under this the rate itself was not removed. The Q. B. quashed the order. On application at the next sessions, the magistrates refused to quash the rate, on the ground that they had no power, as the case was no longer before them. The Ct. of Q. B. refused a *mandamus* to enter continuances to quash the rate, on the ground that the ct. could not dictate to the sessions in a matter judicial.—*R. v. MIDDLESEX JJ.* (1839), 9 Ad. & El. 540; 1 Per. & Dav. 402; 2 Will. Woll. & H. 100; 8 L. J. M. C. 85; 3 J. P. 704; 112 E. R. 1316.

**1548. Mistake of law.**—(1) 9 Geo. 4, c. 61, s. 34, enacts "that no conviction under this Act, nor any adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by writ of *certiorari* or otherwise, into any of His Majesty's superior cts. of record." On an application for a *mandamus*:—*Held*: this provision does not prevent the ct. from hearing by affidavits the proceedings that took place on an appeal to the sessions, & granting a *mandamus* to compel an adjudication by the sessions, if the affidavits show that the justices have improperly refused to hear the appeal.

(2) A recognisance is not vitiated by the fact that an Act of Parliament is therein referred to by letters & figures, instead of by words at length, & not abbreviated.—*R. v. SUFFOLK JJ.* (1843), 1 L. T. O. S. 144; 7 J. P. 590.

**1549.** ——— As to necessity for statement of grounds of appeal.]—On an appeal against an order of two justices under Poor Law Amendment Act, 1844 (c. 101), against the putative father of an illegitimate child, the sessions refused to hear the appeal, because no grounds of appeal, as required by Poor Law Amendment Act, 1834 (c. 76), & 2 & 3 Vict. c. 85, had been sent to resp. *Semble*: no grounds of appeal are required by the statutes in such a case. On an application for a *mandamus* to the sessions to hear such appeal, a copy of the rule *nisi* should be served on resp. as well as the justices; but where this had not been done, the judge allowed the rule to be made absolute.—*R. v. DERBYSHIRE JJ.* (1844), 1 New Sess. Cas. 461; 4 L. T. O. S. 120, 161; 9 Jur. 181; 8 J. P. Jo. 773.

**1550. Act amounting to refusal of jurisdiction—Refusal to allow respondent's costs—On abandonment of appeal.**—An appeal against an order of settlement was brought before sessions. The hearing of the appeal was adjourned from time to time, till ultimately applt. declined to proceed, & gave notice of countermand. The justices then, acting upon a rule of their sessions, refused to allow resp. his costs:—*Held*: a *mandamus* would lie to compel them, as such a refusal, under the circumstances, amounted to a declining of jurisdiction.—*R. v. MONTGOMERYSHIRE JJ.* (1868), 19 L. T. 397; 33 J. P. 6.

#### D. To Hear and Rehear Appeals.

See CROWN PRACTICE, Vol. XVI., p. 312, No. 1231.

**1551. Where justices have superseded own order.**—*R. v. NORFOLK JJ.*, No. 682, *ante*.

**1552. Where justices have stated case.**—*R. v. WEST RIDING JJ.*, No. 1565, *post*.

**1553.** ———.]—Where on an appeal against a removal, the sessions quashed the order, but granted a case, the ct. will not grant a *mandamus* to compel them to hear the appeal.—*R. v. SUFFOLK JJ.* (1837), 6 Ad. & El. 109; 1 Nev. & P. K. B. 306; Nev. & P. M. C. 104; Will. Woll. & Dav. 6; 6 L. J. M. C. 37; 1 J. P. 5, 136; 112 E. R. 42.

**1554. Appeal dismissed without hearing—Absence of appellant's attorney—Refusal to re-open except on terms.**—Where an order of two justices is affirmed on appeal by the quarter sessions, without hearing, owing to the absence of applt.'s attorney, & the sessions refuse to re-open the appeal, except on terms of payment of full costs, this ct. will not interfere by *mandamus*.—*R. v. LANCASHIRE JJ.* (1838), 2 Jur. 468.

**1555. Appeal abandoned before entry.**—*R. v. BOLTON RECORDER*, No. 1113, *ante*.

**1556. Refusal to hear appeal—Erroneous supposition as to powers.**—An appeal against an order of removal was entered & respited at the Michaelmas Sessions, 1846. At the next Jan. sessions, no notice or grounds of appeal having been given, applts. applied for a further respite of the appeal on affidavits stating facts which showed that they had been unable to give notice of appeal in time for those sessions. Resps. objected to this on the ground that no notice or

#### PART XIV. SECT. 4, SUB-SECT. 1.—D.

• *Bench equally divided.*]—In discretionary applications to quarter

sessions, where there is an equal division of opinion among the justices & they decline to make the order sought, & refuse to adjourn & rehear the matter,

the K. B. Div. will not compel them by *mandamus* to do so.—*R. (MULCAHY) v. TIPPERARY JJ.*, [1903] 2 I. R. 108.—IR.



*Sect. 1.—Tolls: Sub-sect. 3, E. (b); Sub-sects. 4, 5 & 6. Sect. 2: Sub-sects. 1, 2 & 3, A., B., C. & D.; sub-sect. 4.]*

**228.** ———.] — A general *indebitatus assumpsit* will lie for tolls.—*SEWARD v. BAKER* (1787), 1 Term Rep. 616; 99 E. R. 1283.

*Annotations:—Refd. Cork & Bandon Ry. v. Goode* (1853), 13 C. B. 826. *Mentd. Westover v. Perkins* (1859), 5 Jur. N. S. 1352.

**229. Pleading—Form of declaration.]—**Declaration in *assumpsit*, charging that deft. was indebted to pltf. in 500 quarts of wheat for tolls, without stating any value, is bad upon special demurrer.—*READING CORPN. v. CLARKE* (1821), 4 B. & Ald. 268; 106 E. R. 936.

**Right of action for evasion of toll.]—**See No. 302, *post*.

**Recovery from lessee.]—**See No. 75, *ante*.

**Recovery of excessive toll.]—**See No. 268, *post*.

#### SUB-SECT. 4.—UNREASONABLE OR EXCESSIVE TOLL.

**230. Grant of unreasonable toll void.]—**HEDDEY *v. WELHOUSE*, No. 177, *ante*.

**231. Whether toll unreasonable — Question for judge.]—**The judge can alone decide whether tolls are or are not reasonable (DALLAS, J.).—*LOWDEN v. HIERONS* (1818), 2 Moore, C. P. 102.

*Annotation:—Refd. Stamford Corpn. v. Pawlett* (1830), 1 Cr. & J. 57.

**232. ——— Toll paid for many years—Presumption that reasonable.]—**The jury having found that the sum of 1d. a pig had been usually taken as a toll in the market of Bishop's Stortford, the ct. held such a toll not to be unreasonable.

The jury having found that this toll had been usually taken, it is the duty of the ct. to support it, unless it be unreasonable; & the *onus* of showing it to be unreasonable is on deft. (PARKE, J.).

The jury having found that the toll has been paid for such a considerable period by persons frequenting the market, I think that it is too much for us to say that, in point of law, it is unreasonable (PATTESON, J.).—*WRIGHT v. BRUISTER* (1832), 4 B. & Ad. 116; 2 L. J. K. B. 6; 110 E. R. 399.

*Annotation:—Apld. Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521.

**233. ——— Onus of proof.]—***WRIGHT v. BRUISTER*, No. 232, *ante*.

**234. ——— Toll varying from time to time—With value of money.]—***LAWRENCE v. HITCH*, No. 194, *ante*.

**235. ——— One penny per beast.]—**HEDDEY *v. WELHOUSE*, No. 177, *ante*.

**236. ——— One penny per pig.]—***WRIGHT v. BRUISTER*, No. 232, *ante*.

**237. ——— One shilling per cartload of vegetables.]—***LAWRENCE v. HITCH*, No. 194, *ante*.

**238. Remedy of party injured by excessive toll—Trover for excess.]—***NORMAN v. BELL*, No. 268, *post*.

*See, further, Sect. 1, sub-sect. 3, D., ante.*

#### SUB-SECT. 5.—EVASION OF TOLL.

**As disturbance of market.]—**See Part VII., Sect. 1, sub-sect. 1, *post*.

**239. Penalties for—By whom recoverable — Construction of local Act.]—***R. v. HICKS*, No. 412, *post*.

#### SUB-SECT. 6.—LIABILITY FOR RATES AND TAXES.

**Liability for income tax.]—**See INCOME TAX, Vol. XXVIII., pp. 8, 9, No. 34.

**Calculation of profits — Set-off.]—**See INCOME TAX, Vol. XXVIII., p. 55, No. 280.

**Whether included in assessment for poor rate.]—**See RATES & RATING.

#### SECT. 2.—STALLAGE AND PICCAGE.

##### SUB-SECT. 1.—DEFINITIONS AND NATURE.

**240. Stallage.]—***NORTHAMPTON CORPN. v. WARD*, No. 246, *post*.

**241. ———.]—***YARMOUTH CORPN. v. GROOM*, No. 257, *post*.

**242. Piccage.]—***NORTHAMPTON CORPN. v. WARD*, No. 246, *post*.

**243. ———.]—***YARMOUTH CORPN. v. GROOM*, No. 257, *post*.

**244. Incident to the soil.]—***HEDDEY v. WELHOUSE*, No. 196, *ante*.

**245. ———.]—***HICKMAN'S CASE* (1599), Noy, 37; 2 Roll. Abr. 123; 74 E. R. 1006.

*Annotations:—Refd. Bennington v. Taylor* (1700), 2 Lut. 1517; *Lockwood v. Wood* (1841), 6 Q. B. 31.

**246. ———.]—**Erecting a stall in a market is not of common right, & trespass is the proper remedy for so doing.

Every person . . . has not of common right a liberty of placing a stall (in a public market) but he must acquire that by a compensation which is called stallage; & if in the erecting one the soil is broken, it is called piccage. . . . It is not properly a toll, which can only be due by grant or prescription; whereas stallage is demandable in the case of a newly erected market: & the soil is no further considered as dedicated to the public, than the common right of entry goes (LEE, C.J.).—*NORTHAMPTON CORPN. v. WARD* (1745), 2 Stra. 1238; 1 Wils. 107; 93 E. R. 1155.

*Annotations:—Consd. London Corpn. v. Greenwich Union Assint. Com.* (1883), 48 L. T. 437. *Refd. Norwich Corpn. v. Swann* (1776), 2 Wm. Bl. 1116; *R. v. St. Peter of Mancroft, Norwich* (1828), 6 L. J. O. S. M. C. 69; *Newport Corpn. v. Saunders* (1832), 3 B. & Ad. 411; *Lockwood v. Wood* (1841), 6 Q. B. 31; *Draper v. Sperring* (1861), 10 C. B. N. S. 113; *Free Fishers & Dredgers Co., of Whitstable v. Gann* (1863), 13 C. B. N. S. 853; *R. v. Casswell* (1872), 20 W. R. 624; *Swindon Central Market Co. v. Panting* (1872), 27 L. T. 578; *A.-G. v. Tynemouth Corpn.* (1900), 17 T. L. R. 77; *Newcastle v. Worksop U. C.*, [1907] 2 Ch. 145.

**247. ———.]—***BEDFORD (DUKE) v. EMMETT*, No. 195, *ante*.

**248. ———.]—***YARMOUTH CORPN. v. GROOM*, No. 257, *post*.

**249. ———.]—***NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL*, No. 176, *ante*.

**250. Right to stallage under lease — Confers no right in soil.]—***COLEMAN v. HOWARD* (1860), 2 L. T. 463.

**Whether stallage included in toll.]—**See Nos. 160–166, *ante*.

**251. Distinguished from toll.]—***HEDDEY v. WELHOUSE*, No. 196, *ante*.

**252. ———.]—***BEDFORD (DUKE) v. EMMETT*, No. 195, *ante*.

**Customary right to erect stall on payment.]—**See No. 136, *ante*.

##### SUB-SECT. 2.—ORIGIN.

**253. By prescription.]—***BENNINGTON v. TAYLOR* (1700), 2 Lut. 1517; 125 E. R. 835.

*Annotations:—Refd. Northampton Corpn. v. Ward* (1745), 1 Wils. 107; *Tyson v. Smith* (1839), 9 Ad. & El. 406; *Lockwood v. Wood* (1841), 6 Q. B. 31. *Mentd. Mercer v. . . .*, [1904] 2 Ch. 534.

254. By statute.]—BEDFORD (DUKE) v. EM-METT, No. 195, *ante*.

255. By grant—Though soil acquired after grant.]—LOCKWOOD v. WOOD, No. 273, *post*.

At common law—Incident of soil.]—See Sub-sect. 1, *ante*.

### SUB-SECT. 3.—PAYMENT AND RECOVERY.

#### A. On What Payable.

256. On stall—& surrounding ground—By prescription.]—BENNINGTON v. TAYLOR (1700), 2 Lut. 1517; 125 E. R. 835.

*Annotations*:—*Reid*. Northampton Corpn. v. Ward (1745), 1 Wils. 107; Tyson v. Smith (1839), 9 Ad. & El. 406; Lockwood v. Wood (1841), 6 Q. B. 31. *Mentd.* Mercer v. Denne, [1904] 2 Ch. 534.

257. Fixing in ground immaterial.]—(1) Pltfs., an ancient corpn., had held markets on their land prior to & since the year 1448, & all persons, except as hereinafter mentioned, using the market with stalls, stands, or peds, which are baskets with lids, convertible into tables for exposing the wares, had paid the corpn., & had places allotted them. The manor of O. was a manor of ancient demesne, & extended into the parish of O., & certain other parishes. Several confirmation rolls recited & confirmed the stallage, etc. Some of the inhabitants of the parish of O., & of two other parishes into which the manor of O. extended, being owners or occupiers of lands in the said parishes, had attended the market during living memory without paying for their peds, & no evidence was given that such persons ever had paid. Defts. owned freehold & occupied other lands in the parish of O., but none of the tenure of ancient demesne, & used pltfs.' market with peds, but refused to pay:—*Held*: whatever might be defts.' liability for toll, they were at all events liable to stallage for the occupation of a portion of pltfs.' soil with their peds to the exclusion of others, though for a temporary purpose.

(2) A stall is an erection for selling goods, of which the mode of construction is immaterial, & whether it be fixed in the ground is immaterial.

(3) Stallage is money paid for holding a stall in a market, piccage for breaking ground (WILDE, B.).—YARMOUTH CORPN. v. GROOM (1862), 1 H. & C. 102; 32 L. J. Ex. 74; 7 L. T. 161; 8 Jur. N. S. 677; 158 E. R. 818.

*Annotations*:—As to (1) *Consd.* Bedford v. St. Paul, Covent Garden, Overseers (1881), 51 L. J. M. C. 41. *Reid*. Horner v. Stepney Assmt. Com. (1908), 98 L. T. 450. As to (3) *Reid*. A.-G. v. Tynemouth Corpn. (1900), 17 T. L. R. 77. *Generally*, *Mentd.* R. v. Casswell (1872), L. R. 7 Q. B. 328.

258. Basket—Necessary for containing goods.]—A person who exposes goods for sale in a public market has a right to occupy the soil with its necessary & proper for containing the goods.—TOWNEND v. WOODRUFF (1850), 5 Exch. 506; 19 L. J. Ex. 315; 155 E. R. 221.

*Annotation*:—*Reid*. A.-G. v. Tynemouth Corpn. (1900), 17 T. L. R. 77.

259. Adapted for display of goods.]—YARMOUTH CORPN. v. GROOM, No. 257, *ante*.

See, also, No. 62, *ante*.

260. On goods.]—HEDDEY v. WELHOUSE, No. 196, *ante*.

261. On live cattle.]—HEDDEY v. WELHOUSE, No. 196, *ante*.

262. Sold in open street—Not stalled or penned.]—Charles I. granted by letters patent to the lord of the manor of Swindon, his heirs & assigns, full & absolute licence & authority to hold a market within the town of Swindon, with all

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liberties & free customs, tolls, stallage, piccage, fines, & all other profits, commodities, & emoluments, whatsoever to such market appertaining. In 1866 the then lord of the manor of Swindon, being seised of & entitled to the rights granted by Charles I., demised to pltfs. for twenty-one years all the tolls, rates, dues, & duties arising & to be collected & received at the Swindon market. The market was held in the public street, & no stalls or pens had ever been erected for the standing or separation of the cattle. Up to the time that pltfs. acquired their rights in 1866 no payment was ever demanded except upon the sale of cattle, when a small sum was paid per head either by the buyer or the seller. Pltfs. made a charge upon the vendors for stallage upon all cattle brought to the market in lieu of the tolls charged on the sale thereof. In an action against a vendor of cattle to recover this stallage:—*Held*: pltfs. had no right to make such charge.—SWINDON CENTRAL MARKET CO., LTD. v. PANTING (1872), 27 L. T. 578; 37 J. P. 118.

*Annotation*:—*Reid*. Newcastle v. Worksop U. C., [1902] 2 Ch. 145.

#### B. By Whom Payable.

263. Fish salesman—Selling fish landed by fishermen.]—A charge imposed by the urban authority, who were the owners of the soil of a quay & were also the market authority, upon fish salesmen in a market without the sanction of the Local Govt. Board, was not justified as a stallage charge, or as a landing charge, or as a rent.—A.-G. v. TYNEMOUTH CORPN. (1900), 17 T. L. R. 77.

Whether shopkeepers exempted—By custom.]—See Part VII., Sect. 1, sub-sect. 3, E., *post*.

By statute.]—See Part VII., Sect. 2, sub-sect. 5, A., *post*.

#### C. Mode of Payment.

264. May be payable in kind.]—HICKMAN'S CASE (1599), Noy, 37; 2 Roll. Abr. 123; 74 E. R. 1006.

*Annotations*:—*Reid*. Bennington v. Taylor (1700), 2 Lut. 1517; Lockwood v. Wood (1841), 6 Q. B. 31.

#### D. Recovery.

265. Action for use & occupation.]—TAUNTON MARKET v. KIMBERLEY (1776), 2 Wm. Bl. 1120; 96 E. R. 662.

*Annotation*:—*Mentd.* Morley v. Law (1820), 2 Brod. & Bing. 34.

266. Act of debt—Proof of special contract not necessary.]—*Assumpsit* may be maintained by the owner of a market, for stallage, & that without showing any contract in fact between him & the occupier of the stall.—NEWPORT CORPN. v. SAUNDERS (1832), 3 B. & Ad. 411; 1 L. J. K. B. 147; 110 E. R. 148.

*Annotations*:—*Reid*. Yarmouth Corpn. v. Groom, Same v. Daniel (1862), 7 L. T. 161. *Mentd.* Turner v. Cameron's Coalbrook Steam Coal Co. (1850), 5 Exch. 932.

Remedy of market owner for stalls set up without payment.]—See Nos. 61, 62, *ante*.

### SUB-SECT. 4.—UNREASONABLE AND EXCESSIVE STALLAGE.

267. Market place covered by stalls—Public compelled to take stalls.]—If the owner of the soil of a market covers the market place so completely with stalls that the market people are obliged to use them, taking stallage in extortion. Otherwise where sufficient standing room is



*Sect. 2.—Stallage and picage: Sub-sect. 4. Sect. 3: Sub-sects. 1 & 2, A., B., C. & D.; sub-sect. 3. Sects. 4 & 5.]*

*R. v. BURDETT* (1697), as reported in 1 *Ld. Raym.* 148; 91 *E. R.* 996.

*Annotations.—Consd. A.-G. v. Tynemouth Corpn.* (1800), 17 *T. L. R.* 77. *Refd. Northampton Corpn. v. Ward* (1745), 2 *Stra.* 1238; *Draper v. Sperring* (1861), 10 *C. B. N. S.* 113. *Mentd. R. v. Gillham* (1795), 6 *Term Rep.* 265.

**268. Toll in kind—Taken in unaccustomed manner.]—**Where a toll of corn had been customarily taken by dipping into the sack so as to bring out a certain quantity, & the collector varied from the proper mode, by sweeping instead of lifting the toll, so as to take more:—*Held: trover lay against him for the excess.*—*NORMAN v. BELL* (1831), 2 *B. & Ad.* 190; 9 *L. J. O. S. K. B.* 177; 109 *E. R.* 1114.

*Annotation.—Mentd. Batchelor v. Vyse* (1834), 4 *Moo. & S.* 552.

**269. — Recovery of excess — Trover.] —***NORMAN v. BELL*, No. 268, *ante*.

### SECT. 3.—EXEMPTIONS.

#### SUB-SECT. 1.—IN GENERAL.

**270. At common law—Tenants in ancient demesne.]—***SAVERY v. SMITH* (1686), 2 *Lut.* 1144; 125 *E. R.* 635.

**271. — —.] —***MIDDLETON (LORD) v. LAMBERT*, No. 294, *post*.

**272. — Ecclesiastical persons.]—***MIDDLETON (LORD) v. LAMBERT*, No. 294, *post*.

**273. Exemption from "toll"—Includes stallage.]—**(1) The word toll in a grant may include stallage; & if the Crown grant to H. & his heirs that they may have & hold a market in the town of E., with all tolls & profits thence arising, but neither the Crown nor H. has any right of soil in the town, if H. afterwards acquires the soil on which the market is held, he may claim stallage by virtue of the grant.

(2) A modern grant by H., a subject, holding under the Crown as before mentioned, to which certain persons, styled inhabitants of E., are parties, granting that the inhabitants of E., their heirs & assigns for ever, shall enjoy the market as freely as H. held it of the Crown, & containing a covenant by H. that they shall do so, does not exempt from stallage an inhabitant not privy to the parties to such grant. Such an exemption for the inhabitants of a town, can be only by way of custom, not of grant or prescription. *Qu.:* whether an exemption or discharge from toll, other than stallage, could be claimed by such grant or prescription for inhabitants generally.—*LOCKWOOD v. WOOD* (1841), 6 *Q. B.* 31; *Arn. & H.* 202; 10 *J. P.* 543; 5 *Jur.* 626;

(1884), 14

— *Annotations.—Consd. A.-G. v. Tynemouth Corpn.* (1800), 17 *T. L. R.* 77. *Refd. Northampton Corpn. v. Ward* (1745), 2 *Stra.* 1238; *Draper v. Sperring* (1861), 10 *C. B. N. S.* 113. *Mentd. R. v. Gillham* (1795), 6 *Term Rep.* 265.

**274. — —.]—**King Charles I. granted by letters patent to G., his heirs & assigns, a weekly & fortnightly market, & two yearly fairs at E., with all tolls & profits. By indenture dated 1646, between G. of the one part & four persons, therein named, described as all of E., yeomen & bye-lawmen for the present year, on behalf of themselves & all the inhabitants of E., on the other part, the four bye-lawmen & the inhabitants granted to G. a house, land, & the market place in E. The indenture then contained a covenant by G. that the four persons & the inhabitants

should have a free market toll free. An action of debt for stallage

having been brought by the proprietor of the market place against deft. as an inhabitant:—*Held:* (1) an exemption from tolls included an exemption from stallage also; (2) the inhabitants of E. could not by that name & description prescribe for an exemption from toll, such exemption being an easement *in alieno solo*.—*LOCKWOOD v. WOOD* (1844), 6 *Q. B.* 50; 13 *L. J. Q. B.* 365; 3 *L. T. O. S.* 139; 5 *Jur.* 543; 115 *E. R.* 19.

*Annotations.—Generally, Mentd. Constable v. Nicholson* (1863), 14 *C. B. N. S.* 230; *Mercer v. Denne*, [1904] 2 *Ch.* 534; *Anglo-Hellenic S.S. Co. v. Dreyfus* (1913), 108 *L. T.* 36.

**275. Exemption of inhabitants generally — Claimable under custom only—Not by grant or prescription.]—***LOCKWOOD v. WOOD*, No. 273, *ante*.

**276. — Claimed under custom—Proof of claim.]—**King Charles I., in 1639, granted to H., his heirs & assigns, a market at E., with all tolls & profits. By indenture in 1646, between H. of the one part, & four persons therein named, described as all of E., yeomen & bye-lawmen for the present year, on behalf of themselves & the inhabitants of E., of the other part, after reciting the charter of 1639, the four bye-lawmen, in consideration of the charge H. had been at in procuring the market, did grant to H. a court house, with the waste lands adjoining the market place, together with the market place in E.; H., in the same deed, covenanted that the four persons & the inhabitants aforesaid, their heirs & assigns for ever, should have a free market in E., toll free. In an action of debt for stallage, brought by pltf., claiming under H., against deft. as an inhabitant:—*Held:* in the absence of any proof of the existence of a market prior to 1639, that non-payment of tolls by the inhabitants since 1646 was no evidence of their exemption by immemorial customary usage.—*LOCKWOOD v. WOOD* (1845), 6 *Q. B.* 67, n.; 1 *New Pract. Cas.* 293; 15 *L. J. Q. B.* 36; 6 *L. T. O. S.* 147; 10 *J. P.* 424; 10 *Jur.* 158.

**277. Enforcement of right—Claim on behalf of corporation.]—**If toll be merely claimed of the individual members of a corpn. exempt from toll, an action well lies on the writ *de effendo quietum de theolonio* in the name of the corpn.—*LONDON CORPN. v. LYNN REGIS CORPN.* (1796), 1 *Bos. & P.* 487; 7 *Bro. Parl. Cas.* 120; 126 *E. R.* 1026, *H. L.* **Exemption of freeman of borough.]—**See *Municipal Corporations Act*, 1882 (c. 50), s. 208.

**278. Effect of franchise vesting in Crown — Whether exemption survives — On regrant.]—***TEWKESBURY CORPN. v. BRICKNELL*, No. 297, *post*.

#### SUB-SECT. 2.—HOW EXEMPTION ARISES.

##### A. By Grant.

**279. By Crown grant—Construction.]—***YORK*

**280. — —.]—**A toll in Penzance market, belonging to the Crown in right of the Duchy of Cornwall, is not discharged by a grant from the Crown exempting the inhabitants of Penzance from all & all manner of toll, pontage, stallage, etc., all which King John had granted to them to be discharged from; for King John never had the toll which belonged to the Crown in right of the Duchy; but if the grant had been general, without referring to the tolls which the Kings of England formerly had in this market, it would have been a good grant of exemption.—*HILL v. PRIOR* (1679), 2 *Show.* 34; 89 *E. R.* 775; *sub GILL v. PRIOR*, *T. Jo.* 118.

**281.** — — —.] — The corp<sup>n</sup>. of T., having proved a prescriptive right to tolls:—*Held*: (1) it was not destroyed by a charter of Elizabeth, granting & confirming, among other things, all the ancient rights of the corp<sup>n</sup>., but exempting the inhabitants from toll in all places except London; (2) this exemption applied to the tolls of all other places, except London, but not to the tolls of T.—*TRURO CORPN. v. REYNALDS, TRURO CORPN. v. BASTIAN* (1832), 8 Bing. 275; 1 Moo. & S. 272; 1 L. J. C. P. 62; 131 E. R. 407.

**282.** — — —.] — *MIDDLETON (LORD) v. LAMBERT*, No. 294, *post*.

**283.** — — — *After forfeiture of franchise.*] — *TWESBURY CORPN. v. BRICKNELL*, No. 297, *post*.

**284.** Grant by owner—Exemption of “inhabitants”—What inhabitants included.] — *LOCKWOOD v. WOOD*, No. 273, *ante*.

#### B. By Statute.

**285.** Exemption by statute—Variation between two local Acts.] — Where there are two local Acts which regulate toll & exemption, & the last Act varies the mode of imposing the toll, so as to enlarge an exemption under the old Act, the exemption shall prevail, though it be not expressly given by the new Act.—*FEARNLEY v. MORLEY* (1826), 5 B. & C. 25; 7 Dow. & Ry. K. B. 832; 4 Dow. & Ry. M. C. 117; 4 L. J. O. S. K. B. 225; 108 E. R. 9.

*Shops.*] — See Part VII., Sect. 2, sub-sect. 5, A., *post*.

#### C. By Prescription.

**286.** On behalf of inhabitants of Duchy of Lancaster.] — *OSBUSTON v. JAMES* (1688), 2 Lut. 1377; 125 E. R. 760.

*Annotation*:—*Consd. Stamford Corp<sup>n</sup>. v. Pawlett* (1830), 1 Cr. & J. 57.

**287.** On behalf of inhabitants generally—Invalid.] — *LOCKWOOD v. WOOD*, No. 273, *ante*.

**288.** — — —.] — *LOCKWOOD v. WOOD*, No. 274, *ante*.

**289.** On behalf of occupiers of houses abutting on market.] — *ELLIS v. BRIDGNORTH CORPN.*, No. 119, *ante*.

**290.** Tolls imposed within legal memory.] — *WOOLWICH CORPN. v. GIBSON*, No. 41, *ante*.

#### D. By Custom.

**291.** Exemption of inhabitants generally.] — *LOCKWOOD v. WOOD*, No. 273, *ante*.

**292.** Evidence of claim.] — *LOCKWOOD v. WOOD*, No. 273, *ante*.

#### SUB-SECT. 3.—EXTENT OF EXEMPTION.

**293.** Ecclesiastical corporation.] — *ST. EDWARD'S ABBOT v. SOUTHAMPTON CORPN.* (1290), cited 2 Co. Inst. 221.

*Annotations*:—*Reid. Leight v. Pym* (1686), 2 Lut. 1329; *Middleton v. Lambert* (1834), 1 Ad. & El. 401. *Mentd. Hill v. Smith* (1812), 4 Taunt. 520.

**294.** — — —.] — Under charters, granting to a dean & chapter, that they & all their men shall be quit of toll, passage, cheminage, etc., in city & borough,

fair, & market, in the passage of bridges, & all ports of the sea, in all places throughout England, their lay tenant of lands included in the charters is exempt from market toll & toll traverse, not only for articles going to or coming from the lands for the necessary manurance & enjoyment of them, but also for goods sent out or coming in for the purpose of merchandise.

*Qu.*: whether, in the latter case, the exemption could have been claimed by ecclesiastical persons.

*Qu.*: whether the exemption from toll claimable at common law by ecclesiastical persons & tenants in ancient demesne, extends to goods bought & sold, or carried, for the mere purpose of trade.—*MIDDLETON (LORD) v. LAMBERT* (1834), 1 Ad. & El. 401; 3 Nev. & M. K. B. 841; 110 E. R. 1260.

**295.** Tenant in ancient demesne — Whether merchandise exempt.] — A tenant in ancient demesne shall not be privileged from paying toll where he trades as a common merchant.—*WARD v. KNIGHT* (1591), Cro. Eliz. 227; 78 E. R. 483.

**296.** — — —.] — *MIDDLETON (LORD) v. LAMBERT*, No. 294, *ante*.

**297.** Corporation — Burgesses — Whether bur-  
gage tenants included.] — The seller of corn by sample in a market, is benefited by the market, as well as the seller of corn which is pitched there in bulk & sold; & if he refuses to pay the same toll which is paid by the seller of corn in bulk, an action on the case lies against him for the injury done to the market, in selling by sample. The bur-  
gage tenants in Tewkesbury are not exempt from payment of toll in the market there. Ancient charters, of obscure or dubious meaning, shall be expounded by contemporaneous usage. A grant of immunity to burgesses, their heirs & successors, was expounded by the usage to be a grant to the burgesses, corporators only; & not to the bur-  
gage tenants & their heirs. If the grantee of a royal franchise, as toll, grant an immunity thereout, & the franchise of toll afterwards become extinct by unity of possession in the Crown, the immunity does not thereby cease; & if the Crown regrants the toll, the grantee must take it still subject to the immunity.—*TWESBURY CORPN. v. BRICKNELL* (1809), 2 Taunt. 120; 127 E. R. 1022.

*Annotations*:—*Mentd. North & South Shields Ferry Co. v. Barker* (1848), 2 Exch. 136; *Brecon Corp<sup>n</sup>. v. Edwards* (1862), 26 J. P. 614; *Crane v. London Dock Co.* (1864), 10 Jur. N. S. 984.

— *Freeman.*] — See Municipal Corporations Act, 1882 (c. 50), s. 208.

#### SECT. 4.—PROFITS OF MARKETS.

*Statutory markets.*] — See Markets & Fairs Clauses Act, 1847 (c. 14), ss. 31–41.

**298.** Market owned by corporation.] — *A.-G. v. WARWICK CORPN.*, No. 17, *ante*.

#### SECT. 5.—HAWKERS.

See Part XI., Sect. 1, *post*.



## Part VII.—Disturbance.

## SECT. 1.—WHAT AMOUNTS TO.

## SUB-SECT. 1.—EVADING TOLL.

**299. Sale outside market—In fraud of market.]**—Distress cannot be made for the toll of goods fraudulently sold out of the market, to avoid the toll. But the party injured must bring a special action on the case.—*BLAKEY v. DINSDALE* (1777), 2 Cowp. 661; 98 E. R. 1294.

*Annotation* :—*Consd. Brecon Corpn. v. Edwards* (1862), 6 L. T. 293.

**300. ———.]—BRIDGLAND v. SHAPTER, No. 73, ante.**

**301. ———.]—BRECON CORPN. v. EDWARDS, No. 305, post.**

**302. ——— Market ordinarily overcrowded—Notice to seller of accommodation.]—**(1) The King granted to A., that he, his heirs & assigns, should have & hold a market in a place therein described, & within certain specified limits there, for the buying & selling of all kinds of vegetables, fruits, flowers, roots, & herbs. The grantee of the market had for his own profit permitted part of the space, within the limits described, to be used for other purposes than those specified in the grant. The remaining part of the space, within which the market was to be held by the terms of the grant, became insufficient for the public accommodation, & there was not, on ordinary occasions, space within the market for carts & waggons resorting thither with vegetables, etc.:—*Held*: the lord of the market could not maintain an action against an individual for selling vegetables in the neighbourhood of his market, & thereby depriving him of toll, even at a time when there was room in the market, without showing that on the day when the sale took place he gave notice to the seller that there was room within the market.

(2) The grantee of a market cannot maintain an action against an individual for selling goods without the market, & thereby defrauding him of the toll; without showing that he has appropriated the whole of the market space, or so much of it as the public convenience requires, to the purposes for which the market was granted.—*PRINCE v. LEWIS* (1826), 5 B. & C. 363; 8 Dow. & Ry. K. B. 121; 4 Dow. & Ry. M. C. 19; 4 L. J. O. S. K. B. 188; 108 E. R. 135; *previous proceedings* (1825), 2 C. & P. 66, N. P.

*Annotations* :—*As to* (1) *Consd. Stamford Corpn. v. Pawlett* (1830), 1 Cr. & J. 57. *As to* (2) *Consd. G. E. Ry. v. Goldsmid* (1884), 9 App. Cas. 927. *Reid. Re Islington Market Bill* (1835), 3 Cl. & Fin. 513; *Brecon Corpn. v. Edwards* (1862), 1 H. & C. 51; *Manchester Corpn. v. Peverley* (1876), 22 Ch. D. 294, n.; *Lax v. Darlington Corpn.* (1879), 5 Ex. D. 28. *Generally, Mentd. Gingell & Foskett v. Stepney B. C.*, [1906] 2 K. B. 468.

*Compare* No. 308, *post*, & Sub-sect. 3, F., *post*.

**303. Sale by sample—When a disturbance.]—***Tewkesbury Corpn. v. Diston*, No. 204, *ante*.

**304. ———.]—TEWKESBURY CORPN. v. BRICKNELL, No. 297, ante.**

**305. ——— Sale to shopkeeper on market day.]—**The bare proof of a sale of goods by sample in a shop near a market on a market day, & of delivery on a subsequent market day, does not constitute proof of a disturbance of the market.

*Pltfs.*, the corpn. of a borough, were entitled to

a market, & a local Act gave them market tolls & imposed a penalty on persons selling or exposing to sale corn, etc., within the borough in any place other than the market place. Deft.'s son, acting on his behalf, came on a market day to the house of H., occupying a house & shop in the borough near to the market place, & there sold by sample to H. twenty sacks of oats, which were not at the time exposed for sale in bulk, but were brought into the borough & delivered to H. by deft. on a subsequent market day. On a special case stating these facts as having been proved at a trial & stating the question to be whether there was evidence for the jury that deft. had infringed *pltf's* right of market:—*Held*: there was no evidence to go to the jury.—*BRECON CORPN. v. EDWARDS* (1862), 1 H. & C. 51; 31 L. J. Ex. 368; 6 L. T. 293; 26 J. P. 614; 8 Jur. N. S. 461; 158 E. R. 797.

*Annotation* :—*Distd. Wilcox v. Steel*, [1904] 1 Ch. 212.

— **Whether evidence of sale by bulk.]—***See* Nos. 206, 207, *ante*.

**Delivery of goods to regular customer—Within limits of market.]—***See* No. 367, *post*.

*See, also*, Part VII., Sect. 2, sub-sect. 5.

## SUB-SECT. 2.—INTERFERENCE OR OBSTRUCTION.

**306. What is interference—Interest in rival market.]—***DORCHESTER CORPN. v. ENSOR*, No. 94, *ante*.

**307. Wrongful collection of toll.]—***DE CHAUNCE v. DE TWENGE & DE ROS* (1337), Y. B. (Rolls Series) 11 Edw. 3, p. 38.

**308. ——— Selling goods outside market—After payment of toll—Construction of local Act.]—**A local improvement Act enacted, that for preventing any encroachment on the market; any person who shall sell any of the articles usually sold in the market in any other place in the town than such market shall incur a penalty. A toll was imposed on persons selling or keeping stalls in the market. S. bought goods in the market & paid the market toll, & then went through the street hawking the same:—*Held*: this was an offence within the enactment, though the goods had already paid toll, & if sold in market would not have been subject to further toll.—*BLACK v. SACKETT* (1869), 10 B. & S. 639; 34 J. P. 38.

**309. Wrongful erection of toll booth.]—**(1) *Trespass vi et armis* lies for disturbance of the profits of a fair by erecting a toll both without saying *clausum fregit*.

(2) Case or trespass lies for disturbance of a fair.—*DENT v. OLIVER* (1606), Cro. Jac. 122; 79 E. R. 106; *previous proceedings* (1604), Cro. Jac. 43.

*Annotations* :—*As to* (2) *Reid. Keble v. Hickeringell* (1707), Kel. W. 273. *Generally, Mentd. St. John v. Moody* (1675), 1 Vent. 274; *Cary v. Buckhurst* (1686), Comb. 31; *Scott v. Shepherd* (1773), 2 Wm. Bl. 892.

**310. Interference with persons attending market.]—***DENESHAM'S (ABBOT) CASE* (1355), Y. B. 29 Edw. 3, fo. 18, B.

*Annotations* :—*Reid. Keble v. Hickeringell* (1707), Kel. W. 273; *Allen v. Flood*, [1898] A. C. 1.

**PART VII. SECT. 1, SUB-SECT. 1.**  
**299 i. Sale outside market—In fraud of market.]—**A person who sold marketable goods elsewhere in the city than in the markets:—*Held*: liable to a

penalty under Market's Act, 1890, s. 25.—*WEEDON v. DAVIDSON* (1907), 4 C. L. R. 895.—*AUS.*

**299 ii. ———.]—***RICHARDSON v. AUSTIN* (1911), 12 C. L. R. 463.—*AUS.*

**PART VII. SECT. 1, SUB-SECT. 2.**

**h. Obstruction of highway.]—***REYNOLDS v. CITY OF TORONTO* (1865), 15 C. P. 276.—*CAN.*

**311. — Exclusion from part of market.]—**Action on the case for continuing a nuisance to pltf.'s market, by a building which excluded the public from a part of the space on which the market was lawfully held. It appeared that the building was erected in Oct. 1838, under the superintendence & direction of defts., not on their own land, but on that of the corpn. of K., of which corpn. they were members. The Earl of L. was the owner of the market in Oct. 1838, & in Feb. 1839 he demised it to pltf.; but the market being afterwards obstructed by the building, this action was brought:—*Held*: defts. were liable for continuing the nuisance, although they had no right to enter upon the land to remove it, & the action was therefore maintainable.—**THOMPSON v. GIBSON** (1841), 7 M. & W. 456; 10 L. J. Ex. 330; 5 Jur. 390; 151 E. R. 845; *subsequent proceedings*, 8 M. & W. 281.

*Annotations*:—**Reid**, Russell v. Shenton (1842), 3 Q. B. 449; Clegg v. Dearden (1848), 12 Q. B. 576; Battishill v. Reed (1856), 18 C. B. 696; Dawson v. G. N. & City Ry., [1904] 1 K. B. 277; Theyer v. Purnell, [1918] 2 K. B. 333. **Mentd.** Bennett v. Bayes (1860), 5 H. & N. 391; Whitehouse v. Fellowes (1861), 10 C. B. N. S. 765; Kennard v. Cory (1922), 91 L. J. Ch. 452.

**312. — Interference with right of way.]—**A district board of works, under the statutory powers conferred by 57 Geo. 3, c. 119, s. 58, & Metropolitan Management Act, 1855 (c. 120), s. 108, threatened to erect posts by the side of public footpaths along the public roads leading into the area of Spitalfields Market, in order to preserve the rights of the public & to insure the safety of foot passengers. It was proved that this would seriously interfere with the access to the market, which had been recently enlarged by throwing into it the site of houses which had been pulled down belonging to pltf.:—*Held*: such an exercise of the board's powers would be an interference with the rights & privileges vested in pltf. in reference to a market within the exception contained in Metropolitan Management Act, 1855 (c. 120), s. 91, & an injunction was granted restraining the proposed action of the board.—**HORNER v. WHITECHAPEL BOARD OF WORKS** (1885), 55 L. J. Ch. 289; 53 L. T. 842, C. A.; *previous proceedings*, *sub nom.* A.-G. v. HORNER (1884), 14 Q. B. D. 245, C. A.; (1885), 11 App. Cas. 66, H. L.

### SUB-SECT. 3.—LEVYING A RIVAL MARKET.

#### A. In General.

**313. General rule.]—**GLOUCESTER GRAMMAR SCHOOL CASE (1410), Y. B. 11 Hen. 4, fo. 47, pl. 21.

*Annotations*:—**Mentd.** R. v. Patrick (1667), 2 Keb. 164; Keble v. Hickerlingell (1707), Kel. W. 273; Allen v. Flood, [1898] A. C. 1.

**314. Market held on same day—In same town.]—**DORCHESTER CORPN. v. ENSOR, No. 94, *ante*.

*See, also*, No. 39, *ante*; Nos. 316, 322, *post*.

**Market held on different days.]—***See* Sub-sect. 3, D., *post*, & No. 329, *post*.

**315. Rival market set up under charter.]—**ANON. (1409), Y. B. 11 Hen. 4, fo. 5, pl. 13.

*Annotations*:—**Consd.** R. v. Butler (1685), 3 Lev. 220. **Distd.** R. v. Aires (1716), 10 Mod. Rep. 354. **Reid.** Elwes v. Payne (1879), 27 W. R. 704. **Mentd.** Herd v. Burstowe (1590), Cro. Eliz. 177; Strata Mercella's Case (1591), 9 Co. Rep. 24 a.

**316. —.]—**The holding of a rival market or auction mart within the prescribed distance on the same day of the week as an ancient charter or franchise market is a disturbance by intendment of law, whether the rival market or mart is itself a later charter or franchise market or an unauthorised market held apart from charter, & in the latter case it is not necessary in the enforcement of the monopolistic rights attaching to the ancient market to prove damage, notwithstanding that the ancient market is a market without tolls.

*Qu.*: whether if the mere interference with their monopolistic rights is not in itself a ground for an injunction, the owners of an ancient charter market without tolls who have acquired power of charging tolls of another kind under the Markets & Fairs Clauses Act, 1847 (c. 14), cannot as proof of damage rely on the loss of those tolls as profits which they are enabled to make by virtue of their franchise.—**MORPETH CORPN. v. NORTHUMBERLAND FARMERS' AUCTION MART CO.**, [1921] 2 Ch. 154; 90 L. J. Ch. 420; 125 L. T. 659; 37 T. L. R. 225; 21 L. G. R. 321.

**317. Whether proof of damage necessary—No sales effected in old market.]—**For a possibility of a damage as an action upon the case lies for the owner of an ancient market for the erection of a new market near his, though the cattle that come to the old market may not be sold & no toll be due (**POWELL, J.**).—**ASHBY v. WHITE** (1703), as reported in 2 Ld. Raym. 938; 6 Mod. Rep. 45; 92 E. R. 126; *on appeal*, 1 Bro. Parl. Cas. 62, H. L.

*Annotations*:—**Consd.** Tewkesbury Corpn. v. Diston (1805), 6 East, 438. **Mentd.** R. v. Paty (1704), 2 Ld. Raym. 1105; Kendall v. John (1708), Fortes. Rep. 104; R. v. Loggen & Froome (1718), 1 Stra. 73; Selwyn v. Honeywood (1744), 9 Mod. Rep. 419; Myddelton v. Wynn (1746), Willes, 597; R. v. Montacute (1750), 1 Wm. Bl. 60; Chapman v. Pickersgill (1762), 2 Wils. 145; Milward v. Serjeant (1786), 14 East, 60, n.; Drewe v. Coulton (1787), 1 East, 563, n.; R. v. Pasmore (1789), 3 Term Rep. 199; Schmottl v. Bumsted (1796), 6 Term Rep. 646; Harman v. Tappenden (1801), 1 East, 555; Burdett v. Abbot (1811), 14 East, 1; Cullen v. Morris (1819), 2 Stark. 577; Williams v. Mostyn (1838), 4 M. & W. 145; Stockdale v. Hansard (1839), 9 Ad. & El. 1; Ferguson v. Kinnoull (1842), 9 Cl. & Fin. 251; Hampden v. Macmullen (1843), 3 Notes of Cases, Supp. 1; Harnett v. Maitland (1847), 16 M. & W. 257; Pryce v. Belcher (1847), 4 C. B. 866; R. v. James (1850), 3 Car. & Kir. 167; Embrey v. Owen (1851), 6 Exch. 353; King v. Rochdale Canal Co. (1851), 14 Q. B. 135; Crouch v. L. & N. W. Ry. (1854), 14 C. B. 255; *Ex p.* Mawby (1854), 18 Jur. 906; Nicklin v. Williams (1854), 10 Exch. 259; Tozer v. Child (1857), 7 E. & B. 377; Waite v. N. E. Ry. (1859), E. B. & E. 728; Chamberlain v. West End of London & Crystal Palace Ry. (1862), 2 B. & S. 617; Fotherby v. Met. Ry. (1866), L. R. 2 C. P. 188; Smith v. Thackeray (1866), L. R. 1 C. P. 564; Basébé v. Matthews (1867), L. R. 2 C. P. 684; Morgan v. Met. Ry. (1868), 37 L. J. C. P. 265; Metropolitan Board of Works v. McCarthy (1874), L. R. 7 H. L. 243; Wood v. Wood (1874), L. R. 9 Exch. 190; Humphreys v. Cousins (1877), 46 L. J. Q. B. 438; Bowen v. Hall (1881), 6 Q. B. D. 333; Dalton v. Angus (1881), 6 App. Cas. 740; Spaight v. Tedcastle (1881), 44 L. T. 589; Bradlaugh v. *\_\_\_\_\_* (1883), 47 L. T. 618; Mills v. Armstrong, The Bernina (1888), 13 App. Cas. 1; Ratcliffe v. Evans, [1892] 2 Q. B. 524; Chaffers v. Goldsmid, [1894] 1 Q. B. 186; Allen v. Flood, [1898] A. C. 1; Clark v. London General Omnibus Co., [1906] 2 K. B. 648; I. R. Comrs. v. Joicey (No. 1), [1913] 1 K. B. 445; Hammerton v. Dysart, [1916] 1 A. C. 57; Neville v. London Express Newspaper, [1919] A. C. 368; Weld-Blundell v. Stephens, [1920] A. C. 956; Simmonds v. Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K. B. 618; Manton v. Brocklebank, [1923] 2 K. B. 212; Everett v. Ryder (1926), 135 L. T. 302.

### PART VII. SECT. 1, SUB-SECT. 3.—A.

**314i. Market held on same day—In same town.]—**CORK CORPN. v. SHINKWIN (1825), Sm. & Bat. 395, 399.—**IR.**

**314ii. —.]—**Where there is a franchise right of holding fairs &

markets, & of taking tolls in respect thereof, & an unauthorised fair or market is held within a reasonable distance of the prescribed place, & within the ambit of the grant, & such fair or market is held on the same day as is prescribed by the grant for holding a fair or market, there is an actual intendment

of law that there has been a disturbance.—**DOWNSHIRE (MARQUIS) v. O'BRIEN** (1887), 19 L. R. Ir. 380.—**IR.**

**k. Whether proof of damage necessary.]—**CORK CORPN. v. SHINKWIN (1825), Sm. & Bat. 395.—**IR.**



*Sect. 1.—What amounts to: Sub-sect. 3, A., B., C., D. & E.]*

**318. — Old market exempt from toll.]—**MORPETH CORPN. v. NORTHUMBERLAND FARMERS' AUCTION MART CO., No. 316, *ante*.

*B. Common Law Distance.*

**319. Within seven miles of existing market.]—**YARD v. FORD, No. 330, *post*.

**320. —.]—**Re ISLINGTON MARKET BILL, No. 352, *post*.

**321. —.]—**GREAT EASTERN RY. CO. v. GOLDSMID, No. 18, *ante*.

*Statutory area.]—See Sect. 2, post.*

*C. What Constitutes a Rival Market.*

**322. Question of fact—Intention immaterial.]—**Pltf. was the lessee of a market, granted in 1698 by Royal Charter, for weekly sales of horses & cattle, the grant & also the lease including the right to receive the market tolls; & weekly sales were regularly conducted at the market accordingly. In 1902 deft., who was an auctioneer & had been in the habit of holding auction sales of horses & cattle at the weekly market, took a field near the market for the purpose of holding sales there of horses & cattle, & then advertised that an auction sale of Welsh ponies would be held by him there upon a particular market day. On that day, after concluding his usual sale of horses & cattle at the market, he induced several of the persons present to leave the market & accompany him to the sale in his field, & the sale then took place. In an action brought by pltf. against deft. for an injunction, deft. disclaimed any intention of setting up a rival market, & excused himself by saying that the market was for various reasons an unsuitable place for the sale of the ponies, which were wild & unbroken:—*Held*: deft.'s acts constituted such a disturbance of pltf.'s market & invasion of his market rights as might be restrained by injunction, the question of intention being immaterial.—WILCOX v. STEEL, [1904] 1 Ch. 212; 73 L. J. Ch. 217; 89 L. T. 640; 68 J. P. 146; 20 T. L. R. 78; 2 L. G. R. 105, C. A.

*Annotation:—*Refd. Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co., [1921] 2 Ch. 154.

**323. Whether levying toll necessary.]—**R. v. — (1682), 2 Show. 201; 89 E. R. 890.

*Annotation:—*Refd. Moseley v. Chadwick (1782), 3 Doug. K. B. 117.

**324. Setting up stalls for sale of goods.]—**The owner of a market within a town, who receives stallage for the stalls erected therein on his own land, may maintain an action against a person who erects other stalls within the town upon his own land for the sale of articles which pay no toll to the owner of the market.—MOSELEY v. CHADWICK (1782), 3 Doug. K. B. 117; 99 E. R. 568; *sub nom.* MOSLEY v. CHADWICK, 7 B. & C. 47, n.

*Annotations:—*Consd. Manchester Corpn. v. Lyons (1882), 47 L. T. 677; G. E. Ry. v. Goldsmid (1884), 9 App. Cas. 927. *Apld.* Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co., [1921] 2 Ch. 154. *Refd.* Mosley v. Walker (1827), 7 B. & C. 40; Pope v. Whalley (1865), 6 B. & S. 303; Dorchester Corpn. v. Ensor (1869), L. R. 4 Q. B. 225; *sub nom.* Ensor v. Dorchester Corpn., 1869, 12 Q. B. 292; A.-G. v. Horner (1884), 14 Q. B. D. 245.

**325. —.]—**GREAT EASTERN RY. CO. v. GOLDSMID, No. 18, *ante*.

**326. Hawking in neighbourhood of market—**

*Though all tolls paid.]—*BLACK v. SACKETT, No. 308, *ante*.

**327. Sale of horses in adjoining field—Allegation that market unsuitable.]—**WILCOX v. STEEL, No. 322,

**328. Sale on premises of seller—Wholesale warehouse facing market.]—**HAYNES v. FORD, No. 390, *post*.

*See, generally, Sect. 2, sub-sect. 3, post.*

**329. Sales on days other than market days.]—**Pltfs. were, down to 1855, possessed of an ancient cattle market in the city of London, & also a grant from the Crown, in 1326, that no market from thenceforth should be granted by the Crown to any within seven miles of the said city. In 1855 this market was closed, & a new market at Islington, without the city, opened by pltfs., under the powers given to them by, & the provisions contained in, Metropolitan Market Act, 1851 (c. 61), which expressed that the new market was to be in lieu of the old.

This Act was repealed, but substantially re-enacted with fuller provisions by Metropolitan Market Act, 1857 (c. 135), by sect. 15 of which it was provided that no new market should be opened within seven miles from St. Paul's Cathedral in the city of London. The new market was within this radius. The elder deft. in 1855, before the opening of the new market, established lairs for cattle in its immediate vicinity. In the interval between one market of pltfs.' & the next a considerable number of cattle were sold in these lairs by private sale, some by the owners with the knowledge of defts., others by defts. selling on commission; cattle so sold did not find their way into pltfs.' market, & pltfs. lost the tolls on them. One uniform charge was made for lairage, whether the cattle were sold in defts.' lairs or not.

As far back as living memory goes, & down to the closing of the old market, there had been thirteen lairs within the seven mile radius in which sales had taken place as before mentioned. In the case of four of these adjoining the old market, including one of defts.', pltfs. had specific knowledge of such sales; in the cases of the others, the arbitrator found that they had the same knowledge:—*Held*: (1) the ct. could not presume any legal origin, in the absence of proof thereof, to the practice of selling cattle in the lairs, so as to give the owners of such lairs a right as against the owners of the old market to have such sales made in the lairs; at the most it amounted merely to a revocable licence which had been revoked. Even if such a right existed as against the owner of the old market, it could not be set up as against the owners of the new market, there being nothing in Metropolitan Market Acts to transfer such a right to Islington; (2) the acts of defts. amounted to a disturbance of pltfs.' market; but, *qu.*, whether they were such as to constitute opening a new market.—LONDON CORPN. v. LOW (1879), 49 L. J. Q. B. 144; 42 L. T. 16; 44 J. P. 169; 28 W. R. 250.

**Protection of existing rights & privileges—Under Public Health Acts.]—**See Nos. 39–42, *ante*.

*D. Market Held on Different Day.*

**330. Whether a disturbance—Question of fact.]—**If a new market be erected without patent in

**PART VII. SECT. 1, SUB-SECT. 3.—C.**

**3241. Setting up stalls for sale of goods.]—***Held*: laying out ground for a public market, erecting stalls there for the sale of wares, & letting those

stalls to the vendors of such wares, for the purpose of exposing them to sale, amounted to a levying & erecting a market.—CORK CORPN. v. SHINKWIN (1825), 5m. & Bat. 395.—IR.

**PART VII. SECT. 1, SUB-SECT. 3.—D.**

**3301. Whether a disturbance—Question of fact.]—**Where there is a franchise right of holding markets & fairs & of taking tolls in respect thereof, & injury



a town near to an ancient market [within seven miles], it may be a nuisance, though holden on different days; & therefore in an action on the case for erecting such new market to the nuisance of an ancient market, if the jury find for pltf., the ct. will not doubt of the nuisance, though it appears they are holden on different days.—**YARD v. FORD** (1670), 2 Saund. 172; 1 Mod. Rep. 69; 1 Lev. 296; 2 Keb. 689, 706; 1 Vent. 98; T. Raym. 195; 85 E. R. 922.

*Annotations*:—**Consd.** Moseley v. Chadwick (1782), 3 Doug. K. B. 117. **Foll.** Elwes v. Payne (1879), 12 Ch. D. 468. **Consd.** G. E. Ry. v. Goldsmid (1884), 9 App. Cas. 927. **Reid.** Ripon v. Hobart (1834), 3 My. & K. 169; Dorchester Corp. v. Ensor (1869), L. R. 4 Exch. 335; Manchester Corp. v. Lyons (1882), 47 L. T. 677; Wilcox v. Steel, [1904] 1 Ch. 212; Morpeth Corp. v. Northumberland Farmers' Auction Mart Co., [1921] 2 Ch. 154. **Mentd.** Bryant v. Foot (1867), L. R. 2 Q. B. 161; Dalton v. Angus (1881), 6 App. Cas. 740; Hammerton v. Dysart, [1916] 1 A. C. 57.

**331.** ———.] — **DORCHESTER CORPN. v. ENSOR**, No. 94, *ante*.

**332.** ——— **Proof of damage necessary.**]—The law appears to be that if the second market is held on the same day as the first market it is presumed to be a nuisance without further proof; that is to say, the law presumes it to be an actionable injury to the first market; but if the other market is held on a different day then you must prove the injury & show the actual damage before you can stop the holding of the second market (**JESSEL, M.R.**).—**ELWES v. PAYNE** (1879), 12 Ch. D. 468; 27 W. R. 704; *on appeal*, 12 Ch. D. 475, C. A.

*Annotations*:—**Reid.** Hailsham Cattle Market Co. v. Tolman, [1915] 1 Ch. 360; Morpeth Corp. v. Northumberland Farmers' Auction Mart Co., [1921] 2 Ch. 154. **Mentd.** Manchester Corp. v. Lyons (1882), 47 L. T. 677; Abergavenny Improvement Comrs. v. Straker (1889), 42 Ch. D. 83.

**333.** ———.]—In a case where pltf. proved that defts. had infringed their franchise of a market on Saturday by holding another market on Thursday:—**Held**: as defts.' market was held on a different day from that of pltf. damages would not be presumed by law as they would if it were held on the same day, but must be proved by pltf. —**WINSFORD ENTERTAINMENTS, LTD. v. WINSFORD URBAN DISTRICT COUNCIL** (1924), 23 L. G. R. 254.

#### *E. Sales in Shops and Dwelling-Houses.*

**334. Right to prevent sales in shops—Claimable only by custom.**]—**ANON.** (prior to 1612), cited in 2 Brownl. at p. 179; 123 E. R. 884.

*Annotation*:—**Reid.** Macclesfield Corp. v. Pedley (1833), 4 B. & Ad. 397.

**335.** ———.] — **NEWINGTON FAIR CASE** (1617), 2 Roll. Abr. 123.

*Annotations*:—**Reid.** Mosley v. Chadwick (1782), 7 B. & C. 47, n.; Macclesfield Corp. v. Pedley (1833), 4 B. & Ad. 397.

**336.** ———.]—**Qu.**: if the grantee of a newly created market can, by virtue of such grant merely, maintain an action for disturbance of franchise, against a person selling marketable articles in his own shop, within the franchise, but not within the limits of the market place, on the market day. But a claim by immemorial custom to exclude others from selling such commodities on the market day, except in the market place, is valid in law. Where a market for meat, etc. was proved to have been in existence in the reign of James I., proof that the grantees of the market had for the last hundred years appointed market lookers, that no butchers' shops had existed out of the market place until 1810, & that the shops then

set up were objected to by the grantees, was held to be sufficient evidence of such immemorial right. —**MACCLESFIELD CORPN. v. PEDLEY** (1833), 4 B. & Ad. 397; 1 Nev. & M. K. B. 708; 110 E. R. 504.

*Annotations*:—**Reid.** Devines Corp. v. Clark (1835), 3 Ad. & El. 506; Macclesfield Corp. v. Chapman (1843), 12 M. & W. 18; Brecon Corp. v. Edwards (1862), 1 H. & C. 51; Penryn Corp. v. Best (1878), 3 Ex. D. 292; London City Corp. v. Low (1879), 28 W. R. 250; Manchester Corp. v. Lyons (1882), 22 Ch. D. 287.

**337.** ———.] — **DEVIZES CORPN. v. CLARK** (1835), 3 Ad. & El. 506; 111 E. R. 506.

**338.** ———.]—The grant of a market does not of itself imply a right in the grantee to prevent persons from selling marketable articles in their private shops, within the limits of the franchise, on market days. Such a right can exist only by immemorial custom.—**MACCLESFIELD CORPN. v. CHAPMAN** (1843), 12 M. & W. 18; 13 L. J. Ex. 32; 2 L. T. O. S. 103; 7 J. P. 707; 7 Jur. 1041; 152 E. R. 1093.

*Annotations*:—**Reid.** North & South Shields Ferry Co. v. Barker (1848), 2 Exch. 136; Pope v. Whalley (1865), 6 B. & S. 303; Fearon v. Mitchell (1872), L. R. 7 Q. B. 690; Penryn Corp. v. Best (1878), 3 Ex. D. 292; London City Corp. v. Low (1879), 28 W. R. 250; Manchester Corp. v. Lyons (1882), 22 Ch. D. 287; Wilcox v. Steel, [1904] 1 Ch. 212.

**339.** ——— **Or prescription.**]—The grant of a market, with the addition of the words with all liberties & free customs to such a market belonging, does not imply a right in the grantee to prevent persons selling marketable articles on market days within the limits of the franchise. Such a right may be gained by immemorial enjoyment or prescription.

Pltf. claimed to be entitled by prescription to a meat market within a borough, & as incident thereto they claimed the right to prevent butchers from selling meat in their own shops on market days within the limits of the franchise. The evidence was that from the time of living memory down to 1862 butchers who had shops in the borough closed them on market days, & resorted to the market & sold there, paying stallage: that in 1862 two butchers refused to do this, but on actions being brought submitted, & thenceforth paid toll for keeping their shops open on market days, & that deft. had paid a similar toll for some years before 1875, when he declined to continue the payment:—**Held**: the evidence was sufficient to support the claim to prevent the owners of shop from selling in them on market days.—**PENRYN CORPN. v. BEST** (1878), 3 Ex. D. 292; 48 L. J. Q. B. 103; 38 L. T. 805; 42 J. P. 629; 27 W. R. 126, C. A.

*Annotations*:—**Reid.** London City Corp. v. Low (1879), 28 W. R. 250; Manchester Corp. v. Lyons (1882), 22 Ch. D. 287; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140. **Mentd.** Heath v. Deane, [1905] 2 Ch. 86.

**340. Right to sell in shop or dwelling house—When accommodation insufficient.**]—**MOSLEY v. WALKER**, No. 91, *ante*.

**341.** ——— **Or erect stalls opposite—By custom.**] —**ELLIS v. BRIDGNORTH CORPN.**, No. 119, *ante*.

**342.** ——— **In vicinity of statutory market.**]—(1) Under the powers of an Act of 1844, the corp. of Manchester purchased the manorial rights of the manor of Manchester, which was co-extensive with one of the six townships included in the borough. Among these rights was an ancient franchise to hold a market, which appeared to have been a Saturday market. After this, by Manchester Market Act, 1846, the corp. were empowered to hold markets on such days as they should think fit at any places within the

arises from acts done outside the prescribed limit, or done on different days from those specified, a question of fact

arises, & proof must be adduced of actual disturbance by the persons sought to be made liable & of injury

to the rights of the patentee.—**DOWNSHIRE (MARQUIS) v. O'BRIEN** (1887), 19 R. Ir. 380.—



*Sect. 1.—What amounts to: Sub-sect. 3, E., F. & G. Sect. 2: Sub-sects. 1 & 2.]*

borough which they should appropriate as market places, & to charge any tolls not exceeding those mentioned in the schedule to the Act, which were higher than the old accustomed tolls, & to make certain charges for weighing which could not have been made under the old franchise:—*Held*: there being under the Act a change of time, a change of place, an alteration of the old charges, an imposition of new charges, & an extension of the market from the township to the borough, the effect of the Act was to give the corpn. new rights of holding markets in substitution for the old franchise, & the old franchise was extinguished.

(2) The corpn. brought an action to restrain defts. from selling eggs & dried fish on market days in their shop. The shop was situated in a street which adjoined one side of one of plths.' markets, & was on the opposite side of the street from, but not opposite to, the entrance from that street to the market. Defts. only sold their own goods in their shop in the ordinary course of business:—*Held*: this was no disturbance of the statutory right of market.—*MANCHESTER CORPN. v. LYONS* (1882), 22 Ch. D. 287; 47 L. T. 677, C. A.

*Annotations*:—As to (1) *Refd.* Abergavenny Improvement Comrs. v. Straker (1889), 42 Ch. D. 83; New Windsor Corpn. v. Taylor, [1899] A. C. 41; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140; Hailsham Cattle Market Co. v. Tolman, [1915] 1 Ch. 360. *Generally*, *Refd.* Birmingham Corpn. v. Foster (1894), 70 L. T. 371.

343. — Private sale yard set up by individuals.]—By virtue of a consolidating statute of 1883 the corpn. of Birmingham had the sole right to establish, & had in fact, a market for pigs. Under sect. 90 of this Act penalties were imposed upon any person selling or exposing for sale within the borough, any animals or articles, in respect of which tolls were authorised to be taken "except in some market or fair lawfully authorised, or in his own dwelling-place, shop, or place of business . . . or on any farm or land in his occupation." Defts. were an assocn. of six individuals who had set up within the borough a sale yard or private market for pigs, to which the public had access during market hours, & at which the pigs of anyone might be sold. In this sale yard there were common ways, & a common room provided for the frequenters of the market. All the sales of pigs were, however, effected through the individual members of the assocn., to whom alone the various stalls were let as yearly tenants; & a charge of 2d. had to be paid by them to the assocn. for every pig sold, whether on the premises or not. There was evidence that sales took place on portions of the yard not let to individual defts.:—*Held*: what defts. were doing as an assocn. & as individuals was not within the exceptions in the Act of 1883, but amounted to a disturbance of the market rights of plths., which must be restrained by an injunction.—*BIRMINGHAM CORPN. v. FOSTER* (1894), 70 L. T. 371; 10 T. L. R. 309; 38 Sol. Jo. 290.

*Annotation*:—*Refd.* Hailsham Cattle Market Co. v. Tolman, [1915] 1 Ch. 360.

— Exemption under statute.]—See Sect. 2, sub-sect. 5, A., *post*.

What is a shop.]—See Sect. 2, sub-sect. 5, A., *post*.

#### PART VII. SECT. 1, SUB-SECT. 3.—F.

344. Right to set up rival market.]—*CORK CORPN. v. SHINKWIN* (1825), Sm. & Bat. 395.—IR.

#### PART VII. SECT. 1, SUB-SECT. 3.—G.

1. Extorting illegal tolls or unreasonable

stallages.]—*CORK CORPN. v. SHINKWIN* (1825), Sm. & Bat. 395.—IR.

m. —.]—Although the taking of tolls on an animal not sold may be illegal, unless such tolls are demanded as stallage, still the levying of them cannot form a justification for setting up a rival market.—*MIDDLETON (LORD)*

#### F. Inadequacy of Accommodation.

344. Right to set up rival market.]—Essential to the complaint of an old market against a new one set up near it, that the old is competent to the accommodation of the public; so here the old proprietors must be able to keep it up properly; the accommodation of the public being the principal thing.—*Ex p. O'REILY* (1790), 1 Ves. 112; 30 E. R. 256.

*Annotation*:—*Mentd.* *Ex p. Ford* (1802), 7 Ves. 617.

345. —.]—*Re ISLINGTON MARKET BILL*, No. 352, *post*.

346. —.]—*GREAT EASTERN RY. Co. v. GOLD-SMID*, No. 18, *ante*.

347. Whether a defence to action for selling outside market.]—*PRINCE v. LEWIS*, No. 302, *ante*.

348. —.]—*MOSLEY v. WALKER*, No. 91, *ante*.

349. Market unsuitable for special purpose—Sale of unbroken ponies.]—*WILCOX v. STEEL*, No. 322, *ante*.

Duty to provide of adequate accommodation.]—See Part IV., Sect. 2, sub-sect. 2, *ante*.

#### G. Justification.

350. Long acquiescence in disturbance by owner.]—*HOLCROFT v. HEEL*, No. 29, *ante*.

351. —.]—*GREAT EASTERN RY. Co. v. GOLD-SMID*, No. 18, *ante*.

352. Grant from Crown—Existing market insufficient.]—Where a corpn. had held a market by prescription, & the Crown afterwards granted to the corpn. a charter with these words, "*quod nullum mercatum infra septem leucas in circuitu burgi predicti per nos vel hæredes nostros alieno concedatur*":—*Held*: (1) such prohibition, if it could be construed to extend beyond that which is attached by the common law to the grant of a market, was void; (2) the establishment of a new market, to be holden at the same times within the common law distance of the old market, was *prima facie* injurious to the latter, & therefore void; the convenience of the public would not, under such circumstances, justify the grant of a new market.

(3) Where the first charter purported to be granted "*de assensu prælatorum, comitum, etc., in instanti Parlamento convocato*," a new charter granted to hold a market within the prescribed distance would be void, & would be repealable by *sci. fa.* The words stated would have the effect of giving the first charter the authority of an Act of Parliament.

(4) Such a charter could only be repealed by Act of Parliament.

(5) If the market created by the first charter had not sufficient space for the accommodation of the public, & also, if part of the space originally allotted to it was employed or suffered by the grantee to be employed for other purposes, without his providing as convenient a place for the public to buy & sell in elsewhere within the limits of his grant, such circumstances would furnish a good defence to an action brought by him against any person for selling out of the market; they might also furnish ground for a *sci. fa.* to repeal the charter. *Qu.*: whether such circumstances would not render the grantee liable to an indict-

*v. POWER* (1886), 19 L. R. Ir. 1.—IR.

n. Holding market on illegal days.]—*CORK CORPN. v. SHINKWIN* (1825), Sm. & Bat. 395.—IR.

o. Abuse or neglect of franchise.]—Where the patentees of fairs remove them to any place within the precinct of their grant, if the accommodation

ment for a misdemeanour? If they would, an action would also lie against him for his default.

(6) While such grant remained unrepealed, no other market could be granted within the limited distance.

(7) If by the terms of the grant the market was to be held in a fixed place defined & known by metes & bounds, should those limits not be sufficient, & the owner of the market have no power to enlarge them, a new market might be granted to such an extent as to supply the deficiency, but no more.—*Re ISLINGTON MARKET BILL* (1835), 3 Cl. & Fin. 513; 12 M. & W. 20, n.; 6 E. R. 1530.

*Annotations* :—As to (2) *Reid*. Wilcox v. Steel, [1904] 1 Ch. 212; Morpeth Corp'n. v. Northumberland Farmers' Auction Mart Co., [1921] 2 Ch. 154. As to (3) *Reid*. Windsor Corp'n. v. Taylor (1898), 79 L. T. 450. As to (4) *Reid*. Manchester Corp'n. v. Peverley (1882), 22 Ch. D. 294, n. As to (5) *Reid*. G. E. Ry. v. Goldsmid (1884), 9 App. Cas. 927; Scott v. Glasgow Corp'n., [1899] A. C. 470; Gilling & Foskett v. Stepney B. C., [1906] 2 K. B. 468; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140. Generally, *Mentd*. Young v. Thank (1845), 6 L. T. O. S. 146; Newton v. Cubitt (1859), 5 C. B. N. S. 627; Ellis v. Bridgnorth Corp'n. (1863), 15 C. B. N. S. 52; Wortley v. Nottingham L. B. (1869), 33 J. P. 806; Hammerton v. Dysart, [1916] 1 A. C. 57.

**Inadequacy of accommodation.**—See Sub-sect. 2, F., *ante*.

## SECT. 2.—STATUTORY PROTECTION.

### SUB-SECT. 1.—AREA PROTECTED.

See Markets & Fairs Clauses Act, 1847 (c. 14), s. 13.

**353. What are the "prescribed limits"—Boundaries of borough—Markets & Fairs Clauses Act, 1847, (c. 14) s. 13.**—*CASWELL v. COOK*, No. 374, *post*.

**354. — District of urban authority—Public Health Act, 1875, c. 55, s. 166.**—*SPURLING v. BANTOFT*, No. 38, *ante*.

**355. "Town"—Addition of new streets—After local Act passed.**—By a local Act passed in 1822 it was enacted that no person should sell any fish within the "town" of R. except in the market places thereof, & that any person offending against this provision should forfeit a sum of money. In 1876 resp. sold fish in M. street, which then was a main thoroughfare of the town of R., but in 1882 its site was green fields; M. street was not within the market places of R.:—*Held*: the word "town," as used in the local Act, meant the collection of buildings from time to time called the town of R., & resp. had been guilty of an offence against that Act.—*COLLIER v. WORTH* (1876), 1 Ex. D. 464; 35 L. T. 345; 40 J. P. 808.

*Annotation* :—*Apld*. Killmister v. Fitton (1885), 53 L. T. 959.

**356. — — — — — Boundaries of borough subsequently extended by statute.**—By a local Act of 1822, s. 42, it is an offence punishable on summary conviction with a fine not exceeding £5 for any person to sell within "the town of Rochdale," other than within the limits of the market place there, except in the vendor's private dwelling-house or the shop any . . . vegetables or other marketable commodities or provisions, etc. Resp. sold a quantity of potatoes in a street or place within the present municipal & Parliamentary borough of Rochdale, about a mile from & not within the said market place. The limits of the town are not defined in the Act of 1822, nor has

any subsequent Act defined the meaning of the expression "town of Rochdale" as used in that Act; but since 1822 the town has increased, & is now, & for many years has been, a municipal & Parliamentary borough, the boundaries of which have been extended & defined by Royal Charter & various Acts of Parliament, & the borough as now existing was constituted by a local Act of 1872 by sect. 8 of which Act the boundaries of the town & borough were extended & made co-extensive with those of the Parliamentary borough as specified in the Boundary Act, 1868 (c. 46), & the provisions of the Act of 1872, & of various other Acts specified in sect. 8, & "of all other Acts at present applying to & in force in & in relation to the existing town & borough," were to "apply to & be in force & in relation to the borough." The street or place where the sale took place was an aggregation of about a dozen houses, & was within the extended boundaries; but prior to 1822 it was outside the then municipal borough, & though there were one or more detached houses here & there along the road leading from the market places to the spot in question, there was no continuous line of buildings on any part of the road.

The justices were of opinion that the prohibition in sect. 42 of the Act of 1822 was limited to the town as it existed in 1822, & that the spot in question was not within the "town of Rochdale" within the meaning of the Act, & that the extension of the borough for municipal purposes did not give a wider meaning to the expression "town of Rochdale" so as to extend the market rights to the extended borough, & the local Act of 1872 did not extend the provisions of any local Acts to the extended borough, but only applied all municipal & general Acts relating to sanitary & local government matters in the old borough to the extended borough; & they accordingly declined to convict resp. of an offence within that sect.:—*Held*: the justices were wrong in not convicting resp., inasmuch as the Act of 1822 must have contemplated a growing town, & the expression "town of Rochdale" in sect. 42 was intended to include not merely the then existing but the increasing town of coming years & that, under the Act of 1872, the provisions of the Act of 1822 apply to & are in force within the extended boundaries so as to make the "town of Rochdale" mentioned in the earlier Act comprise, for all the purposes of that Act, the whole of the municipal borough as constituted by the later Act of 1872.—*KILLMISTER v. FITTON* (1885), 53 L. T. 959, D. C.

**Common law distance.**—See Sect. 1, sub-sect. 3. B., *ante*.

### SUB-SECT. 2.—SALE.

**357. Sale—Must be complete—Negotiations begun in shop or dwelling-house—Bargain completed outside.**—*BROWNE v. SKINNER* (1871), 35 J. P. Jo. 100.

**358. Regular course of dealing—Delivery of goods to tradesman.**—Markets & Fairs Clauses Act, 1847 (c. 14), says "no one shall sell or expose to sale tollable articles within the limits of the market, except in his shop or house." A farmer

provided by them is inadequate or the change so injurious as to amount to an abuse of the franchise, the remedy of those injured is not the setting up of a rival fair.—*MIDLETON (LORD) v. POWER* (1886), 19 L. R. Ir. 1.—*IR*.

**PART VII. SECT. 2, SUB-SECT. 2.**  
p. Bulk of articles sold substantially within area at time of contract of sale.—*LONDONDERY CORPN. v. M'ELHINNEY* (1875), 1 R. 9 C. L. 61.—*IR*.

q. —.—A sale of goods on a market day "within the prescribed limits" of a town is not within 10 Vict. c. 14, s. 13, unless the bulk of the goods sold is, at the time of such sale, substantially "within the prescribed



**Sect. 4.—Mandamus: Sub-sect. 1, D., E., F. & G.]**

grounds of appeal had been given, but the sessions respited the appeal to the next Easter Sessions without prejudice to the right of resps. to renew their objection then. At the Easter Sessions resps. did renew their objection, & the justices refused to hear the appeal, on the ground that the sessions in Jan. had no power to respite:—*Held*: the Jan. sessions clearly had the power to respite the appeal, & had thought proper to exercise it; & the Easter Sessions having refused to hear the appeal on the ground that the Jan. sessions had no such power, the ct. granted a *mandamus*.—*R. v. LANCASHIRE JJ.* (1847), 2 New Mag. Cas. 289; 3 New Sess. Cas. 37; 17 L. J. M. C. 45; 11 Jur. 1085; 11 J. P. Jo. 820; *sub nom. R. v. LANCASHIRE JJ., BUTLEY v. ASHTON-UNDER-LYNE*, 2 Saund. & C. 153; 10 L. T. O. S. 138.

**1557. Justices having interest.]—***Ex p. HOPKINS*, No. 1447, *ante*.

**1558. No appeal given by statute.]—**No appeal lies against a refusal by justices to grant a billiard license under Gaming Act, 1845 (c. 109), s. 10.—*Ex p. CHAMBERLAIN* (1857), 8 E. & B. 644; 4 Jur. N. S. 477; 120 E. R. 240; *sub nom. R. v. DEVON JJ.*, 30 L. T. O. S. 150; 6 W. R. 75; 21 J. P. Jo. 773.

**1559. Appeal dismissed subject to case—Applicants not having brought up case.]—**Where quarter sessions have dismissed an appeal upon a point of practice, subject to a case, which applts. for the case have not brought up, this ct. will not, at their instance, grant a *mandamus* to enter continuances & hear the appeal.—*R. v. WEST RIDING JJ.* (1834), 1 Ad. & El. 606; 3 Nev. & M. K. B. 757; 2 Nev. & M. M. C. 389; 110 E. R. 1339.

*Annotation*:—*Apld. R. v. Suffolk JJ.* (1837), 6 Ad. & El. 109.

**1560. — Death of recorder before stating.]—**Where the recorder of a city, who had heard an appeal against the poor rate & provisionally dismissed the appeal subject to a case for the High Ct., which he consented to state, died before stating the case, the ct. granted a *mandamus* to the newly appointed recorder to enter continuances & hear the appeal.—*LIVERPOOL CORPN. v. WEST DERBY UNION* (1904), as reported in 3 L. G. R. 647, D. C.

*Annotation*:—*Mentd. Hornsey School of Art v. Edmonton Union* (1905), 94 L. T. 203.

**E. Rejection or Refusal of Evidence.**

**1561. Refusal to hear further evidence—Prefaced by irregular observations.]—**The Ct. of K. B. has no jurisdiction to review the judgment of quarter sessions, except on a case sent up for their consideration; & therefore, where sessions, having heard the witnesses on one side, had refused to hear those on the other side in an appeal, on the ground that their testimony had been prefaced by observations on the part of the advocate contrary to their usual practice, the ct. refused to grant a *mandamus* to rehear the appeal.—*R. v. CARNARVON JJ.* (1820), 4 B. & Ald. 86; 106 E. R. 870.

*Annotations*:—*Distd. R. v. Cumberland JJ.* (1836), 4 Ad. & El. 695. *Consd. Ex p. Pratt* (1837), 2 Nev. & P. K. B. 102. *Refd. R. v. Lancashire JJ., Re Mann v. Johnson* (1874), 29 L. T. 886; *R. v. Offlow General Income Tax Comrs.* (1911), 27 T. L. R. 353. *Mentd. R. v. Canterbury (Archbp.)* (1848), 11 Q. B. 483.

**1562. — Decision on question of law.]—**Sessions refused to hear any further evidence. On application to this ct. for a *mandamus*:—*Held*: the dismissal of the appeal was not a declining of jurisdiction, but a decision upon the hearing of the appeal; & this ct. would not issue a *mandamus* even if the construction put upon

the act were wrong.—*R. v. LIVERPOOL RECORDER* (1850), 1 L. M. & P. 682; 4 New Sess. Cas. 403; 20 L. J. M. C. 35; 16 L. T. O. S. 198; 14 J. P. 801.

*Annotation*:—*Refd. R. v. Mills* (1851), 15 J. P. 435.

**1563. Rejection of particular evidence.]—**Deft. having been convicted of forcibly passing a turnpike gate without paying toll, sessions, on appeal, rejected evidence to show that the gate had been unlawfully erected, & this ct. refused a *mandamus* to compel sessions to receive such evidence, the admissibility of it being exclusively a question for the justices; & the ct. also refused to issue a *mandamus* to sessions to hear an original complaint, touching the conduct of the trustees in the erection of the gate after a lapse of twenty six-years, from the time when it was erected, leaving the party to proceed by indictment for the nuisance, or by an action of trespass if his passage was obstructed.—*R. v. CAMBRIDGESHIRE JJ.* (1822), 1 Dow. & Ry. K. B. 325; 1 Dow. & Ry. M. C. 86.

*Annotations*:—*Refd. R. v. Grant* (1849), 13 Jur. 1026; *R. v. Offlow General Income Tax Comrs.* (1911), 27 T. L. R. 353.

**1564. —.]—***R. v. FRIESTON (INHABITANTS)*, No. 1500, *ante*.

**1565. —.]—**Where an inferior ct. declines to exercise a jurisdiction imposed on it by law, the ct. will, by *mandamus*, enforce its proceeding; but when it has acted, its judgment can only be reversed in the ct. on a case stated for its opinion. Therefore, where sessions refused to hear evidence on an appeal on the ground that the examinations were deficient in particularity the ct. refused a *mandamus* to compel them.—*R. v. WEST RIDING JJ.* (1844), 1 New Sess. Cas. 247; 3 L. T. O. S. 180; 8 J. P. 662.

**1566. — Though erroneous.]—**Where the sessions in an appeal from a conviction refuse, though mistakenly, to hear certain evidence tendered by applt., the Ct. of K. B. will not grant a *mandamus* to compel the justices to re-hear.

The case amounts to no more than this, that sessions had made a mistake in point of law, & this ct. had no power to correct them. The *certiorari* having been taken away, there was no power in this ct. to review their decision. They had heard the appeal, & decided it; & their decision must be final (LORD DENMAN, C.J.).—*R. v. BERKSHIRE JJ.* (1837), 6 L. J. M. C. 156; 1 J. P. 156; 1 Jur. 380.

*Annotation*:—*Mentd. R. v. York JJ.* (1837), 1 Jur. 867.

**1567. Refusal to hear any evidence—Previous decision in exactly similar case.]—***R. v. WORCESTERSHIRE JJ.*, No. 1496, *ante*.

**1568. —.]—**A mistake as to date had been made in the copy of an order of removal served on applts., who entered an appeal against it. A correct copy was afterwards served, & a return of the former requested by resps.; applts. however, refused to return it, & entered a second appeal. Sessions heard & quashed the first appeal, but refused to hear the second, on the ground that it was in fact the same as the one already decided:—*Held*: sessions were not justified in such refusal, & a *mandamus* was granted to compel them to enter continuances & hear the second appeal.—*R. v. CORNWALL JJ.* (1844), 5 Q. B. 9, n.; 1 New Sess. Cas. 314; 8 J. P. Jo. 439; 114 E. R. 1150; *previous proceedings*, 1 New Sess. Cas. 161 a.

*Annotation*:—*Refd. R. v. Glamorganshire JJ.* (1846), 10 J. P. 617.

**1569. —.]—**After the licensed tenant had gone out of occupation & before the license expired, H., as a new tenant, applied to the general

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living without the limits used to send all his butter to a shop within the limits in a course of dealing, being allowed the market price for the same:—*Held*: this was not a selling by the farmer within the limits within Markets & Fairs Clauses Act, 1847 (c. 14), s. 13.—*STRETCH v. WHITE* (1861), 25 J. P. 485.

*Annotations*:—*Consd. Jenkins v. Thomas* (1910), 104 L. T. 74. *Folld. Lambert v. Rowe*, [1914] 1 K. B. 38. *Mentd. Pletts v. Campbell*, [1895] 2 Q. B. 229.

*Compare* No. 366, *post*.

**359. — Offer of goods to tradesman—Purchase by tradesman.**—*HART v. BOUCHER*, No. 367, *post*.

*Compare* Nos. 368, 369, *post*.

**360. Sale made outside limits of market—Delivery made within.**—The sale of an article liable to toll within a town under Markets & Fairs Clauses Act, 1847 (c. 14), is not a sale within sect. 13, if the sale be without, although the delivery be within, the limits under the Act.—*BOURNE v. LOWNDES* (1858), 31 L. T. O. S. 114; 22 J. P. 354.

*Annotation*:—*Expld. Lambert v. Rowe*, [1914] 1 K. B. 38.

**361. — — — — —**—A farmer at his own dwelling-house agreed to sell to a butcher two specific pigs at a certain price per score. By the terms of the contract the pigs were to be killed & delivered by the seller, & were to be at his risk until delivery. A few days later he killed & delivered the pigs at the purchaser's shop, which was within the marked limits. Dead pigs were tollable articles:—*Held*: the word "sell" in Markets & Fairs Clauses Act, 1847 (c. 14), s. 13 is to be understood in a popular & not its strict legal sense; for the purpose of that sect. the pigs were sold where the agreement was made, notwithstanding that the property did not then pass; & the seller had consequently not committed an offence within the sect.—*LAMBERT v. ROWE*, [1914] 1 K. B. 38; 83 L. J. K. B. 274; 109 L. T. 939; 78 J. P. 20; 12 L. G. R. 68; 23 Cox, C. C. 696, D. C.

*Annotation*:—*Mentd. Re Anglo Russian Merchant Traders & Batt* (London), [1917] 2 K. B. 679.

**362. Sale made within limits of market—Subsequent delivery within.**—Resp. was charged before the magistrates of the city of E. for having infringed a private Act, which composed a fine on any person selling, offering, or exposing for sale any carcasses or meat within the limits of the city & county of E., except within the markets. It was proved on Jan. 12, 1877, resp. delivered certain carcasses at a door within the limits, & that the carcasses were then weighed & paid for, but it was alleged that they were delivered in pursuance of a previous contract, entered into between the same parties at the same place on Jan. 5. The summons was taken out for Jan. 12, & the magistrates found that there had been a previous sale & purchase on Jan. 5:—*Held*: they should have convicted applt. on the above facts, & if they had thought it necessary, they should have amended the summons by altering the date on which the offence was alleged to have been committed from Jan. 12 to Jan. 5.—*EXETER CORPN. v. HEAMAN* (1877), 37 L. T. 534; 42 J. P. 503, D. C.

*Annotations*:—*Folld. Torquay Market Co. v. Burrigge, Same v. Middleton* (1883), 48 J. P. 71. *Distd. Lambert v. Rowe*, [1914] 1 K. B. 38.

**363. — — — — —**—A greengrocer within the limits of the T. market used to order vegetables from B., a farmer outside, & paid monthly. B. was charged with selling marketable goods without paying toll:—*Held*: B. was liable to pay the tolls.—*TORQUAY MARKET CO. v. BURRIDGE, SAME v. MIDDLETON* (1883), 48 J. P. 71, D. C.

*Annotations*:—*Consd. Lambert v. Rowe*, [1914] 1 K. B. 38. *Refd. Jenkins v. Thomas* (1910), 104 L. T. 74.

**364. — Sale by sample—To shopkeeper on market day.**—*BRECON CORPN. v. EDWARDS*, No. 305, *ante*.

—*See, generally*, Nos. 204–209, *ante*.

**SUB-SECT. 3.—EXPOSURE FOR SALE.**

*See* Markets & Fairs Clauses Act, 1847 (c. 14), s. 13.

**365. What amounts to—Exposing stallion to view—Toll imposed by local Act.**—A market Act enacted that no person should sell or expose to sale in a certain district, except in the market place, any provisions or other goods mentioned in schedule F. Schedule F., amongst other things, contained this item; "For every stallion exposed to view, one shilling":—*Held*: the sect. of the statute did not incorporate those words of Schedule F., so as to make it an offence to expose to view a stallion within the district, for the sect. applied only to "exposing to sale."—*LUKE v. CHARLES* (1861), 25 J. P. 148.

**366. — Delivery to regular customer—Bread.**—A baker living outside the limits of a borough, who in a mutual course of dealing, delivers bread to his customers within the borough from a cart three days in the week, is not guilty of the offence of exposing for sale an article in respect of which tolls are authorised to be taken within prescribed limits.—*WHITE v. YEOVIL CORPN.* (1892), 61 L. J. M. C. 213, D. C.

*Compare* No. 358, *ante*.

**367. — Offer to regular customer—Course of dealing.**—B., residing out of the limits of a local market, used to send butter to a customer [a retailer] within the limits of the market on a course of dealing, whereby the latter took as much as he pleased at the price, fixed, by B.:—*Held*: this was not a selling or exposing to sale by B. within the limits of the market, so as to make him liable to the penalty under Markets & Fairs Clauses Act, 1847 (c. 14), s. 13.—*HART v. BOUCHER* (1862), 26 J. P. 215.

**368. — — — — —**—Pltfs. were authorised by a local Act to collect a toll "for every cart use by any person for exposing or in which shall be exposed for sale any article," etc. An aerated water dealer was in the habit of sending round a cart loaded with aerated waters to the houses of his customers. The man in charge of the cart entered the house of the customer, took his order, & there & then delivered from the cart the goods ordered:—*Held*: the goods were not exposed for sale within the meaning of the local Act, & no toll was therefore chargeable in respect of the cart.—*NEWTON-IN-MAKERFIELD URBAN COUNCIL v. LYON* (1900), 69 L. J. Q. B. 230; 81 L. T. 756; 48 W. R. 222; 44 Sol. Jo. 176, D. C.

*Annotations*:—*Folld. Philpott v. Allright* (1906), 94 L. T. 540. *Refd. Jenkins v. Thomas* (1910), 9 L. G. R. 321.

**369. — — — — —**—By a bye-law of the borough D., "every person or persons who shall hawk or

limits."—*NEWTOWNARDS TOWN COMRS.* (1877), L. R. 11 C. L.

F. — — — — —*GRACEY v. BANBRIDGE URBAN DISTRICT COUNCIL*, [1906] 2 L. R. 209.—*IR.*

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t. *What amounts to.*—*WEBBER v. ADAMS* (1869), L. R. 5 C. L. 146.—*IR.*



expose about the town for sale" certain articles should pay a toll. *Resp.*, who was in the employ of a manufacturer of mineral waters at R., brought into the borough of D. a van laden with mineral waters. He called at the houses & shops of regular customers to sell & deliver to them any mineral waters they might require. The goods were not cried in the streets, & no effort was made to attract casual customers:—*Held*: *resp.* had not hawked or exposed about the town for sale the mineral waters, within the meaning of the bye-law.

I do not think we are assisted in the least by the definition in *Hawkers Act*, 1888 (c. 33) (*LAWRENCE, J.*).—*PHILPOTT v. ALLRIGHT* (1906), 94 L. T. 540; 70 J. P. 287; 4 L. G. R. 1013; 21 Cox, C. C. 128, D. C.

#### SUB-SECT. 4.—ARTICLES UPON WHICH TOLL IMPOSED.

See *Markets & Fairs Clauses Act*, 1847 (c. 14), s. 13.

**370. Article—Horse.]**—*LLANDAFF & CANTON DISTRICT MARKET CO. v. LYNDON*, No. 380, *post*.

**371. "Article, commodity or thing"—Coal.]**—A local Act imposed a penalty upon any person selling or exposing for sale out of the market place any article in respect of the sale or exposure for sale whereof in the market place a licence was required, & amongst the articles for the sale of which a licence was so required was "every cart-load of hay, straw, grass, vetches, or other article, commodity, or thing, exposed for public sale, if drawn by one horse:—*Held*: coal does not come within the words in this clause "other article, commodity, or thing," & a person selling or exposing coal for sale outside the market place does not require a licence.—*JOHNSON v. ATKINSON* (1909), 101 L. T. 637; 73 J. P. 510; 7 L. G. R. 1134, D. C.

**372. "Marketable commodity"—Gingerade.]**—A local improvement Act prohibited persons selling elsewhere than in the market any meat, fish, vegetable, fruit, butter, cheese, or other marketable commodities, goods, wares, or merchandise. M., a servant of the manufacturer, sold gingerade in bottles from a waggon elsewhere than in the market:—*Held*: gingerade did not come within the description of marketable commodities mentioned in such enactment.—*MORGAN v. KINGDON* (1875), 39 J. P. 471.

**373. "Provisions"—Potatoes.]**—The T. Market Act prohibited the selling within certain limits of the market corn, grain, meat, fish, poultry, or other provisions, or any bulls, sheep, swine, or other live cattle which are usually sold in public markets:—*Held*: a shopkeeper selling potatoes came within the statute, these being "provisions," & also "usually sold within market."—*SHEPHERD v. FOLLAND* (1884), 49 J. P. 165, D. C.

**374. Toll not payable on article—Toll on stall—Sale from door to door.]**—*Markets & Fairs Clauses Act*, 1847 (c. 14), s. 13 enacts that, "after the market place is open for public use, every person, other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market," shall forfeit 40s. A local Act enacted that "the

local board & their lessees may from time to time demand & take from any person occupying or using any shop, stall, stand, bench, or ground space in any market place for the time being under the management of the local board, & used as a general market, such tolls as the local board or their lessees from time to time appoint, not exceeding the several tolls specified in the schedule A. to the Act annexed:" & the schedule in terms imposed the "toll" on the occupier of "every shop, stall, or ground space" in the market, & not upon the commodities sold or exposed for sale there:—*Held*: (1) a person who sold fruit & fish which are marketable articles, from door to door within the prescribed limits, did not thereby become liable to the penalty imposed by sect. 13 of the general Act; (2) the "prescribed limits" meant the limits to which the local Act applied, viz. the boundaries of the borough.—*CASWELL v. COOK* (1862), 11 C. B. N. S. 637; 27 J. P. 183; 142 E. R. 945; *sub nom.* *CASWELL v. COOK*, 31 L. J. M. C. 185.

*Annotation*:—As to (1) *Consd. Jenkins v. Thomas* (1910), 104 L. T. 74.

**375. —Toll on cart—Whether sale subject to toll.]**—By a table of tolls of a certain market there was to be a toll "for every cart containing milk, fish or other goods, provisions, marketable commodities, or articles, 6d." *Resp.* sold milk from a cart within the prescribed limits, & was summoned under *Markets & Fairs Clauses Act*, 1847 (c. 14), s. 13 which was incorporated in the local Act, for unlawfully selling within the prescribed limits, milk in respect of which toll was duly authorised to be taken in the market:—*Held*: the toll was a toll on every cart containing milk & not on the sale of milk, & *resp.* could not be convicted for unlawfully selling milk within the prescribed limits.—*JENKINS v. THOMAS* (1910), 104 L. T. 74; 75 J. P. 87; 9 L. G. R. 321, D. C.

**376. Unauthorised sale by agent—Liability of principal.]**—By a market Act it was provided: "For preventing any encroachments . . . on the said market, be it further enacted . . . that it shall not be lawful . . . to vend or expose to sale any . . . meat . . . in any shop . . . & every person who shall so vend or expose to sale" such meat on conviction shall forfeit £5 to be recovered by distress, & in default of distress imprisonment could be inflicted. *Resp.*, who had only a pork licence for his shop, brought some sheep carcasses to such shop for storage, intending to remove them to his stall in the market next morning. His wife, contrary to his instructions, & without his knowledge or authority express or implied, sold some of the mutton to a customer at the shop:—*Held*: *resp.* was not liable to the penalty.—*WAKE v. DYER* (1911), 104 L. T. 448; 75 J. P. 210; 9 L. G. R. 348; 22 Cox, C. C. 413, D. C.

*Annotation*:—*Reid. Public Prosecutions Director v. Witkowski* (1911), 104 L. T. 453.

See, generally, *CRIMINAL LAW*, Vol. XIV., pp. 40 et seq.

#### SUB-SECT. 5.—EXEMPTIONS.

##### A. Sales in Shops or Dwelling-Place.

See *Markets & Fairs Clauses Act*, 1847 (c. 14), s. 13.

**377. What court may consider.]**—Upon an information, under *Markets & Fairs Clauses Act*, 1847 (c. 14), s. 13, the justices of W. decided that

#### PART VII. SECT. 2, SUB-SECT. 4.

a. *Milk.*—*QUILLIGAN v. LIMERICK MARKET (TRUSTEES)* (1884), 14 L. R. Ir. 265.—IR.

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a certain structure was not a "shop" within the meaning of the sect., because: (a) It was not of a stable & substantial character; (b) It was merely a stall, altered to evade this Act; (c) Though it was possible for a customer to go inside to purchase, yet, from its size & arrangement, it was obviously intended that the seller should stand inside, & the buyer outside. (d) It did not afford protection from rain, & goods could not be safely left there at night:—*Held*: though no one of these reasons was singly conclusive, yet the justices rightly considered them all as material elements in the case, & the terms for which the premises were let was also an element to be considered. *Semble*: the word "shop" means a place fit, not only for the sale, but also for the storing of articles, according to the nature of the business there carried on; but where, from such a cause as the perishable nature of the articles, room for storing is not required, this definition does not hold.—*POPE v. WHALLEY* (1865), 6 B. & S. 303; 5 New Rep. 323; 34 L. J. M. C. 76; 11 L. T. 769; 29 J. P. 134; 11 Jur. N. S. 444; 13 W. R. 402; 122 E. R. 1208.

*Annotations*:—*Appld.* G. E. Ry. v. Goldsmid (1884), 9 App. Cas. 927; *Haynes v. Ford*, [1911] 2 Ch. 237. *Refd.* *Fearon v. Mitchell* (1872), L. R. 7 Q. B. 690; *Manchester Corpn. v. Lyons* (1882), 47 L. T. 677; *Pike v. Jones* (1922), 128 L. T. 373.

**378. Sale must be completed in house.]**—*BROWNE v. SKINNER* (1871), 35 J. P. Jo. 100.

**379. Shop must be adapted for & used for storage of goods.]**—*POPE v. WHALLEY*, No. 377, *ante*.

*See, also*, No. 384, *post*.

**380. Yard attached to dwelling-house of another person.]**—A local Act enacted that every person who "shall sell or expose for sale, at any place within the limits of the Act, other than in his own dwelling-house, or in any shop attached to & being part of any dwelling-house, any article in respect of which tolls are by this act authorised to be taken," shall forfeit & pay any sum not exceeding 40s. By a schedule to the Act a toll was imposed on horses:—*Held*: (1) a horse was an "article" within the above sect.; (2) a sale by auction of horses by A., a licensed auctioneer, in a yard attached to the dwelling-house of B., within the district, was an offence against the Act.—*LLAN-DAFF & CANTON DISTRICT MARKET CO. v. LYNDON* (1860), 8 C. B. N. S. 515; 30 L. J. M. C. 105; 2 L. T. 771; 25 J. P. 295; 6 Jur. N. S. 1344; 8 W. R. 693; 141 E. R. 1267.

**381. Shop attached to dwelling-house of another person.]**—*WILTSHIRE v. WILLET*, No. 392, *post*.

**382. Vessel moored to side of wharf.]**—A local Act enacted that "every person who shall sell or expose for sale at any place within the limits of this Act, other than in any existing market place, or the market house & market places to be established under this Act, or in his own dwelling-house, or in any shop attached to & being part of any dwelling-house any article in respect of which tolls are by this Act authorised to be taken, other than eggs, butter, & fruit, shall forfeit 40s." :—*Held*: a vessel moored to a wharf on the old canal within the limits was not a "shop" within the exemption.—*WILTSHIRE v. BAKER* (1861), 11 C. B. N. S. 237; 31 L. J. M. C. 10, n.; 5 L. T. 355; 10 W. R. 89; 142 E. R. 787.

**383. Temporary stall.]**—*POPE v. WHALLEY*, No. 377, *ante*.

**384. —.]**—*Resp.* was the occupier of a stall standing on vacant land in the borough of Bolton.

The stall was open for part of the day only, & *resp.* removed the unsold goods each evening when he closed the stall. *Resp.* was not the holder of a licence as hawker, auctioneer, or otherwise, & he was summoned for exposing cheese for sale on the stall without a licence contrary to a local Act, which provided that "every person, other than a licenced hawker or auctioneer, who shall sell or expose or offer for sale in any place in the borough, except in his own dwelling-house or shop, or in a place appointed by the corpn. a public market place, any marketable commodity, except fresh eggs, butter, & milk, shall for every such offence be liable to a penalty." The justices dismissed the information on the ground that *resp.* kept a "shop":—*Held*: as the object of the Act was to prevent the setting up of a market which would be a rival to the corpn. market, the stall was not a "shop" within the meaning of the Act, & the justices ought to have convicted *resp.*—*PIKE v. JONES* (1922), 128 L. T. 373; 87 J. P. 36; 20 L. G. R. 798; 27 Cox, C. C. 370, D. C.

**385. Shed adjoining & fixed to house.]**—By Markets & Fairs Clauses Act, 1847 (c. 14), s. 13, after the market place is open for public use, every person, other than a licenced hawker, who shall sell, or expose for sale, in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are authorised to be taken in the market, is made liable to a penalty not exceeding 40s. *Applt.* was the tenant of a dwelling-house & shop & a piece of ground in front of the shop, in the town of B.; there was a wooden shed affixed to the house, & supported on wooden posts, which had been erected over the piece of ground for eighteen years, & previous to the erection of the shed stone flags had been built into & formed part of the house, which projected 3 feet from the house, & these flags helped to support the wooden shed. *Applt.* after a market had been opened for the town, exposed potatoes & other vegetables for sale outside his house & shop, upon the piece of ground & beneath the wooden shed, & was convicted by justices on an information charging that he had contravened the above sect. On a case stating the above facts:—*Held*: the facts showed that the shed was part of the *applt.*'s dwelling-place or shop, & the justices were wrong in convicting him.—*ASHWORTH v. HEYWORTH* (1869), L. R. 4 Q. B. 316; 10 B. & S. 309; 38 L. J. M. C. 91; 20 L. T. 439; 33 J. P. 565; 17 W. R. 668.

*Annotations*:—*Refd.* *Wilson v. Cunliffe* (1874), 29 L. T. 913; *Manchester Corpn. v. Lyons* (1882), 47 L. T. 677.

**386. Large hall separated from dwelling by yard.]**—*FEARON v. MITCHELL*, No. 39, *ante*.

**387. Pen behind inn.]**—*P.* sold to dealers & others pigs in a pen within the yard at the back of the Swan Inn, being allowed to do so by the landlord. The place was within the limits of the local market, & the local Act prohibited all persons publicly exposing for sale animals, etc., except in, upon, or in front of the seller's house, shop, or premises:—*Held*: there was an exposing for sale, & the pen was not a house, shop, or premises within the meaning of the proviso.—*PERKINS v. ARBER* (1873), 37 J. P. 406.

**388. Sale yard adjoining dwelling-house.]**—*Applt.* was convicted under a local Act in similar language to Markets & Fairs Clauses Act, 1847 (c. 14), s. 13, which prohibits a person from selling or exposing for sale within the limits of a market articles for which tolls are authorised to be taken, except in his dwelling-place or shop. *Applt.* resided in a street within the limits, & occupied a



large yard adjoining his residence, in which were sheds & other places for sale of cattle & sheep, & he exposed there for sale two hundred sheep. The entrance to the yard was from the street through double doors. After passing through the doors there is a place about 30 feet by 20 feet, covered in by beams & flooring. Applt. resided in a small house, supported by pillars on either side of this place, the floor of his house forming the ceiling of this under space; the yard extended further back without a ceiling, to about 158 feet from the doors. There were stairs from the dwelling-house down into the covered space, & this was the communication between the yard & sheds & the house:—*Held*: the yard & sheds were not the dwelling-place or shop of applt., & he was rightly convicted.—*McHOLE v. DAVIES* (1875), 1 Q. B. D. 59; 45 L. J. M. C. 30; 33 L. T. 502; 40 J. P. 548; 24 W. R. 343.

*Annotations*:—*Refd.* *Wright v. Wallasey L. B.* (1887), 18 Q. B. D. 783; *Clayton v. Le Roy*, [1911] 2 K.B. 1031.

**389. Skittle alley of inn hired for two days.**—By a local Act, which incorporated the provisions of the Markets & Fairs Clauses Act, 1847 (c. 14) any person not licenced was prohibited under a penalty from selling or exposing for sale manufactured goods “in any open place within the limits of the market, except in his own dwelling-place or shop.” Resp. who had no licence, sold & exposed for sale manufactured goods in the skittle alley of an inn, rented for that purpose from the landlord, & within the prescribed limits. The alley was under cover & connected with the house; the goods were ranged on a table near to which resp. stood:—*Held*: such place was an “open place” & not a “shop,” within the meaning of the local Act.—*HOOPER v. KENSHOLE* (1877), 2 Q. B. D. 127; 46 L. J. M. C. 160; 36 L. T. 111; 41 J. P. 182; 25 W. R. 368.

*Annotation*:—*Refd.* *Wright v. Wallasey L. B.* (1887), 18 Q. B. D. 783.

**390. Large wholesale warehouse—Used for sales on commission.**—The Southwark Borough market was founded by a local Act, & by an amending Act it was provided that if any poulterer, country chapman, victualler, gardener, fruiterer, fish-seller, or any other person, should sell or expose for sale by way of hawking or otherwise any poultry, fish, fruit, herbs, oatmeal, or other victuals or provision whatsoever, in any private house, lane, alley, inn, warehouse, street, stall, common passage, or other place whatsoever, within 1,000 yards of the market, but only in his own shop or shops, or in the public market place, he should be liable to a penalty. In modern times the market had become a fruit & vegetable market only, & the business carried on there was wholesale. A former salesman at the market obtained a lease of a large four storeyed building fronting the market. He used the ground floor for the sale of fruit & vegetables, the second & third floors for the storage of goods intended for immediate sale & for the ripening of bananas, & the fourth floor for domestic purposes. The business which he carried on on these premises was a wholesale business, & he sold goods on commission as well as goods of his own. In an action by the market authorities for an injunction to restrain him from carrying on this business:—*Held*: deft. was carrying on business in his own shop within the meaning of the Act & the action failed.—*HAYNES v. FORD*, [1911] 2 Ch. 237; 80 L. J. Ch. 490; 104 L. T. 696; 75 J. P. 401; 27 T. L. R. 416; 9 L. G. R. 702, C. A.

*Annotation*:—*Apld.* *Hallsham Cattle Market Co. v. Tolman*, [1915] 2 Ch. 1.

**391. “Immediately in front” of shop, dwelling-house—Footpath between stall & house.**—*R. v. DURHAM MARKET CO.* (1857), 29 L. T. O. S. 247; 21 J. P. Jo. 452.

**392. Whether mode of sale material—Sale by auction.**—A local market Act imposed a penalty on “every person who shall sell or expose for sale at any place within the limits of the Act, other than in an existing market place, etc., or in his own dwelling-house, or in any shop attached to & being part of any dwelling-house, any article in respect of which tolls are by the act authorised to be taken,” etc. Markets & Fairs Clauses Act, 1847 (c. 14), incorporated in the local Act, except so far as it is expressly varied thereby, by sect. 13, imposes a penalty on any one “who shall sell, etc., except in his own dwelling-house or shop,” & is therefore varied as above by the local Act. Resp. sold goods by auction in a room in a house which was not his own dwelling-house:—*Held*: he was within the exemption of the local Act, the evidence being that the room was a “shop”; & it made no difference that the sale was a sale by auction.

If it was a shop, the mode of selling therein cannot deprive it of the ordinary privilege attached to a shop (*BYLES, J.*).—*WILTSHIRE v. WILLETT* (1861), 11 C. B. N. S. 240; 31 L. J. M. C. 8; 5 L. T. 355; 26 J. P. 312; 10 W. R. 44; 142 E. R. 788.

*Annotations*:—*Consd.* *Clayton v. Le Roy*, [1911] 2 K. B. 1031. *Refd.* *Hallsham Cattle Market Co. v. Tolman*, [1915] 1 Ch. 360.

#### *B. Sales on Premises in Occupation of Seller.*

**393. Exemption acquired by prescription—Whether exemption extends to new premises—On removal of market.**—*LONDON CORPN. v. LOW*, No. 329, *ante*.

**394. Exemption by local Act—Sale by auctioneer in field.**—*RUTHERFORD v. STRAKER* (1887), 42 Ch. D. 85, n.; 58 L. J. Ch. 718, n.; 60 L. T. 756, n., D. C.; *subsequent proceedings, sub nom.* *ABERGAVERNNEY IMPROVEMENT COMRS. v. STRAKER* (1889), 42 Ch. D. 83.

*Annotation*:—*Refd.* *Hallsham Cattle Market Co. v. Tolman* (1915), 113 L. T. 254.

**395. ———.**—(1) The Comrs. of a town were by their Act incorporating the Markets & Fairs Clauses Act, 1847 (c. 14), empowered to set up a market and take tolls for articles sold therein. Sect. 47 of the local Act imposed tolls on all persons selling except on premises in their own occupation. Markets & Fairs Clauses Act, 1847 (c. 14), s. 13, imposes penalties on all persons selling except in their own dwellings or shops:—*Held*: an auctioneer holding sales on a field in his own occupation could not be sued for disturbance of the market, though apart from the special Act that mode of sale would have been a disturbance of an ancient market.

(2) Where the privileges of a market have been enlarged by statute, the common law rights in respect of the market as an ancient market are gone, & its privileges are those of a modern market, as conferred by the statutory provisions. Where, therefore, upon the construction of the statutes authorising & regulating a market, the owner of land adjoining the market was not liable either for tolls or penalties for holding a rival market upon that land:—*Held*: the owners of the statutory market could not maintain an action for disturbance of their market by the adjoining owner but, on the other hand, must be restrained from interfering with his market by attempting to exact tolls from persons using the same.

**Sect. 2.—Statutory protection: Sub-sect. 5, B. & C.**  
**Sect. 3: Sub-sects. 1 & 2. Part VIII. Sect. 1:**  
**Sub-sect. 1.]**

(3) *Qu.*: whether, when the Acts regulating the statutory market give a remedy by distress in respect of the tolls & penalties imposed by the Acts, but confer no express remedy for disturbances of the market, an action for disturbance will lie.—**ABERGAVENNY IMPROVEMENT COMRS. v. STRAKER** (1889), 42 Ch. D. 83; 58 L. J. Ch. 717; 60 L. T. 756; 38 W. R. 158.

*Annotation*:—*As to* (2) **Consd. Hailsham Cattle Market Co. v. Tolman** (1915), 113 L. T. 254.

**396. — Sale by auctioneer in building.]—**Pltf. co., which was incorporated under 25 & 26 Vict. c. 89, was empowered by a private Act to hold a cattle market at a certain town on every alternate Wednesday throughout the year. In 1914 deft. acquired land, & occupied the same within the limits over which pltf. co.'s rights extended, & he erected thereon buildings which were used for cattle & other animals, in respect of which tolls were payable when sold in pltf. co.'s market & for selling purposes. Deft. held auction sales of such cattle & other animals every third Tuesday:—*Held*: the acts of deft. being confined to excepted land—that was to say, land belonging to him or in his occupation within the meaning of sect. 42 of the private Act—& the same being on days other than market days, pltf. were not entitled to an injunction restraining him from establishing a market on such land.—**HAILSHAM CATTLE MARKET CO. v. TOLMAN**, [1915] 2 Ch. 1; 84 L. J. Ch. 607; 113 L. T. 254; 79 J. P. 420; 31 T. L. R. 401; 59 Sol. Jo. 493; 13 L. G. R. 926, C. A.

*See, also*, No. 392, *ante*.

**397. — Sale by commission.]—HAYNES v. FORD**, No. 390, *ante*.

*C. Sales by Hawkers and Pedlars.*

*See Part XI., post.*

### SECT. 3.—REMEDIES.

#### SUB-SECT. 1.—APART FROM STATUTE.

**398. Trespass—For wrongful collection of toll.]—****DE CHAUNCE v. DE TWENGE & DE ROS** (1337), Y. B. (Rolls Series) 11 Edw. 3, p. 38.

**399. — Obstruction of persons frequenting market.]—DENESHAM'S (ABBOT) CASE** (1355), Y. B. 29 Edw. 3, fo. 18 B.

*Annotations*:—*Reid*. **Keble v. Hickeringell** (1707), Kel. W. 273; **Allen v. Flood**, [1898] A. C. 1.

**400. — Disturbance.]—DENT v. OLIVER**, No. 309, *ante*.

**401. — — — Proof of damage.]—ASHBY v. WHITE**, No. 317, *ante*.

**402. — Evasion of toll—Goods sold out of market.]—BLAKEY v. DINDALE**, No. 299, *ante*.

**403. — — — Sale by sample.]—TEWKESBURY CORPN. v. BRICKNELL**, No. 297, *ante*.

**404. — — — —.]—BRECON CORPN. v. EDWARDS**, No. 305, *ante*.

**405. Seizure & sale of goods—Goods improperly brought to market.]—**An attachment lies against a town clerk for attaching & selling goods brought improperly into the market of the town, instead

of taking bail from the offender to answer the charge.—**R. v. RICHMOND** (1722), 8 Mod. Rep. 95; 88 E. R. 74.

— *For tolls.]—See* DISTRESS, Vol. XVIII., pp. 426, 427.

— *As damage feasant.]—See* DISTRESS, Vol. XVIII., p. 443, Nos. 1803–1807.

**406. Injunction—To restrain rival market.]—**Pltf. owned an ancient market, held weekly on Thursdays. Defts. put up stalls on a neighbouring close, & proposed to hold sales there on Mondays. An interlocutory injunction having been granted to restrain defts. from holding the sales & injuring pltf.'s franchise:—*Held*: on the balance of convenience, as it would be difficult to assess the compensation on defts. succeeding at the trial if the injunction stood, while, if there were no injunction, pltf. need suffer nothing if they succeeded, the injunction must be dissolved on defts. undertaking to keep an account.—**ELWES v. PAYNE** (1879), 12 Ch. D. 468; 48 L. J. Ch. 831; 41 L. T. 118; 28 W. R. 234, C. A.

*Annotations*:—*Reid*. **Abergavenny Improvement Comrs. v. Straker** (1889), 42 Ch. D. 83; **Hailsham Cattle Market Co. v. Tolman** (1915), 113 L. T. 254; **Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co.**, [1921] 2 Ch. 154. *Mentd.* **Manchester Corpn. v. Lyons** (1882), 47 L. T. 677.

**407. — — —.]—GREAT EASTERN RY. CO. v. GOLDSMID**, No. 18, *ante*.

**408. — — —.]—WILCOX v. STEEL**, No. 322, *ante*.

**409. — — — Toll-free market.]—MORPETH CORPN. v. NORTHUMBERLAND FARMERS' AUCTION MART CO.**, No. 316, *ante*.

**410. — Obstruction of persons frequenting market.]—HORNER v. WHITECHAPEL BOARD OF WORKS**, No. 312, *ante*.

**411. Abatement of nuisance—Building excluding public.]—THOMPSON v. GIBSON**, No. 311, *ante*.

#### SUB-SECT. 2.—UNDER STATUTE.

**412. Information for statutory penalty—By whom laid—Penalty made payable to market company.]—**A co. was constituted, by a public statute, with authority to construct a market house, which was to be the only market house in T., & to demand tolls for certain goods sold there, & to let sheds, stalls, etc., in the market. It was enacted that any one who, with certain exceptions, should sell, elsewhere than in the market, goods liable to such toll, should forfeit & pay to the co. any sum not exceeding 40s.:—*Held*: no conviction could be made under this clause, unless upon information at the instance of the co.—Although several clauses of the Act appeared to have in view the general convenience of the inhabitants of T.—**R. v. HICKS** (1855), 4 E. & B. 633; 3 C. L. R. 833; 24 L. J. M. C. 94; 24 L. T. O. S. 252; 19 J. P. 515; 1 Jur. N. S. 654; 3 W. R. 208; 119 E. R. 232.

*Annotations*:—*Reid*. **Cole v. Coulton** (1860), 24 J. P. 596; **Anderson v. Hamlin** (1890), 25 Q. B. D. 221.

**413. — — — Association of retail dealers.]—**An association of retail dealers, many of whom deal in tollable articles in a place in which the Markets & Fairs Clauses Act, 1847 (c. 14), is applicable under Public Health Act, 1875 (c. 55), s. 167,

#### PART VII. SECT. 3, SUB-SECT. 1.

**406 i. Injunction—To restrain rival market.]—**Resps. were *prima facie* shown to be interfering with appct.'s exclusive right of holding a market by holding a market for the sale & purchase of produce. In consequence

dealers were regularly frequenting resps.' market to the prejudice of appct.:—*Held*: an interim interdict should be granted restraining resps. from holding their market.—**DURBAN MUNICIPALITY v. MAHOMMEDAN MOSQUE (TRUSTEES)** (1897), 18 N. L. R. 83.—S. AF.

**406 ii — — —.]—DURBAN CORPN. v. McDONALD** (1908), 29 N. L. R. 726.—S. AF.

*b. What plaintiff must prove—Franchise to hold market or fair—& possession of franchise.]—FITZGERALD v. CONNORS (1871), 1 R. 5 C. L. 191.—IR.*



may, by their servant, take proceedings as a party aggrieved within the meaning of Public Health Act, 1875 (c. 55), s. 253, for the recovery of penalties for selling tollable articles in that place contrary to Markets & Fairs Clauses Act, 1847 (c. 14), s. 13.—*ROSS v. TAYLERSON* (1898), 62 J. P. 181, D. C.

414. Effect of statute on non-statutory remedies—Statutory remedy of distress for tolls—Whether trespass for disturbance lies.]—*ABERGAVERNNEY IMPROVEMENT COMRS. v. STRAKER*, No. 395, *ante*.

415. — Summary remedy given before special tribunal—Equitable remedies not excluded.]—Where an ancient market is regulated by an Act of Parliament, an action at law will lie for disturbance of the market, notwithstanding provisions giving a summary remedy before a special tribunal. But the remedy formerly administered by the Ct. of Ch. by injunction was more extensive than any common law remedy, & may be invoked to prevent an invasion of proprietary rights, whether newly created or merely confirmed by statute, unless the statute expressly or by a necessary implication excludes that remedy, & the ct. will not infer this intention from a provision for

the purpose of protecting the right.—*STEVENS v. CHOWN, STEVENS v. CLARK*, [1901] 1 Ch. 894; 70 L. J. Ch. 571; 84 L. T. 796; 65 J. P. 470; 49 W. R. 460; 17 T. L. R. 313.

*Annotations*:—*Consd. Fraser v. Fear* (1912), 107 L. T. 423. *Reid. Yorkshire Miners' Assoon. v. Howden*, [1905] A. C. 256. *Mentd. A.-G. v. De Winton*, [1906] 2 Ch. 106; *Panagotis v. S.S. Pontiac*, [1912] 1 K. B. 74.

*Compare Nos. 342, 343, ante.*

416. Loss of remedy—Whether by condonation—Toll accepted after first refusal to pay.]—*Resp.*, at nine o'clock in the morning, sold certain marketable vegetables, he not having a licence, nor having previously paid the market tolls, & upon being required to pay the same, he refused. At seven o'clock in the evening of the same day he paid the toll, & was afterwards summoned for the offence of selling these goods without having a licence or having paid the toll; & at the hearing, the justices being of opinion that by the subsequent payment of the toll the offence was condoned, they dismissed the information:—*Held*: the justices were wrong, & the offence was one which could not be condoned.—*CARTER v. PARKHOUSE* (1870), 22 L. T. 788; 34 J. P. 438.

## Part VIII.—Forfeiture, Extinction, Abolition and Prohibition.

### SECT. 1.—FORFEITURE AND OUSTER.

#### SUB-SECT. 1.—GROUNDS OF FORFEITURE.

417. Holding on unauthorised day—Market.]—*ANON.* (1348), Y. B. 22 Lib. Ass. fo. 93, pl. 34; 15 Vin. Abr. 246.

*Annotations*:—*Mentd. Nevil's Case* (1605), 7 Co. Rep. 33 a; *Shrewsbury's Case* (1610), 9 Co. Rep. 46 b.

418. — Fair.]—*NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL*, No. 176, *ante*.

419. Holding on additional day—Fair.]—*ANON.* (1348), Y. B. 22 Lib. Ass. fo. 93, pl. 34; 15 Vin. Abr. 246.

*Annotations*:—*Mentd. Nevil's Case* (1605), 7 Co. Rep. 33 a; *Shrewsbury's Case* (1610), 9 Co. Rep. 46 b.

420. — Market.]—*A.-G. v. HORNER*, No. 45, *ante*.

421. Non-appearance to writ of quo warranto—Questioning right to market.]—*ANON.* (1475), Y. B. 15 Edw. 4, fo. 6, pl. 12.

422. Non-user.]—The non-user of fairs, markets, or courts, is a cause of forfeiture, for the subjects have an interest in their being held.—*LEICESTER FOREST CASE* (1607), Cro. Jac. 155; 79 E. R. 135.

*Annotations*:—*Mentd. Grammer v. Watson* (1685), 1 Lut. 74; *Malvern Hills Conservators v. Whitmore* (1909), 100 L. T. 841.

423. Neglect to take toll—Toll may be forfeit without market.]—*R. v. MAIDENHEAD CORPN.* (1620), Palm. 76; cited in 2 Show. at p. 265; 81 E. R. 986.

*Annotations*:—*Reid. Northampton Corpn. v. Ward* (1745), 1 Wils. 107; *Stamford Corpn. v. Pawlett* (1830), 1 Cr. & J. 57; *Wright v. Brulster* (1832), 2 L. J. K. B. 6; *Lockwood v. Wood* (1841), 6 Q. B. 31; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *Newcastle v. Worksop U. C.*, [1902] 2 Ch. 145. *Mentd. Weymouth Corpn. v. Nugent* (1865), 6 B. & S. 22.

424. Failure to carry out obligation of grant—

Failure to provide sufficient accommodation.]—*Re ISLINGTON MARKET BILL*, No. 352, *ante*.

425. —.]—A franchise right to a market or fair with the tolls belonging thereto, imports a holding by the owner of the right under the Crown, either upon foot of an extent charter or by prescription which assumes the former existence of such a charter, & such a right of market is in its very nature an exclusive right, & one which imports not merely a title in the grantee to enjoy the benefits conferred upon him by the grant under which he claims title, but also a correlative obligation to provide proper accommodation for the market, & for its due regulation, & the grant is held by the grantee subject to an implied liability to its being recalled by the Crown, by proceedings by *sci. fa.*, in case of his failure to properly discharge its accompanying obligations. But if after such a grant has been made by the Crown the three estates, which jointly constitute Parliament, step in, whether on the solicitation of the grantee or otherwise, & by their joint act create the same rights or larger or different rights of the same nature & character in favour of the grantee, it seems to me that of necessity these Parliamentary rights, emanating as they do from a paramount authority, must supersede those which the grantee was previously holding from the Crown alone, & that after the passing of such an Act there can be no continuing tenure by the grantee under his original title, nor a continuance of his prior accountability on foot thereof to the Crown (*LITTLE, V.-C.*).—*MANCHESTER CORPN. v. PEVERLEY* (1876), 22 Ch. D. 294, n.

*Annotations*:—*Appld. Manchester Corpn. v. Lyons* (1882), 22 Ch. D. 287. *Consd. Taylor v. New Windsor Corpn.*, [1898] 1 Q. B. 186. *Reid. London Corpn. v. Low* (1879), 49 L. J. Q. B. 144; *G. E. Ry. v. Goldamid* (1884), 9 App. Cas. 927.

#### PART VIII. SECT. 1, SUB-SECT. 1.

*e. Waiver of forfeiture.*]—A forfeiture may be waived by the Crown, & such waiver may be proved by the continued acceptance of Crown rent.—*MIDDLETON (LORD) v. POWER* (1886), 19 L. R. Ir. 1.—*IR.*

*Sect. 1.—Forfeiture and ouster: Sub-sect. 2. Sects. 2 & 3. Part IX. Sect. 1: Sub-sects. 1 & 2, A., B., C., D., E. & F.; sub-sects. 3 & 4, A. (a).]*

**SUB-SECT. 2.—EFFECT OF FORFEITURE.**

**426. Market or fair not extinguished.] —** HEDDEY v. WELHOUSE, No. 177, *ante*.

## SECT. 2.—EXTINCTION.

**Market held under charter—By repeal of charter —On scire facias.]—See CROWN PRACTICE, Vol. XVI., p. 246, Nos. 435, 436.**

**427. —Granted with consent of Parliament—** By Act of Parliament.]—*Re ISLINGTON MARKET BILL*, No. 352, *ante*.

**Statutory right superseding existing franchise.]—** See Nos. 33–35, *ante*.

## SECT. 3.—STATUTORY POWERS OF ABOLITION OR PROHIBITION.

**Abolition.]—See Fairs Act, 1871 (c. 12); Local Government Act, 1894 (c. 73), s. 27.**

**Prohibition.]—See Diseases of Animals Act, 1894 (c. 57), s. 22 (xix).**

# Part IX.—Sale in Market Overt.

## SECT. 1.—ACQUISITION OF TITLE BY BUYER.

### SUB-SECT. 1.—IN GENERAL.

*See Sale of Goods Act, 1893 (c. 71), s. 22 (1).*

**428. Common law rule.]—ANON.** (1456), No. 453, *post*.

**429. —.]—The property of goods stolen is changed by a *bona fide* purchase of them in market overt for a valuable consideration.—DAVILLER v. HERRING (1720), 11 Mod. Rep. 319; 88 E. R. 1063.**

**430. —.]—By a purchase in market overt the title obtained, is good against all the world.—CUNDY v. LINDSAY (1878), 3 App. Cas. 459; 38 L. T. 573; 42 J. P. 483, 26 W. R. 406; 14 Cox, C. C. 93; *sub nom.* LINDSAY & Co. v. CUNDY, 47 L. J. Q. B. 481, H. L.; *affg.* (1877), 2 Q. B. D. 96, C. A.; *revg.* (1876), 1 Q. B. D. 348.**

*Annotations:—Reid. Bentley v. Vilmont (1887), 12 App. Cas. 471; Henderson v. Williams, [1895] 1 Q. B. 521. Mentd. Re Reed, Ex p. Barnett (1876), 3 Ch. D. 123; Attenborough v. St. Katharine's Dock Co. (1878), 3 C. P. D. 450; Moyce v. Newington (1878), 4 Q. B. D. 32; Babcock v. Lawson (1879), 4 Q. B. D. 394; R. v. Central Criminal Court JJ. (1886), 18 Q. B. D. 314; Kings Norton Metal Co. v. Edridge, Merrett, Same v. Roberts (1897), 14 T. L. R. 98; Re International Soc. of Auctioneers & Valuers, Baillie's Case, [1898] 1 Ch. 110; G. W. Ry. v. London & County Banking Co., [1901] A. C. 414; Whitehorn v. Davison, [1911] 1 K. B. 463; Phillips v. Brooks, [1919] 2 K. B. 243; Folkes v. King, [1923] 1 K. B. 282; Nanka-Bruce v. Commonwealth Trust (1925), 94 L. J. P. C. 169.*

### SUB-SECT. 2.—CONDITIONS PRECEDENT.

**A. Place of Sale—Whether in Market Overt.**

**431. General rule.]—(1) A sale by public auction at a horse repository out of the city of London, is not a sale in market overt.**

**(2) [Market overt] is an open, public, & legally**

**constituted market (JERVIS, C.J.).—LEE v. BAYES (1856), 18 C. B. 599; 25 L. J. C. P. 249; 27 L. T. O. S. 157; 20 J. P. 694; 2 Jur. N. S. 1093; 139 E. R. 1504.**

*Annotations:—As to (2) Reid. Hargreave v. Spink, [1892] 1 Q. B. 25; Clayton v. Le Roy, [1911] 2 K. B. 1031.*

**432. Open fair.]—COMYNS v. BOYER, No. 79, *ante*.**

**433. Horse repository.]—LEE v. BAYES, No. 431, *ite*.**

**434. Modern statutory market.]—It is to be observed that though the sale from W. to pltf. took place in open market, it was admitted before us that the market having recently been established by the corp'n. of Maidstone under a local Act, was not one in respect of which the protection arising from a sale in market overt would attach (COCKBURN, C.J.).—MOYCE v. NEWINGTON (1878), 4 Q. B. D. 32; 48 L. J. Q. B. 125; 39 L. T. 535; 43 J. P. 191; 27 W. R. 319; 14 Cox, C. C. 182.**

*Annotations:—Reid. Bentley v. Vilmont (1887), 12 App. Cas. 471. Mentd. Babcock v. Lawson (1879), 4 Q. B. D. 394; R. v. Central Criminal Court JJ. (1886), 55 L. T. 486.*

**435. Shop.]—HARRIS v. SHAW, No. 459, *post*.**

**436. —Sale to shop-keeper.]—CRANE v. LONDON DOCK CO., No. 444, *post*.**

**437. — — — Though in City of London.]—HARGREAVE v. SPINK, No. 472, *post*.**

**438. —Private showroom not included.]—HARGREAVE v. SPINK, No. 472, *post*.**

**—Where such goods usually sold.]—See Sub-sect. 2, E., *post*.**

**—Custom of the City of London.]—See Sub-sect. 4, A., *post*.**

*See, also, Sub-sect. 2, C., *post*.*

### B. Time of Sale.

**439. Must be at convenient time.]—Sale in market overt must be at a convenient time.—**

## PART VIII. SECT. 1, SUB-SECT. 2.

**d. Does not operate as ground for granting new charter to another.]—The principle that whilst the grant of a fair or market remains unrepealed the default of finding proper accommodation for the public cannot operate in point of law as a ground for granting a new charter to another to hold a market within the common law distance, applies equally to other breaches of duty involving forfeiture of grant, such as holding a fair or market on days other than those appointed by the charter.—MIDDLETON (LORD) v. POWER (1886), 19 L. R. Ir. 1.—IR.**

## PART IX. SECT. 1, SUB-SECT. 1.

**428 i. Common law rule.]—A market**

**duly established by a municipal council under & by virtue of Local Government Act, 1874, s. 451, is a market overt, so that the property in chattels sold therein passes, though they may have been stolen from the true owner.—WARD v. STEPHENS (1886), 12 V. L. R. 378.—AUS.**

**428 ii. —.]—The town of Saint John's is a market overt, & therefore the lien of the supplying merchant upon the produce of the voyage is divested by a *bona fide* sale of such produce in Saint John's.—BAINE, JOHNSTON & Co. v. CHAMBERS (1819), 1 Nfld. L. R. 154.—NFLD.**

**428 iii. —.]—A *bona fide* purchaser at a public market of stolen property**

**is entitled to retain such property against the true owner until the latter repays him the purchase price.—RETIEF v. HAMERSBACH (1884), 1 S. A. R. 171.—S. AF.**

**428 iv. —.]—JANTJE v. PRETORIUS (1889), 3 S. A. R. 65.—S. AF.**

## PART IX. SECT. 1, SUB-SECT. 2.—A.

**434 i. Modern statutory market.]—The protection attendant upon a sale in market overt is not confined to ancient markets created by charter or prescription, but extends to modern markets established under powers conferred by Act of Parliament.—GANBY v. LEDWIDGE (1876), 1 R. 10 C. L. 33.—IR.**



BURCH v. SCORY (1699), 12 Mod. Rep. 309; 88 T. R. 1341.

*C. Sale must be Open.*

**440. General rule.]—CLIFTON v. CHANCELLOR** (1600), Moore, K. B. 624; 72 E. R. 800.

*Annotation:—Reid. Hartop v. Hoare* (1744), 3 Atk. 44.

**441. —.]—PANTON v. HASSEL** (1629), Het. 62; 124 E. R. 344.

**442. Goods must be exposed for sale.]—MARKET-OVERT CASE**, No. 458, *post*.

**443. —.]—A sale in market overt by covin shall not bind the property of a stranger, etc.—SPRAT & HEAL'S CASE** (1602), 13 Co. Rep. 23; 77 E. R. 1434.

**444. — Sale by sample.]—(1) A sale of goods by sample in the City of London in a shop where such goods are usually sold, is not a sale in market overt, & will not vest in the buyer as against the true owner, the property in stolen goods subsequently delivered to the buyer under the contract of sale, & which were not in the shop at the time of the making of the contract.**

**(2) In order to constitute a sale in market overt, all the incidents of the sale, from the inception to the completion thereof, must take place in the market overt, whilst the goods are there.**

**(3) Qu. : whether a sale in the shop of the vendee can be a sale in market overt.**

**(4) Qu. : whether a purchase of goods made in a market, by a shopkeeper, of goods brought to his shop is so entitled.—CRANE v. LONDON DOCK Co.** (1864), 5 B. & S. 313; 4 New Rep. 94; 33 L. J. Q. B. 224; 10 L. T. 372; 28 J. P. 565; 10 Jur. N. S. 984; 12 W. R. 745; 122 E. R. 847.

*Annotations:—As to (1) Reid. Clayton v. Le Roy*, [1911] 2 K. B. 1031. *As to (4) Consd. Hargreave v. Spink*, [1892] 1 Q. B. 25.

**445. — Sale in showroom over shop.]—HARGREAVE v. SPINK**, No. 472, *post*.

*D. Completion of Sale in Market.*

**446. General rule.]—CRANE v. LONDON DOCK Co.**, No. 444, *ante*.

*E. Nature of Goods Sold.*

**447. Goods usually sold in shop.]—MARKET-OVERT CASE**, No. 458, *post*.

**448. —.]—CLIFTON v. CHANCELLOR** (1600), Moore, K. B. 624; 72 E. R. 800.

*Annotation:—Reid. Hartop v. Hoare* (1744), 3 Atk. 44.

**449. —.]—PANTON v. HASSEL** (1629), Het. 62; 124 E. R. 344.

**450. —.]—CRANE v. LONDON DOCK Co.**, No. 444, *ante*.

*F. Payment of Toll.*

**451. Whether necessary—Onus of proving necessity for toll.]—COMYNS v. BOYER**, No. 79, *ante*.

**452. —.]—There may be a good sale in market overt though no toll was paid.—HODGES v. FRANKLIN** (1628), Het. 49; 124 E. R. 333.

SUB-SECT. 3.—GOODS BELONGING TO THE CROWN.

**453. General rule.]—If a man steal my goods & sell them in market overt, by this sale the property passes & I cannot take them after, provided I do not come & claim them before the sale; but it is otherwise if a man steal the goods of the King & sell them in market overt, in spite**

**of this the King shall take them back when he will; though there be twenty sales one after another in market overt, yet the King shall always be said to be in possession.—ANON.** (1456), Y. B. 35 Hen. 6, fo. 28 B., Ex. Ch.

*Annotations:—Mentd. Oxford's Case* (1615), 1 Rep. Ch. 1; *Wiseman v. Cotton* (1662), T. Raym. 76; *Rogers v. Brenton* (1847), 10 Q. B. 26; *R. v. Herford* (1860), 3 E. & E. 115.

**454. —.]—A sale of [the King's] goods by a stranger in market overt shall not alter the property nor bind him.—WILLION v. BERKLEY** (1562), 1 Plowd. 223; 75 E. R. 339.

*Annotations:—Mentd. Heydon's Case* (1584), 3 Co. Rep. 7 a; *Sadlers' Case* (1588), 4 Co. Rep. 54 b; *Strata Mercella's Case* (1591), 9 Co. Rep. 24 a; *Alton Woods Case* (1595), 1 Co. Rep. 28 b; *Anderson's Case* (1597), 7 Co. Rep. 21 a; *Butt's Case* (1600), 7 Co. Rep. 23 a; *Case of Ecclesiastical Persons* (1601), 5 Co. Rep. 14 a; *Atkins v. Longville* (1604), Cro. Jac. 50; *Case of a Fine* (1604), 7 Co. Rep. 32 a; *Rutland's Case* (1605), 6 Co. Rep. 52 b; *Prince's Case* (1606), 8 Co. Rep. 1 a; *Calvin's Case* (1609), 7 Co. Rep. 1 a; *Turnor's Case* (1610), 8 Co. Rep. 132 a; *Peytoe's Case* (1611), 9 Co. Rep. 77 b; *Priddle & Napper's Case* (1612), 11 Co. Rep. 8 b; *Seymour's Case* (1612), 10 Co. Rep. 95 b; *Sutton's Hospital Case* (1612), 10 Co. Rep. 23 a; *Whistler's Case* (1613), 10 Co. Rep. 63 a; *Magdalen College, Cambridge Case* (1615), 11 Co. Rep. 66 b; *Winchcombe v. Winchester (Bp.) & Pulleston* (1616), Hob. 165; *R. v. Hampden* (1637), 3 State Tr. 826; *Wiseman v. Cotton* (1663), 1 Keb. 505; *R. v. London (Bp.)* (1693), 1 Show. 441; *Bankers' Case* (1695), Skin. 601; *Banbury v. Wood* (1703), 1 Salk. 5; *A.-G. v. Allgood* (1743), Park. 1; *R. v. Berkley & Bragge* (1754), 1 Keny. 80; *Wolferstan v. Lincoln (Bp.) & Whitehead* (1763), 2 Wils. 174; *Doe d. Hayne v. Redfern* (1810), 12 East, 96; *Holloway v. Berkeley* (1826), 6 B. & C. 2; *Meath (Bp.) v. Winchester* (1836), 3 Bing. N. C. 183; *A.-G. v. Donaldson* (1842), 10 M. & W. 117; *Crofts v. Middleton* (1856), 8 De G. M. & G. 192; *Rustomjee v. R.* (1876), 1 Q. B. D. 487.

**455. —.]—KNIGHT'S CASE** (1588), as reported in Moore, K. B. 199, 205; 72 E. R. 530, 533.

*Annotations:—Reid. R. v. Cotton* (1751), Park. 112. *Mentd. Stukeley v. Butler* (1615), Hob. 168; *Haveril v. Hare* (1616), 3 Bulst. 250; *Beare v. Woodley* (1629), Cro. Car. 154; *Fild v. Boethsby* (1658), 2 Sid. 137; *Ward v. Everet* (1699), 1 Ld. Raym. 422; *Orby v. Mohun* (1706), 3 Rep. Ch. 102; *A.-G. v. Allgood* (1743), Park. 1; *Doe d. Hayne v. Redfern* (1810), 12 East, 96; *Twynam v. Pickard* (1818), 2 B. & Ald. 105; *Evans v. Robins* (1863), 11 L. T. 211; *Delacherois v. Delacherois* (1864), 11 H. L. Cas. 62; *Hyde v. Warden* (1877), 3 Ex. D. 72.

**456. —.]—A sale in market overt shall not bind the King (HOBART, C.J.).—COKE'S CASE** (1623), as reported in Godb. 289; 78 E. R. 169; *sub nom. COOK'S CASE*, 2 Roll. Rep. 294.

*Annotations:—Mentd. Sheffield v. Ratcliffe* (1615), Hob. 334; *A.-G. v. Sands* (1669), 2 Freem. Ch. 129; *Loyd v. Brooking* (1671), 1 Vent. 188; *Scot v. Bell* (1672), 3 Keb. 82; *R. v. Cotton* (1751), Park. 112; *R. v. Smith* (1810), Wight. 34; *R. v. Lambe* (1827), M'Cle. 402; *Giles v. Grover* (1832), 9 Bing. 128; *Ellis v. R.* (1851), 15 Jur. 917.

SUB-SECT. 4.—UNDER SPECIAL CUSTOM.

*A. Custom of the City of London.*

*(a) In General.*

**457. General rule.]—LANTONY (PRIOR) v. —** (1472), Y. B. 12 Edw. 4, fo. 8, pl. 22.

*Annotations:—Reid. R. v. Maidenhead Corpn.* (1620), Palm. 76; *Sury v. Pigot* (1626), Poph. 166. *Mentd.*

146 a; *Isaack v. Clark* (1615), 2 Bulst. 306; *Broome* (1764), 3 Burr. 1595.

**458. —.]—(1) If plate be stolen & sold openly in a scrivener's shop on market day, this shall not alter the property; otherwise if it had been in a goldsmith's shop.**

**(2) Every day except Sunday is a market-day in London.**

**(3) If a sale be not in the shop, but in the warehouse or other place in the house, the property is not changed.**

**(4) Every shop in London is a market overt for**

*Sect. 1.—Acquisition of title by buyer: Sub-sect. 4, A. (a), (b), (c), (d), (e) & (f), & B.; sub-sects. 5 & 6. Sects. 2 & 3.]*

such things only, which by the trade of the owner are put there for sale.—**MARKET-OVERT CASE** (1596), 5 Co. Rep. 83 b; 77 E. R. 180; *sub nom.* **WORCESTER'S (BP.) CASE**, Moore, K. B. 360; *sub nom.* **PALMER v. WOLLEY**, Cro. Eliz. 454; *sub nom.* **ANON.**, Poph. 84; 1 And. 344.

*Annotations:—As to (1) Follid.* Clifton v. Chancellor (1600), Moore, K. B. 624. *Reid.* Dunlop v. Dalhousie (1830), 7 Bl. N. S. 422. *As to (3) Reid.* Hill v. Smith (1812), 4 Taunt. 520; Wells v. Miles (1821), 4 B. & Ald. 559; Crane v. London Dock Co. (1864), 5 B. & S. 313. *As to (4) Follid.* Lyons v. De Pass (1840), 11 Ad. & El. 326. *Consd.* Hargreave v. Spink, [1892] 1 Q. B. 25; Clayton v. Le Roy, [1911] 2 K. B. 1031. *Reid.* Hartop v. Hoare (1743), 2 Stra. 1187. *Generally, Mentd.* R. v. Bosworth (1738), 2 Stra. 1112.

**459. —**—By the custom of London every man's shop is a market overt, & a *bonâ fide* sale therein of stolen goods without notice, divests the original owner of his property therein; *aliter* if the shop be not in London.—**HARRIS v. SHAW** (1736), Lee temp. Hard. 349; 95 E. R. 226.

*Annotation:—Mentd.* Wells v. Abraham (1872), L. R. 7 Q. B. 554.

(b) *What the City of London includes.*

**460. Whether Strand included.**—Sale of goods in the Strand does not alter the property. Property not changed.—**ANON.** (1701), 12 Mod. Rep. 521; 88 E. R. 1492.

The borough.]—See No. 467, *post*.

(c) *Place of Sale.*

**461. What constitutes a shop—Question of fact.**—The custom of the City of London with regard to sales in market overt is that every open sale in a shop or sale in an open shop in the City of London of such goods as by the trade of the owner are put there for sale, is a sale in market overt; & whether the premises in which goods are sold constitute a "shop" within the meaning of the custom is a question of fact in each case.

Pltf.'s watch was stolen & pledged with a pawnbroker, & was afterwards sold as an unredeemed pledge by public auction by auctioneers at their City auction rooms on the first floor of a building in the City of London. It was bought by a *bonâ fide* purchaser, & was afterwards sent to deft., a jeweller, for examination, & deft. claimed to retain it for his customer who had sent it to him. In an action by pltf. for the return of the watch or its value & damages:—*Held*: upon the facts of the case, the City auction rooms were not a "shop" & the sale of the watch thereat was not a sale in market overt according to the custom, & did not divest pltf. of his property in the watch.—**CLAYTON v. LE ROY**, [1911] 2 K. B. 1031; 81 L. J. K. B. 49; 104 L. T. 419; 75 J. P. 229; 27 T. L. R. 206; *reversd.* on other grounds, [1911] 2 K. B. 1046, C. A.

*Annotations:—Mentd.* Eastern Construction Co. v. National Trust Co. & Schmidt, [1914] A. C. 197; *Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 1 K. B. 456.

**462. Shop must be open.**—A sale in market overt in London, ought to be in a shop which is open to the street, & not in chambers or inward rooms, otherwise the property is not altered (**ANDERSON, C.J.**).—**ANON.** (1587), Godb. 131; 78 E. R. 80.

**463. —**—**CLIFTON v. CHANCELLOR** (1600), Moore, K. B. 624; 72 E. R. 800.

*Annotation:—Consd.* Hartop v. Hoare (1743), 3 Atk. 44.

**464. —**—Need not be open to observation.]—A sale within the City of London, in an open shop, of goods usually dealt in there, is a sale in market

overt, though the premises are described in evidence as a warehouse, & are not sufficiently open to the street for a person on the outside to see what passes within.—**LYONS v. DE PASS** (1840), 11 Ad. & El. 326; 9 C. & P. 68; 3 Per. & Dav. 177; 9 L. J. Q. B. 51; 4 Jur. 505; 113 E. R. 439; *sub nom.* **SCILLY v. LYON**, 4 J. P. 41.

*Annotations:—Consd.* Clayton v. Le Roy, [1911] 2 K. B. 1031. *Reid.* Scattergood v. Silvester (1850), 15 L. T. O. S. 227; *Hargreave v. Spink*, [1892] 1 Q. B. 25.

**465. Sale not in shop but in other part of building—In warehouse.**—**MARKET-OVERT CASE**, No. 458, *ante*.

**466. —**—In showroom over shop.]—**HARGREAVE v. SPINK**, No. 472, *post*.

**467. Sale on wharf.**—The owner of goods sends them to a wharf in the borough of Southwark where goods of the same sort are usually sold. The wharfinger, without any authority, sells them to a *bonâ fide* purchaser, who duly pays for them. This is not a sale in market overt to change the property & trover lies for the goods at the suit of the owner against the purchaser.—**WILKINSON v. KING** (1809), 2 Camp. 335, N. P.

*Annotations:—Reid.* Clayton v. Le Roy, [1911] 2 K. B. 1031. *Mentd.* Pickering v. Busk (1812), 15 East, 38; *Fenn v. Bittleston* (1851), 7 Exch. 152; *Cole v. North Western Bank* (1875), L. R. 10 C. P. 354.

**468. Sale in public auction room.**—**CLAYTON v. LE ROY**, No. 461, *ante*.

(d) *Nature of Goods Sold.*

**469. Goods usually sold.**—**MARKET-OVERT CASE**, No. 458, *ante*.

**470. —**—A shop in London is not a market overt, except for goods proper to its trade.—**TAYLOR v. CHAMBERS** (1605), Cro. Jac. 68; 79 E. R. 58.

*Annotations:—Consd.* Hartop v. Hoare (1743), 3 Atk. 44. *Distd.* Lyons v. Depass (1840), 4 Jur. 505. *Consd.* Hargreave v. Spink, [1892] 1 Q. B. 25. *Mentd.* Hartford v. Jones (1697), 2 Salk. 654.

(e) *Sale to Shop-Keeper.*

**471. Whether sale within the custom.**—**CRANE v. LONDON DOCK CO.**, No. 444, *ante*.

**472. —**—(1) Jewellery, stolen from pltf., was sold to defts., jewellers in the City of London. The sale took place in a showroom above defts.' shop to which access could only be obtained by their special permission:—*Held*: the sale was not a sale in market overt, & pltf. was therefore entitled to recover back the jewellery from defts.

(2) *Semble*: the doctrine as to sales in market overt in the City of London does not apply to a sale by a customer to a shopkeeper.—**HARGREAVE v. SPINK**, [1892] 1 Q. B. 25; 61 L. J. Q. B. 318; 65 L. T. 650; 40 W. R. 254; 8 T. L. R. 18; 36 Sol. Jo. 29.

*Annotation:—As to (1) Consd.* Clayton v. Le Roy, [1911] 2 K. B. 1031.

(f) *Pawning.*

**473. Pawning not within the custom.**—A market overt cannot be for pawning, & the ct. cannot take notice of the custom of London unless it be found.—**HARTOP v. HOARE** (1743), 1 Wils. 8; 3 Atk. 44; 2 Stra. 1187; 95 E. R. 462.

*Annotations:—Consd.* Clayton v. Le Roy, [1911] 2 K. B. 1031. *Mentd.* Mason v. Lickbarrow (1790), 1 Hy. Bl. 357; *Boyson v. Coles* (1817), 6 M. & S. 14; *Wookey v. Pole* (1820), 4 B. & Ald. 1; *Thorndike v. Hunt, Browne v. Butter* (1859), 32 L. T. O. S. 346.

See, generally, **PAWNS & PLEDGES.**

*B. Custom of Bristol.*

**474. Existence of custom.**—**CLIFTON v. CHANCELLOR** (1600), Moore, K. B. 624; 72 E. R. 800.

*Annotation:—Reid.* Hartop v. Hoare (1743), 3 Atk. 44.



## SUB-SECT. 5.—SALE OF HORSES.

475. *Bona fide sale passes property.*—WIKES v. MOREFOOTS, No. 152, *ante*.

476. —.]—A *bona fide* purchaser of a horse from a person who had bought it, as the second purchaser knew, at a fair, without any evidence that he knew it was obtained dishonestly although it had been purchased on credit, & not paid for:—*Held*: 'entitled to maintain trover against the original owner for retaking it.—NORTH v. JACKSON (1859), 2 F. & F. 198, N. P.

*Annotation*:—*Distd.* Moran v. Pitt (1873), 21 W. R. 525.

477. — Recovery on proof of theft—Issue of warrant against thief not sufficient.]—JOSEPHS v. ADKINS, No. 156, *ante*.

*Statutory formalities.*—See Part V., Sect. 2, sub-sect. 4, *ante*.

## SUB-SECT. 6.—SALE OF SHIPS.

*See, generally*, SHIPPING.

478. No market overt for ships.]—A ship is not like an ordinary chattel, which passes by delivery, & there is no market overt for ships.—HOOPER v. GUMM, McLELLAN v. GUMM (1867), 2 Ch. App. 282; 36 L. J. Ch. 605; 16 L. T. 107; 15 W. R. 464; 2 Mar. L. C. 481, L. C. & L. J.

*Annotation*:—*Mentd.* Alcock v. Smith, [1892] 1 Ch. 238.

Whether goods within the Sale of Goods Act, 1893 (c. 71).]—See SALE OF GOODS; SHIPPING.

## SECT. 2.—LIABILITY OF SELLER OF STOLEN GOODS.

*See, generally*, TROVER.

479. Resale before conviction—After notice of theft—Purchase in market overt.]—The owner of goods stolen, prosecuting the felon to conviction, cannot recover the value of them in trover from the person who purchased them in market overt, & sold them again before conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession.—HORWOOD v. SMITH (1788), 2 Term Rep. 750; 100 E. R. 404.

*Annotations*:—*Distd.* Peer v. Humphrey (1835), 2 Ad. & El. 495. *Consd.* Scattergood v. Sylvester (1850), 15 Q. B. 506. *Apld.* Lindsay v. Cundy (1876), 1 Q. B. D. 348. (See 3 App. Cas. 459.) *Consd.* Moyce v. Newington (1878), 4 Q. B. D. 32; Bentley v. Vilmont (1887), 12 App. Cas. 471. *Refd.* Featherstonlaugh v. Johnston (1818), 8 Taunt. 237; Gimson v. Woodfull (1825), 2 C. & P. 41; White v. Garden (1851), 10 C. B. 919; R. v. Stancliffe (1869), 11 Cox, C. C. 318; Chichester v. Hill (1882), 52 L. J. Q. B. 160; R. v. Central Criminal Court JJ. (1886), 55 L. T. 486; Moss v. Hancock, [1899] 2 Q. B. 111. *Mentd.* Higgons v. Burton (1857), 26 L. J. Ex. 342; G. W. Ry. v. London & County Banking Co., [1901] A. C. 414.

480. — Purchase not in market overt—Sale in market overt.]—Property feloniously taken from pltf. was sold by the felon to deft., who purchased *bona fide*, but not in market overt. Pltf. gave notice of the felony to deft., who afterwards sold the property in market overt; after which pltf. prosecuted the felon to conviction:—*Held*: pltf. might recover from deft. the value of the property in trover.—PEER v. HUMPHREY (1835), 2 Ad. & El. 495; 1 Har. & W. 28; 4 Nev. & M. K. B. 430; 4 L. J. K. B. 100; 111 E. R. 191.

*Annotations*:—*Distd.* Leo v. Bayes (1856), 18 C. B. 599. *Refd.* White v. Garden (1851), 10 C. B. 919; Scattergood v. Sylvester (1860), 14 Jur. 977; Lindsay v. Cundy (1876), 1 Q. B. D. 348; London & County Banking Co. v. London & River Plate Bank (1887), 20 Q. B. D. 232.

## PART IX. SECT. 1, SUB-SECT. 5.

475 i. *Bona fide sale passes property.*—TODD v. ARMSUR (1882), 9 R. (Ct. of Sess.) 901; 19 Sc. L. R. 656.—SCOT.

## PART IX. SECT. 2.

a. *Bona fide sale by public sales*—

—.]—A salesmaster, who in market overt publicly sells & afterwards delivers a stolen beast, although he does so innocently & in the ordinary course of his business, is responsible, in trover, to the true owner for the value of the beast.—GANBY v. LED-

481. Conversion after conviction.]—SCATTERGOOD v. SYLVESTER, No. 485, *post*.

## SECT. 3.—REVESTING OF PROPERTY ON THIEF'S CONVICTION.

*See, generally*, CRIMINAL LAW, Vol. XV., pp. 617 *et seq.*

482. Restitution of proceeds of sale to owner.]—HARIS'S CASE (1608), Noy, 128; 74 E. R. 1092.

*Annotations*:—*Consd.* R. v. Central Criminal Court JJ. (1886), 17 Q. B. D. 598. *Refd.* Golightly v. Reynolds (1772), Loft, 88.

483. Restitution of stolen property to owner.]—If the owner of stolen goods prosecutes the felon to conviction he shall have restitution, notwithstanding a sale in market overt.—SMART'S CASE (1678), Freem. K. B. 460; 89 E. R. 344.

484. —.]—BURGES v. CONEY (1697), Trem. P. O. 315.

*Annotation*:—*Refd.* R. v. Macklin (1850), 15 J. P. 518.

485. —.]—Goods which have been stolen may be recovered in trover from the purchaser of them in market overt, upon a conversion by him subsequent to the conviction of the felon, without any further order for restitution having been made; for the effect of 7 & 8 Geo. 4, c. 29, s. 57, is to revest the property in stolen goods in the original owner upon conviction of the felon.—SCATTERGOOD v. SYLVESTER (1850), 15 Q. B. 506; 19 L. J. Q. B. 447; 15 L. T. O. S. 227; 14 Jur. 977; 14 J. P. Jo. 351; 117 E. R. 551.

*Annotations*:—*Consd.* Nickling v. Heaps (1870), 21 L. T. 754; Chichester v. Hill (1882), 52 L. J. Q. B. 160. *Apld.* Vilmont v. Bentley (1886), 18 Q. B. D. 322. *Refd.* R. v. Stancliffe (1869), 11 Cox, C. C. 318; Lindsay v. Cundy (1876), 1 Q. B. D. 348; Delaney v. Wallis (1884), 15 Cox, C. C. 525; Moss v. Hancock, [1899] 2 Q. B. 111; Re Vautin, *Ex p.* Saffery, [1899] 2 Q. B. 549.

486. Restitution of goods obtained by false pretences.]—The owner of goods, induced by fraud, parted with them under a voluntary contract of sale which vested the property in the fraudulent purchasers. The goods were then sold in market overt to a purchaser without notice of the fraud. The fraudulent purchasers were afterwards, upon the prosecution of the original owner convicted of obtaining the goods by false pretences. The judge before whom the prisoners were tried refused to make an order of restitution:—*Held*: under Larceny Act, 1861 (c. 96), s. 100, the property in the goods revested in the original owner upon conviction, & he was entitled to recover them from the innocent purchaser.—BENTLEY v. VILMONT (1887), 12 App. Cas. 471; 57 L. J. Q. B. 18; 57 L. T. 854; 52 J. P. 68; 36 W. R. 481; *sub nom.* VILMONT v. BENTLEY, 3 T. L. R. 824, H. L.

*Annotations*:—*Refd.* Payne v. Wilson, [1895] 1 Q. B. 653. R. v. George (1901), 65 J. P. 729.

*See, now*, Sale of Goods Act, 1893 (c. 71), s. 24; Larceny Act, 1916 (c. 50), s. 24.

487. Rights of purchaser—Whether entitled to expenses of keep.]—The *bona fide* purchaser of stolen beasts sold in market overt cannot, in answer to a claim for them by the original owner after the conviction of the thief, counterclaim for the cost of their keep while the beasts were in the possession of the purchaser, for they were his own property until, on the conviction, the property revested in the original owner.—WALKER v. MATTHEWS (1881), 8 Q. B. D. 109; 51 L. J. Q. B. 243; 46 L. T. 915; 30 W. R. 338, D. C.

WIDGE (1876), 1. R. 10 C. L. 33.—IR.

1. —.]—DELANEY v. WALLIS & SONS (1884), 15 Cox, C. C. 525.—IR.

annual licensing meeting for the renewal to him of the license of a beerhouse licensed before & continuously since May 1, 1869, but it was refused on the ground of the disorderly character of the house. From this refusal H. appealed to quarter sessions, & the appeal was dismissed after a full hearing. After the expiration of the license H. applied to the special sessions for a new license in his own name, which was refused on the same grounds after a full hearing. H. appealed to quarter sessions, who refused to rehear the evidence, & dismissed the appeal as *res judicata*. H. applied for a *mandamus* for a rehearing:—*Held*: a *mandamus* should not be granted.—*R. v. WEST RIDING, YORKS JJ., Ex p. HILL* (1895), 59 J. P. 278, D. C.; *affd.*, 59 J. P. Jo. 308, C. A.

**1570. — Decision on question of law.]—**Sessions on appeal against a certificate of two justices, that a turnpike road, made under a local Act, had been completed, & was fit to be travelled upon, having decided that the certificate was void in point of law, & having refused to go into the merits of the appeal in point of fact, this ct. refused to grant a *mandamus* to them to hear the appeal on the ground that their decision was contrary to the local Act.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1834), 5 B. & Ad. 1003; 3 Nev. & M. K. B. 86; 2 Nev. & M. M. C. 71; 3 L. J. M. C. 54, 110 E. R. 1062.

*Annotation*:—*Mentd.* *R. v. Bury* (1844), 2 L. T. O. S. 309.

#### F. Alteration of Entry of Order.

**1571. Special entry—Showing reasons for judgment.]—***R. v. DEVON JJ., No. 1495, ante.*

**1572. — Showing quashing on formal grounds.]—**When quarter sessions, on appeal, have quashed an order of removal generally, this ct. will not compel them by *mandamus* to enter their reasons as the order to quash, though it appear by affidavit that the justices in sessions made their order on the ground of informality, but refused a special entry for the purpose of preventing a second removal.—*R. v. LANCASHIRE JJ.* (1843), 3 Q. B. 367; 2 Gal. & Dav. 714; 12 L. J. M. C. 76; 1 L. T. O. S. 167; 7 J. P. 626; 7 Jur. 490; 114 E. R. 547.

*Annotations*:—*Refd.* *R. v. Evenwood* (1843), 3 Q. B. 370; *R. v. West Riding of Yorkshire JJ., Ex p. Ackworth Overseers* (1844), 8 Jur. 291.

**1573. Alteration of verdict.]—**The ct. will not grant a *mandamus* to the justices or clerk of the peace to enter up judgment upon the verdict of a jury otherwise than in the terms in which it is given by the jury, even though it appear by affidavit that in considering the amount of damages to be assessed by them, they took into consideration matters not properly within their jurisdiction. So, though it should appear upon the face of the proceedings that the jury have assessed separate damages in respect of matters foreign to their jurisdiction. But such a finding would be a nullity & could not be enforced.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1834), 1 Ad. & El. 563; 3 Nev. & M. K. B. 802; 2 Nev. & M. M. C. 391; 3 L. J. M. C. 117; 110 E. R. 1322.

*Annotations*:—*Refd.* *Jubb v. Kingston upon Hull Dock Co.* (1846), 9 Q. B. 443. *Mentd.* *R. v. Bristol & Exeter Ry.* (1838), 2 Ry. & Can. Cas. 99.

**1574. —.]—**This ct. will not issue a *mandamus* to a ct. of criminal jurisdiction, to alter the minutes of a verdict according to the fact, or to cancel an alteration in such minutes, on a representation that the verdict was erroneously entered at the trial. As where a jury at sessions, on an indictment for poisoning horses, found a verdict of "Guilty by mischance," & were then told by the chairman that

they must say either guilty or not guilty, whereupon they brought deft. in guilty, & recommended him to mercy on the ground that he had no malicious intent but administered the material to benefit the condition of the horses; upon which finding & explanation a verdict of guilty was entered.

I have always understood that this ct. might send a *mandamus* to an inferior ct. to do its duty in general terms, but not to do a particular thing as to make an alteration here or there in the clerk of the peace's minutes (*PARTESON, J.*).—*R. v. HEWES* (1835), 3 Ad. & El. 725; 5 L. J. M. C. 45; 111 E. R. 589; *sub nom.* *R. v. HUGHES*, 1 Har. & W. 313.

*Annotations*:—*Refd.* *Rochester Corpn. v. R., Re St. Nicholas* (1858), E. B. & E. 1024. *Mentd.* *Combe v. Edwards* (1878), 42 J. P. 820.

**1575. —.]—**Upon the trial of an indictment at quarter sessions, that ct. is the sole judge of the propriety of the entry of the verdict. Where, therefore, upon a special finding by the jury, amounting to an acquittal, the chairman directs a verdict of guilty to be entered, the Ct. of K. B. will not grant a *mandamus* requiring the minute of the verdict to be altered according to the fact.—*R. v. SUFFOLK JJ.* (1835), 5 Nev. & M. K. B. 139; 3 Nev. & M. M. C. 221.

**1576. Erasure of entry.]—***Ex p. ACKWORTH OVERSEERS, No. 1477, ante.*

**1577. —.]—**Where sessions make an entry that an order is quashed, not on the merits, where in point of law it was quashed on the merits, this ct. cannot interfere to compel them to erase such entry.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1843), 2 L. T. O. S. 154.

**1578. —.]—**An order of removal had been served, & notice & grounds of appeal sent in time for trial at the Oct. sessions, but in consequence of an arrangement made with the attorney for appls., by the agent of the attorney for resps., it was agreed that the trial of the appeal should be postponed until the Epiphany sessions. The attorney for resps., being in ignorance of this arrangement, & on a certificate by the clerk of the peace that no appeal was entered, filed the order of removal, & had it confirmed at the Oct. sessions, & immediately after the pauper was removed under the order. On an application by appls. to enter & respite an appeal against the same order at the Epiphany sessions, the clerk of the peace refused to do so, as there was already an order confirming it on the files of the ct. On a *mandamus* to erase the entry of the order made at the Oct. sessions, the ct. refused the rule as the sessions had jurisdiction by the entry of the appeal.—*R. v. GLAMORGANSHIRE JJ.* (1846), 15 L. J. M. C. 110; 10 J. P. 617; 10 Jur. 809.

**1579. — Manifestly false & without jurisdiction.]—**The ct. of quarter sessions has no power of its own authority to erase an entry from the records of a past sessions. But a *mandamus* will go directing it to do so where an entry has been made which is manifestly false & made without jurisdiction.—*R. v. WEST RIDING OF YORKSHIRE JJ., SHEFFIELD v. CRICH* (1843), 5 Q. B. 1; 3 Gal. & Dav. 170; 12 L. J. M. C. 148; 1 L. T. O. S. 314; 114 E. R. 1147; *sub nom.* *R. v. WEST RIDING OF YORKSHIRE JJ., CRICH v. SHEFFIELD*, 8 J. P. 244; 7 Jur. 698.

*Annotations*:—*Distd.* *Ex p. Ackworth Overseers* (1843), 3 Q. B. 397 a; *R. v. Cornwall JJ.* (1843), 8 J. P. 74; *R. v. Glamorganshire JJ.* (1846), 15 L. J. M. C. 110. *Refd.* *R. v. Sevenoaks* (1845), 14 L. J. M. C. 92.

#### G. Rules of Practice of Sessions.

See Part XIII., Sect. 1, sub-sect. 4, A., *ante*.



## Part X.—Courts of Pie Poudre.

See COURTS, Vol. XVI., pp. 197, 198.

## Part XI.—Hawkers, Pedlars etc.

### SECT. 1.—HAWKERS.

#### SUB-SECT. 1.—WHAT IS "HAWKING."

##### A. Under Statute.

See Hawkers Act, 1888 (c. 33), s. 2.

**488. From place to place—Sale at one place—Other than place of residence.]—**DEAN v. SCHOLLES (1820), 12 Price, 58, n.; 147 E. R. 655, N. P.

**489. ———.]—**An information, charging a deft. under 50 Geo. 3, c. 41, as a trading person going from town to town, etc., with selling at S., by sale at auction, goods, etc., held to be supported by evidence that deft. lived at B. & was a trader there, that he went to S., & took up a temporary abode at an inn there, & that he employed an auctioneer living at S. to sell for him there goods sent to him there from B., part of which was proved to be of his own manufacture, who sold the goods by deft.'s order, & under his directions & authority, deft. remaining in S. during the sale against the objection that the evidence did not establish a going from town to town, so as to bring deft. within the statute.—A.-G. v. TONGUE (1823), 12 Price, 51; 147 E. R. 653.

*Annotations:—*Folld. A.-G. v. Woolhouse (1827), 12 Price, 65. *Appld.* Manson v. Hope (1862), 2 B. & S. 498.

**490. ———.]—**In an information for penalties, founded on 50 Geo. 3, c. 41, filed against a cabinet maker, who, living & keeping a shop in one town, took some of his goods to another, & sold them there at auction, through the medium & agency of an auctioneer there, evidence of those facts was held sufficient to bring the sale within the statute, without proof that deft. was a hawker & pedlar, or that he had otherwise travelled from town to town, as that he had gone to more towns than one besides his own, or that the manner of deft.'s travelling was with a horse or on foot, or that the mode & place of sale was by opening a room or shop, etc., & selling by retail, in the words of the statute.—A.-G. v. WOOLHOUSE (1827), 12 Price, 65; 1 Y. & J. 463; 4 Dow. & Ry. M. C. 276; 147 E. R. 657.

*Annotations:—*Appld. R. v. Pease (1829), 5 Man. & Ry. K. B. 507; Manson v. Hope (1862), 2 B. & S. 498.

**491. ———.]—**(1) A person, who resided in L., brought a quantity of drapery goods from thence to H., which he said were the remains of the stock of a co., & there sold them without a licence:—*Held*: he was subject to the duty imposed by 50 Geo. 3, c. 41, s. 6, as "a trading person going from town to town," & therefore was liable to be convicted under sect. 17.

(2) I cannot see that a man may not be a hawker for one day within this Act (CROMPTON, J.).—

MANSON v. HOPE (1862), 2 B. & S. 498; 31 L. J. M. C. 191; 6 L. T. 326; 26 J. P. 532; 8 Jur. N. S. 971; 10 W. R. 664; 121 E. R. 1158.

*Annotation:—*As to (1) *Refd.* Haynes v. Ford, [1911] 2 Ch. 237.

**492. "Carrying to sell"—Goods sent by separate conveyance.]—**DEAN v. SCHOLLES (1820), 12 Price, 58, n.; 147 E. R. 655, N. P.

**493. ———.]—**A licenced auctioneer going from town to town in a public stage-coach, & sending goods by public waggons, & selling the same on commission, by retail or by auction, at the different towns, is a trading person within 50 Geo. 3, c. 41, s. 6, & must take out a hawker's & pedlar's licence.—R. v. TURNER (1821), 4 B. & Ald. 510; 106 E. R. 1024.

*Annotations:—*Folld. A.-G. v. Woolhouse (1827), 1 Y. & J. 463. *Refd.* R. v. Websdell (1823), 2 B. & C. 136.

**494. ———.]—**A person travelling from town to town, & having packages of books, etc., sent after him by public conveyance, & taking rooms at each town, & there selling such books, etc., by retail by auction, is a trading person within 50 Geo. 3, c. 41, s. 7.—DEAN v. KING (1821), 4 B. & Ald. 517; 106 E. R. 1026.

*Annotations:—*Consd. Manson v. Hope (1862), 2 B. & S. 498. *Refd.* A.-G. v. Woolhouse (1827), 1 Y. & J. 465.

**495. ———.]—**A.-G. v. TONGUE, No. 489, ante.

**496. ——— Agent asking for orders.]—**Where a person on one day went the round of a neighbourhood soliciting & obtaining orders for tea, but having no tea with him; & on a subsequent day went the same round, delivering the parcels of tea previously ordered:—*Held*: he was not a person "carrying to sell" or "exposing to sale" tea, within 50 Geo. 3, c. 41, so as to be liable to a penalty for trading as a hawker without a licence.—R. v. M'KNIGHT (1830), 10 B. & C. 734; 5 Man. & Ry. K. B. 644; 3 Man. & Ry. M. C. 62; 8 L. J. O. S. M. C. 86; 109 E. R. 623.

**497. ——— Previous request to call—No request for specified quantity.]—**Taking a cask of oil round in a cart to customers in pursuance of orders to call when the quantity required was fixed by the customer at his house, was hawking within Hawker's Act, 1888 (c. 33), & required a licence.—O'DEA v. CROWHURST (1899), 68 L. J. Q. B. 655; 80 L. T. 491; 63 J. P. 424; 15 T. L. R. 320; 19 Cox, C. C. 260, D. C.

*Annotations:—*Appld. Holland v. Hall (1902), 86 L. T. 355. *Refd.* Philpott v. Allright (1906), 94 L. T. 540.

**498. ——— For inspection of goods.]—**Resp. was sent out by his employers, who were manufacturers of sewing machines, with a horse & van in which were some sewing machines, with

#### PART XI. SECT. 1, SUB-SECT. 1.—A.

**497 i. "Carrying to sell"—Previous request to call—No request for specified quantity.]—**Appl. was proprietor of a greengrocer's shop & did not hold a licence for hawking. Applt. called at the house of one customer. He went into the house with an empty basket

then returned to his lorry, weighed some vegetables & took them to the house afterwards coming out with an empty basket. The person was a regular customer of applt. & he was instructed to call three times a week to supply vegetables:—*Held*: applt. had been guilty of hawking.—EVANS v. WARD (1915), 18 W. A. L. R. 31.—AUS.

**g. Exposing for sale—Agent asking for orders—Samples carried.]—**Deft., who was a traveller for a tea dealer, carried samples with him from house to house, & took orders for tea, which orders he forwarded to his employer, who sent the tea to him. Deft. then got the tea which had been forwarded in packages, & delivered it

instructions to call at certain specified houses in different places, & show the machines on approval for the purpose of selling them, & he did so. None of the persons in the houses called at had bought or agreed to buy machines, but they had previously been visited by a canvasser to whom they had expressed a desire to see a machine to decide whether they would purchase it. The machines were shown at these houses on approval, & if approved of they would be sold there:—*Held*: resp. was going "from place to place carrying to sell" within Hawkers Act, 1888 (c. 33), s. 2, & was therefore a "hawker" & required a hawker's licence, & he was none the less a hawker because he had offered the machines only to persons who had previously been visited by a canvasser.—*HOLLAND v. HALL* (1902), 86 L. T. 355; 66 J. P. 424; 50 W. R. 525; 18 T. L. R. 368; 46 Sol. Jo. 319; 20 Cox, C. C. 167, D. C.

*Annotation*:—*Distd. Philpott v. Allright* (1906), 94 L. T. 540.

**499. Exposing for sale—Agent asking for orders No samples carried.]—R. v. M'KNIGHT, No. 496, ante.**

—*Compare* No. 369, ante.

**500. — Sale by outcry.]—A licenced hawker opening a room in a place, he not being a householder there, & that not being the usual place of his abode, & selling there by retail, does not thereby commit an offence within 50 Geo. 3, c. 41, s. 7. To constitute such an offence the selling must be by outcry, etc. or some mode of sale at auction.—ALLEN v. SPARKHALL (1817), 1 B. & Ald. 100; 106 E. R. 38.**

*Annotation*:—*Reid. A. G. v. Woolhouse* (1827), 1 Y. & J. 465.

**501. Sale—Single act of selling.]—Single act of selling does not constitute a man a hawker as that he ought to take out a licence.—R. v. LITTLE (1758), 1 Burr. 609; 2 Keny. 317; 97 E. R. 472.**

*Annotation*:—*Reid. Manson v. Hope* (1862), 31 L. J. M. C. 191.

**502. — Selling on single day.]—MANSON v. HOPE, No. 491, ante.**

**503. — By auction.]—ALLEN v. SPARKHALL, No. 500, ante.**

**504. — —.]—DEAN v. SCHOLDS (1820). 12 Price, 58, n.; 147 E. R. 655, N. P.**

**505. — —.]—R. v. TURNER, No. 493, ante.**

**506. — Includes barter.]—A person who goes about the country & barter needles, threads,**

& tapes, for bones, rags, & other similar articles, is a hawker & pedlar & requires a hawker's licence, under 50 Geo. 3, c. 41, s. 6.—*DRUCE v. GABB* (1858), 31 L. T. O. S. 98; 8 W. R. 497; 22 J. P. Jo. 319.

**507. Goods, wares or merchandise—Includes manufactured & unmanufactured goods.]—A timber merchant residing at the town of A., & sending timber from the town of B. to the town of C., where it is sold by auction, is a hawker requiring a licence under 50 Geo. 3, c. 41, s. 7.**

The sale of goods, whether in a raw or a manufactured state is a sale of goods within that Act.—*R. v. PEASE* (1829), 5 Man. & Ry. K. B. 507; 3 Man. & Ry. M. C. 45; 8 L. J. O. S. M. C. 87.

**508. — Timber.]—R. v. PEASE, No. 507, ante.**

**509. Room hired or used for the purpose.]—ALLEN v. SPARKHALL, No. 500, ante.**

— *Excepted articles.]—See* Sect. 1, sub-sect. 2, B. (c), post.

**510. — —.]—DEAN v. KING, No. 494, ante.**

**511. — Premises held for a term.]—Applts. circulated handbills of the sale of drapery stocks, & sent large quantities of goods from A. to B. by railway, to certain premises they had temporarily hired; they afterwards purchased a stock in B. & took the premises for a term:—*Held*: these facts did not show a travelling from town to town, & a selling or exposing for sale so as to render a licence necessary under the Hawkers Act.—*HAWKINS v. FENWICK* (1858), 32 L. T. O. S. 104.**

**512. — Room hired by travelling auctioneer.]—HUDSON v. SHOOTER (1891), 55 J. P. Jo. 325, D. C.**

#### B. Under Bye-Law.

**513. Whether statutory definition applies.]—PHILPOTT v. ALLRIGHT, No. 369, ante.**

**514. Hawk or expose for sale—Wholesaler calling on regular customers—Casual retail business not solicited.]—PHILPOTT v. ALLRIGHT, No. 369, ante.**

*Compare* Nos. 496–498, ante.

#### SUB-SECT. 2.—LICENCE.

##### A. Necessity for.

**Under statute.]—See** Sect. 1, sub-sect. 1, A., ante.

**515. Under local Act or bye-law—Sale of goods excepted from statute.]—Resp. who had not**

to his customers, receiving the price on delivery:—*Held*: deft. was not a "hawker."—*R. v. COUTTS* (1884), 5 O. R. 844.—CAN.

**h. — — —.]—R. v. BASSETT (1886), 12 O. R. 51.—CAN.**

**k. — — —.]—One who travels about from house to house for the purpose of selling sewing machines, carrying with him only one machine as a sample, his stock being stored in a shop rented for the purpose, cannot be convicted under 58 Vict. c. 39, s. 4 (N. B.), of hawking or peddling goods without licence.—*R. v. PHILLIPS* (1898), 35 N. B. R. 393.—CAN.**

**l. — — —.]—R. v. WOLFE (1906), 6 Terr. L. R. 246; 4 W. L. R. 553.—CAN.**

**501 i. Sale—Single act of selling.]—*Semble*: proof of a single act of sale of goods or merchandise against a man does not constitute him a hawker or pedlar within 58 Vict. c. 39 (N. B.).—*R. v. PHILLIPS* (1898), 35 N. B. R. 393.—CAN.**

**m. Goods wares or merchandise—Electrotype ware not included.]—R. v. CHAYTER (1886), 11 O. R. 217.—CAN.**

**n. — Fish not included.]—*Held*:**

"goods, wares & merchandise" in bye-law in question did not include "fish."—*R. v. PROSTERMAN* (1909), 11 W. L. R. 141.—CAN.

**o. — Includes enlargements of photographs.]—R. (KANE) v. HAWORTH (Sask.), [1920] 2 W. W. R. 1043; 53 D. L. R. 329.—CAN.**

**509 i. Room hired or used for the purpose.]—Applts.' usual place of business was G. They hired a hall in H. for three days. In that hall they sold goods which they had removed from G. Their manager & several other employees, none of whom held a hawker's licence, travelled from G. to H. to conduct the sale. They were charged with hawking without licence. The justices convicted them:—*Held*: applts. were rightly convicted.—*CO-OPERATIVE DRAPERY & FURNISHING SOCIETY, LTD. v. BLIGH* (1902), 66 J. P. 215.—SCOT.**

**p. Taking contract for & installing lightning rods.]—A person going around with a helper & the necessary supplies & tools & procuring a contract for & installing a lightning rod system, the work of installation being a very essential part of the contract, is not a hawker or pedlar.—*R. (VAN CORDER)***

*v. STANDALL*, [1919] 2 W. W. R. 632; 12 Sask. L. R. 282.—CAN.

**q. Agent soliciting orders for enlarging photographs—Exhibiting specimens.]—*GOAD v. NELSON* (Sask.), [1919] 3 W. W. R. 1127; 50 D. L. R. 61; 13 Sask. L. R. 1127.—CAN.**

**r. — — —.]—A person soliciting orders for a co. for enlarging photographs & exhibiting a painting done by the co. for the purpose of showing the kind of work turned out, is a hawker & pedlar within the Act Respecting Hawkers & Pedlars.—*R. (KANE) v. HAWORTH* (Sask.), [1920] 2 W. W. R. 1043; 53 D. L. R. 329.—CAN.**

#### PART XI. SECT. 1, SUB-SECT. 1.—B.

**t. "Sale"—Agent obtaining orders for future delivery.]—Obtaining from purchasers orders on an oil co. to ship to the purchasers named quantities of oil, to be delivered at the places named in the orders, cash on delivery:—*Held*: not to constitute a "sale" within a bye-law.—*Re GARNHAM'S CONVICTION, Re RICHARDSON'S CONVICTION* (1915), 9 O. W. N. 117, 172, 250; 34 O. L. R. 545; 35 O. L. R. 54.—CAN.**



*Sect. 1.—Hawkers: Sub-sect. 2, A., B. (a), (b), (c) & (d), C. & D.; sub-sect. 3.]*

obtained a licence from the corpn. of B., hawked fish within that borough, & when summoned for so doing, contended that he was exempt from all licences by Hawkers Act, 1888 (c. 33), s. 3. The justices discharged resp.:—*Held*: resp. was only exempt under Hawkers Act, 1888 (c. 33), from having to take out an excise licence, & he was liable to the penalty provided under the local Acts for hawking fish without having first obtained a licence from the corpn., & should have been convicted.—*OPENSHAW v. OAKELEY* (1889), 60 L. T. 929; 53 J. P. 740; 5 T. L. R. 520; 16 Cox, C. C. 671, D. C.

516. ———.]—By a local Act, s. 55, it was provided that nothing in the Act should interfere with the lawful exercise of their calling by pedlars & hawkers duly licenced or certificated under any Act relating to such calling. An information was laid against resp. under a local Act for selling tomatoes from a hand barrow in a street in the county borough of D. without having obtained a licence as required by the Act from the corpn. Under the Act tomatoes were included amongst the articles in respect of the sale of which in a market place the corpn. were entitled to take a toll. Resp. had taken out a licence under Hawkers Act, 1888 (c. 33). The justices dismissed the information:—*Held*: the mere fact that resp. had taken out a hawker's licence under Hawkers Act, 1888 (c. 33), was not sufficient to relieve him from the necessity of taking out a licence from the corpn. of D. under the local Act for the sale of the articles in question, since in selling the same he was not acting under his hawker's licence & the exemption granted by the local Act, s. 55, did not apply to hawkers as a class, but only to hawkers in the lawful exercise of their calling as hawkers.—*LEE v. WALLOCKS* (1914), 111 L. T. 573; 78 J. P. 365; 12 L. G. R. 1221; 24 Cox, C. C. 398, D. C.

517. ——— *Effect of exemption in earlier local Act.*—K. sold fish from a cart in B., which was governed by a local Act, one sect. of which required a corpn. licence to sell any goods for which a toll was leviable. A prior local Act contained an exemption from toll for fish sold in places other than the market, & there was no repeal expressed of the prior Act, & parts of it were recited in the second Act:—*Held*: the justices were right in holding that the exemption in the former Act still continued, & no corpn. licence was needed for selling fish.—*LOFTOS v. KIGGINS* (1890), 55 J. P. 151, D. C.

#### *B. Exemptions.*

##### *(a) Sale to Retailers.*

See Hawkers Act, 1888 (c. 33), s. 3 (3) (a).

##### *(b) Sale by Real Worker or Maker.*

See Hawkers Act, 1888 (c. 33), s. 3 (3) (b).

518. *Maker—Books bought in sheets & made up.*—A person buying books in sheets & making them up & then going from London into the country & selling them is within 50 Geo. 3, c. 41, & is not exempted from penalties as the maker of the goods.—*MOORE v. EDWARDS* (1820), 2 Chit. 213.

519. ——— *Personal manual labour not necessary—Manufacturer employing workmen.*—By 50 Geo. 3, c. 41, s. 23, the penalties of hawking without a licence are not to extend to sales by the real

workers or makers of goods, etc. of Great Britain, or by their children, apprentices, etc. usually residing with them. Manufacturers on a large scale, employing workmen on premises where they do not reside, & doing no manual labour themselves, are makers within the exemption. The servant of such manufacturers, not residing with them, travelled with goods of the manufactory to a town, where he sold them in a public room, having advertised the goods as those of his employers, to be disposed of by him according to their instructions. One of the proprietors was present, gave directions, noted the purchases, & received money, but no one was informed who he was:—*Held*: the seller, though not licenced, was exempt from penalty, the sale being substantially a sale by the master.—*R. v. FARADAY, R. v. WOOD* (1830), 1 B. & Ad. 275; 9 L. J. O. S. M. C. 35; 109 E. R. 788.

520. *Servants—Servants living in separate house.*—By 50 Geo. 3, c. 41, s. 23, it is enacted, that nothing in that Act shall extend to hinder the real worker or maker of any goods, etc., or his, her, or their children, apprentices, or known agents, or servants usually residing with such real worker or maker, from carrying abroad or exposing to sale, & selling by retail, or otherwise, any of the said goods, etc., of his, her, or their own making in any mart, market, or fair, & in every city, borough, town corporate, & market town:—*Held*: this exemption applied to such agents, or servants only as resided in the same house with the makers of the goods, as part of his family.—*R. v. MAINWARING* (1829), 10 B. & C. 66; 5 Man. & Ry. K. B. 36; 2 Man. & Ry. M. C. 549; 8 L. J. O. S. M. C. 36; 109 E. R. 375.

521. ——— *Master present at sale.*—*R. v. FARADAY, R. v. WOOD*, No. 519, *ante*.

##### *(c) Sale of Particular Articles.*

See Hawkers Act, 1888 (c. 33), s. 3 (3) (c).

522. *“Victuals”—Candles.*—*CAMBRIDGE UNIVERSITY CASE* (1629), Het. 145; 124 E. R. 410.

523. ——— *Yeast.*—Barm, or yeast, is victuals within the exempting clause of 50 Geo. 3, c. 41, s. 23, & therefore, a person purchasing that article of brewers & carrying the same from town to town & selling the same is not liable to the penalty imposed by that statute upon hawkers trading without a licence.—*R. v. HODGKINSON* (1829), 10 B. & C. 74; 2 Man. & Ry. M. C. 603; 5 Man. & Ry. K. B. 162; 8 L. J. O. S. M. C. 47; 109 E. R. 379.

*Effect of exemption—Whether licence necessary under local Act.*—See Nos. 515, 516, *ante*.

*Whether sale exempt from toll.*—See No. 527, *post*.

##### *(d) Sale in Market or Fair.*

See Hawkers Act, 1888 (c. 33), s. 3 (3) (d).

524. *Legally established markets—De facto market not included.*—*BENJAMIN v. ANDREWS*, No. 7, *ante*.

525. ———.]—*JAY v. SMALES* (1900), cited in 64 J. P. Jo. at p. 211.

*Certificated pedlar acting as hawker.*—See Nos. 537, 538, *post*.

*Exemption from toll—Sale by licenced hawker of goods not requiring licence.*—See No. 527, *post*.

##### *C. Who may be Licencee.*

See Hawkers Act, 1888 (c. 33), s. 4.

#### **PART XI. SECT. 1, SUB-SECT. 2.—C.**

*a. Whether licence personal.*—*Semble*: the licence to a hawker &

pedlar granted under the Municipal Acts of 1866 & 1873, is confined to the licensee only, & does not extend to a servant employed by him.—*Re FORD*

*v. MCARTHUR* (1876), 37 U. C. R. 542.—*OAN.*

*b. Corporation.*—The ordinance respecting auctioneers, hawkers &

*D. Effect.*

**526. Whether exemption from bye-laws conferred.]**—The licence granted to hawkers & pedlars does not authorise a buying & selling against the provisions of a bye-law made by a corpn.—*SIMSON v. MOSS* (1831), 2 B. & Ad. 543; 9 L. J. M. C. 120; 109 E. R. 1244.

*Annotation:—Reid. Leicester Corpn. v. Burgess* (1833), 5 B. & Ad. 246.

**Exemption from tolls.]**—See *Markets & Fairs Clauses Act, 1847* (c. 14), s. 13.

**527. — Goods sold not requiring licence.]**—An itinerant vendor of fruit & vegetables in the public streets of an urban district possessing a market, who holds a hawker's licence, is entitled to the exemption from market tolls afforded by *Markets & Fairs Clauses Act, 1847* (c. 14), s. 13, although no hawker's licence be needed for the sale of such articles, for in so vending his wares he does not act in breach of his licence.—*LLANDUDNO URBAN COUNCIL v. HUGHES*, [1900] 1 Q. B. 472; 69 L. J. Q. B. 303; 82 L. T. 147; 64 J. P. 357; 48 W. R. 366; 16 T. L. R. 171; 44 Sol. Jo. 213; 19 Cox, C. C. 456, D. C.

*Annotation:—Distd. Lee v. Wallocks* (1914), 111 L. T. 573.

**Whether licence under local Act necessary.]**—See Nos. 515, 516, *ante*.

## SUB-SECT. 3.—REGULATION BY BYE-LAWS.

**528. Whether valid—Hawking prohibited in great part of city.]**—A municipal power of regulation, or of making bye-laws for good government, without express words of prohibition, does not authorise a bye-law making it unlawful to carry on a lawful trade in a lawful manner; & therefore, where a municipal council had power to make bye-laws for "regulating & governing" hawkers, etc.:—*Held*: they had not power to prohibit hawkers from plying their trade at all in a substantial & important part of the city, no question of any apprehended nuisance being raised, & a bye-law to that effect was *ultra vires*.—*TORONTO (CITY) MUNICIPAL CORPN. v. VIRGO*, [1896] A. C. 88; 65 L. J. P. C. 4; 73 L. T. 449; 12 T. L. R. 46, P. C.

*Annotations:—Apld. Scott v. Glasgow Corpn.*, [1899] A. C. 470. *Reid. A.-G. for Ontario v. A.-G. for Dominion* [1896] A. C. 348; *Thames Conservators v. Kent*, [1918] 2 K. B. 272.

**529. — Hawkers restricted to part of seashore—Permit required on payment of fee—Permits limited to inhabitants.]**—By a local Act, the B. urban district council might from time to time for the prevention of danger, obstruction,

nuisance, or annoyance to persons using the seashore make & enforce bye-laws for regulating the selling & hawking of any article, commodity or thing on the seashore. A bye-law made in pursuance of this Act provided that where any part or parts of the seashore has or have, by notices affixed in conspicuous positions on the seashore, been set apart by the council for the sale & hawking of such articles, commodities, or things as may be specified in the notices, no person shall offer for sale or hawk any article, commodity, or thing so specified on any other part of the seashore. The council set apart a portion of the seashore for the sale & hawking of specified articles, & by the notice affixed sought to charge 2s. 6d. a week for licences to sell, & licences were only granted to residents in the urban district of B. Applt. was summoned & convicted for selling articles included in the notice on part of the seashore not set apart for such sale by the notices:—*Held*: the conviction must be quashed, as the bye-law was bad, inasmuch as it must be taken to incorporate the notice & the conditions thereof.—*MOORMAN v. TORDOFF* (1908), 98 L. T. 416; 72 J. P. 142; 6 L. G. R. 360, D. C.

*Annotation:—Reid. Mitcham Common Conservators v. Cox, Same v. Cole* (1911), 80 L. J. K. B. 1188.

**530. — —.]**—In pursuance of the powers granted to them by a local Act, to make & enforce bye-laws for the prevention (*inter alia*) of danger, obstruction, nuisance, or annoyance to persons using the seashore & for regulating the selling & hawking of any article, commodity, & thing on the seashore, the corpn. made a bye-law regulating the parts of the seashore which should be used by hawkers, & the parts on which they were forbidden to ply their trade:—*Held*: in the absence of any evidence that the corpn. had acted in such a manner as to make the bye-law a practical prohibition of hawking at all, the bye-law was valid.—*CASSELL v. JONES* (1913), 108 L. T. 806; 77 J. P. 197; 11 L. G. R. 488; 23 Cox, C. C. 372, D. C.

**531. — Hawking prohibited in certain streets during certain hours—On ground of obstruction.]**—A local authority made an order which, after reciting that certain streets specified in the sched. were, between the hours of ten in the forenoon & eight in the afternoon, thronged & liable to be obstructed on all days except Sundays, prohibited costermongers & hawkers from using those streets during those hours for selling fruit, etc., from barrows:—*Held*: the local authority were entitled under *Town Police Clauses Act, 1847* (c. 34), s. 21, to make a general order applicable to any street which was usually or habitually thronged or liable to be obstructed, & the power of the local

pedlars applies only to individuals not to corps.—*R. (NALDER) v. BARLOW*, [1923] 1 D. L. R. 262; 19 Alta. L. R. 66; [1922] 3 W. W. R. 1195.—CAN.

**a. Co-operative society.]**—A co-operative society, registered under the *Industrial & Provident Societies Act, 1893*, is a "person" within *Hawker's Act, 1888*, s. 2, & may be convicted under sect. 6 of that Act if it trades as a hawker without a licence.—*CO-OPERATIVE DRAPERY & FURNISHING CO., LTD. v. BLIGH* (1902), 4 F. (Ct. of Sess.) 97; 39 Sc. L. R. 500; 9 S. L. T. 424 (J.).—SCOT.

## PART XI. SECT. 1, SUB-SECT. 3.

**528 i. Whether valid—Hawking prohibited in great part of city.]**—Where a municipal bye-law was passed prohibiting hawkers & pedlars of vegetables & similar products from pursuing their calling throughout the municipality during certain hours on market days:

—*Held*: the bye-law in question was not authorised by the statute.—*R. v. SUNG CHONG* (1909), 14 B. C. R. 275.—CAN.

**528 ii. — —.]**—A municipality passed a bye-law prohibiting hawkers or pedlars from trading anywhere except in a street or a place to which the public habitually had access:—*Held*: the bye-law was *ultra vires*.—*BAKUS v. LADYSMITH CORPN.* (1914), 35 N. L. R. 469.—S. AF.

**528 iii. — —.]**—*BHIKA HIRA v. BOKSBURG MUNICIPALITY*, [1914] T. P. D. 513.—S. AF.

**d. — Hawking prohibited in certain streets.]**—A city council passed a bye-law to prevent hawkers & pedlars from prosecuting their trade in certain streets:—*Held*: the bye-law was beyond the powers of the council.—*Re VIRGO & CITY OF TORONTO* (1894), 22 S. C. R. 447.—CAN.

**e. — No exception in favour of manufacturer or producer or servants.]**—A bye-law contained no exception in favour of the manufacturer or producer & his servants:—*Held*: the bye-law was *ultra vires* the council.—*R. v. SMITH* (1899), 31 O. R. 224.—CAN.

**f. — Relegating to council power to fix fees by resolution.]**—Power given to a council to fix the licence fee for hawking by bye-law does not authorise a bye-law relegating it to the council to fix the fees by resolution.—*R. v. JIM SING* (1895), 4 B. C. R. 338.—CAN.

**g. — Prohibitory effect.]**—*R. v. LAFORGE* (1906), 12 O. L. R. 308; 8 O. W. R. 104, 551.—CAN.

**h. — Discrimination between residents & non-residents.]**—A bye-law discriminated between resident & non-resident merchants, traders, etc., by imposing a licence tax of \$20 on the



**Sect. 1.—Hawkers: Sub-sects. 3, 4, 5, 6 & 7. Sects.**

authority to make an order was not limited to a case similar to those of public processions, rejoicings, or illuminations.—**TEALE v. WILLIAMS**, [1914] 3 K. B. 395; 83 L. J. K. B. 1413; 111 L. T. 285; 78 J. P. 383; 12 L. G. R. 958; 24 Cox, C. C. 283, D. C.

**532. Construction of bye-law—Whether public notices incorporated.]—MOORMAN v. TORDOFF**, No. 529, *ante*.

**SUB-SECT. 4.—OFFENCES BY HAWKERS.**

See Hawkers Act, 1888 (c. 33), ss. 5, 6.

**533. Licence given to servant.]—A licenced hawker who gives his licence to be used by his servant employed to sell goods on his account is not liable on 29 Geo. 3, c. 26, as for letting to hire or lending the licence.—HODGSON v. FLOWER** (1809), 2 Camp. 288, N. P.

**SUB-SECT. 5.—SALE OF PETROLEUM.**

See, generally, PUBLIC HEALTH.

**534. Sale by hawker from cart—Whether keeping in a place—Within Petroleum Act, 1871 (c. 105).]**—C. had obtained a petroleum licence to sell it in a house specified. C. being a licenced hawker took a quantity of petroleum in two large tin cans without any marks, each holding 10 gallons, in his cart, & went about selling it from door to door in pints & small quantities. He had six gallons in one can when the officer met him on the highway. C. was convicted of unlawfully keeping petroleum not in pursuance of a licence:—**Held**: the carrying the petroleum in a cart was keeping it in a place, & the conviction was right.—**COLEMAN v. GOLDSMITH** (1879), 43 J. P. 718, D. C.

**SUB-SECT. 6.—IN METROPOLIS.**

See HIGHWAYS, Vol. XXVI., pp. 423, 424, Nos. 1428 *et seq.*

**SUB-SECT. 7.—LIABILITY TO CARRIAGE LICENCE DUTY.**

See REVENUE.

**SECT. 2.—PEDLARS.**

See Pedlars Act, 1871 (c. 96).

**535. "Trades"—Sale for charitable purposes not included.]—Twelve ladies, of whom resp. was one, having purchased materials & made them up into articles of wearing apparel, each in turn for one month carried these articles about in a basket,**

called a missionary basket, from house to house for sale. The ladies did not find the money to purchase the materials, but the money derived from the sales was applied towards the purchase, & the profits of the sales were devoted to a village school & religious purposes:—**Held**: resp. did not come within the definition of a "pedlar" in Pedlars Act, 1871 (c. 96), s. 3, & was not liable under sect. 4 to a penalty for acting as a pedlar without a certificate.—**GREGG v. SMITH** (1873), L. R. 8 Q. B. 302; 42 L. J. M. C. 121; 28 L. T. 555; 37 J. P. 679; 21 W. R. 737.

**536. "Sell"—Includes barter.]—DRUCE v. GABB**, No. 506, *ante*.  
town to town."—Compare No. 504,

**537. Whether exempt from tolls—Under Markets & Fairs Clauses Act, 1847 (c. 14), s. 13—Licenced pedlar acting as hawker.]—A pedlar holding a pedlar's certificate & trading within the district for which it was granted, but using a horse & cart, & therefore not acting as a pedlar within the definition in Pedlars Act, 1871 (c. 96), s. 3, was yet within the exemption of above sect., as extended by Pedlars Act, 1871 (c. 96), s. 6, & was not liable to a penalty for selling tollable articles within the limits prescribed by the special Act constituting a market.—**HOWARD v. LUPTON** (1875), L. R. 10 Q. B. 598; 44 L. J. M. C. 150; 40 J. P. 7.**

*Annotations*:—**N.F. Woolwich L. B. of Health v. Gardiner**, [1895] 2 Q. B. 497. **Reid. Openshaw v. Oakeley** (1889), 53 J. P. 740; **Loftos v. Gleave** (1890), 55 J. P. 149.

**538. ———.]—A person holding a pedlar's certificate is only entitled to the exemption provided by above sect., as extended by the Pedlars Act, 1871 (c. 96), s. 6, whilst he is acting as a pedlar within the definition of that term in Pedlars Act, 1871 (c. 96), s. 3. Therefore the holder of such a certificate who uses a horse & cart & sells tollable articles in a market is liable to a penalty.—**WOOLWICH LOCAL BOARD OF HEALTH v. GARDINER**, [1895] 2 Q. B. 497; 64 L. J. M. C. 248; 73 L. T. 218; 59 J. P. 597; 44 W. R. 46; 39 Sol. Jo. 710; 18 Cox, C. C. 173; 15 R. 590, D. C.**

*Annotations*:—**Reid. Llandudno U. C. v. Hughes**, [1900] 1 Q. B. 472; **Lee v. Wallocks** (1914), 111 L. T. 578.

**539. Whether licence necessary—Under local Act—Licence required for tollable goods only.]—G. sold hat guards in the street of B., which was under a local Act, one sect. of which required a corp'n. licence to sell in a place other than the market, any article for which a toll was leviable. G. had a pedlar's certificate, but no licence from the corp'n. The schedule of tolls mentioned only sheds or stalls for flesh, cheese, butter, "or other thing whatsoever":—**Held**: G. was not liable to have a corp'n. licence, as hat guards were not within the list of tollable things.—**LOFTOS v. GLEAVE** (1890), 55 J. P. 149, D. C.**

**SECT. 3.—TRANSIENT TRADERS.**

See Cases *infra*.

former, & \$40 on the latter:—**Held**: the bye-law was invalid.—**JONAS v. GILBERT** (1880), 5 S. O. R. 356.—CAN.

**k. ———.]—MINOR v. R.** (N. S.) (1920), 52 D. L. R. 158.—CAN.

**PART XI. SECT. 2.**

**l. "Trades"—Sale of bibles incidental to religious work.]—DUNCAN (CITY) v. GAIRNS** (B. C.) (1917), 27 Can. Grim. Cas. 440.—CAN.

**m. Regulation by bye-law—Validity of—Bye-law requiring licence.]—R. v. VAN NORMAN** (1909), 14 O. W. R. 659; 1 O. W. N. 35; 19 O. L. R. 447.—CAN.

**n. ——— Prohibition of trade during certain hours.]—A bye-law practically preventing pedlars from peddling any dairy produce (except milk) or garden or field produce within certain hours:—**Held**: invalid.—R. v. SANG CHONG** (1909), 11 W. L. R.

**231.—CAN.**

**o. Offences by pedlars—Form of conviction.]—R. v. HUBLEY** (1915), 49 N. S. R. 281.—CAN.

**PART XI. SECT. 3.**

**p. Who is a transient trader—General rule.]—A transient trader is one whose trade is localised by the occupation of premises or in some other way.—R. v. SCALES & ROBERTS, LTD.**

(1918), 41 O. L. R. 229; 30 Can. Crim. Cas. 82; 13 O. W. N. 305.—CAN.

q. — *Sale of goods on commission by consignee—Owner accompanying goods & assisting at sale.*—Where goods are consigned to be sold on commission, & they are sold in the shop or premises of the consignee, & by him or on his behalf, the owner of goods or his manager is not an occupant of such premises nor a transient trader, merely because he accompanies the goods & assists in their sale.—R. v. CUTHBERT (1880), 45 U. C. R. 19.—CAN.

r. — *Necessity for occupation of premises in municipality.*—Where goods are consigned by the owner to be sold on commission & they are sold by the consignee by auction in premises rented by him, the owner is not an occupant of such premises, nor a transient trader. To support a conviction it is essential that the person

charged occupy premises in the municipality.—R. v. WILSON (1900), 7 B. C. R. 112.—CAN.

t. — *Agent taking orders.*—R. v. MARSHALL (1886), 12 O. R. 55.—CAN.

a. — ———.]—R. v. ST. PIERRE (1902), 22 C. L. T. 233; 4 O. L. R. 76; 1 O. W. R. 385.—CAN.

b. *Licence—Necessity for.*—R. v. HENDERSON (1889), 18 O. R. 144.—CAN.

c. — ———.]—R. v. DOWSLAY (1890), 19 O. R. 622.—CAN.

d. — *Exemption—Farmer selling own produce.*—A charge against a farmer of selling his own produce in a town from a railway car by which it had been transported thither, contrary to a transient traders bye-laws of the town:—*Held*: properly dismissed.—R. v. GEDDES (1915), 9 O. W. N. 307; 35 O. L. R. 177.—CAN.

e. *Regulation by bye-law—Bye-law directed merely against persons not entered on assessment roll—Validity of.*—R. v. APPLEBE (1899), 30 O. R. 623.—CAN.

f. *Offences by transient traders—Form of conviction.*—R. v. MONICOL (1886), 11 O. R. 659.—CAN.

g. — ———.]—R. v. ROCHE (1900), 32 O. R. 20.—CAN.

h. — ———.]—Upon motion to quash the conviction of deft., a transient trader, for offering meat for sale in quantities less than the quarter carcase, without having paid a licence fee, contrary to a bye-law of a village:—*Held*: it was not necessary that the bye-law or conviction should contain the words "for temporary purposes" & "assessment roll for the then municipal year."—R. v. MYERS (1903), 23 C. L. T. 286; 6 O. L. R. 120; 2 O. W. R. 533.—CAN.

## MARQUESS.

See PEERAGES AND DIGNITIES.

## MARRIAGE.

See ECCLESIASTICAL LAW; HUSBAND AND WIFE.

## MARRIAGE SETTLEMENTS.

See BILLS OF SALE; SETTLEMENTS.

## MARRIED WOMEN.

See HUSBAND AND WIFE; REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS.

## MARSHALLING.

See BANKRUPTCY AND INSOLVENCY; EQUITY; EXECUTORS AND ADMINISTRATORS; MORTGAGE.

END OF VOL. XXXIII.









**Sect. 4.—Mandamus: Sub-sects. 2 & 3. Sect. 5 Sub-sects. 1 & 2, A. & B. (a) & (b).]**

**SUB-SECT. 2.—PROCEDURE.**

*See, generally, CROWN PRACTICE, Vol. XVI., pp. 323 et seq.*

**1580. Time for application.]**—If an appeal be given to the sessions within six months after the cause of complaint, & a motion is made there within that time to enter & respite one, which is denied, the ct. will not grant a *mandamus* to the justices to receive it after the six months are elapsed.—*R. v. DERBYSHIRE JJ.* (1791), Nolan, 29; 4 Term Rep. 488; 100 E. R. 1134.

**1581. —.]**—A *certiorari* to remove an order of quarter sessions had been quashed because the affidavit on which it had issued omitted to state that the justices on whom it was served had been present at the sessions at the making of the order pursuant to 13 Geo. 2, c. 18, s. 5. On motion for a fresh *certiorari* to remove the same order after the six months had expired:—*Held*: the writ had not been moved or applied for within the meaning of the Act by the former application, & the present was a fresh motion & consequently out of time.—*R. v. CARTWORTH (INHABITANTS)* (1843), 1 Dow. & L. 837, 842; 8 Jur. 61; 8 J. P. 104; *sub nom.* — *v. —*, 13 L. J. M. C. 28.

*Annotation:—Mentd.* *R. v. West Riding of Yorkshire JJ., Darton v. West* (1844), 1 New Sess. Cas. 406.

*—.]—See CROWN PRACTICE, Vol. XVI., pp. 325, 326, Nos. 1379–1390.*

**1582. Evidence in support of application—Contents of affidavit.]**—Before a *mandamus* is granted to compel sessions to enter continuances & hear an appeal they have refused to hear, it is essential that the affidavits of applts. show that the practice of the particular sessions with respect to the time of notice of appeal has been observed.—*R. v. WARWICKSHIRE JJ.* (1845), 6 Q. B. 750; 1 New Mag. Cas. 193; 1 New Sess. Cas. 463; 14 L. J. M. C. 39; 4 L. T. O. S. 291; 9 J. P. 179; 9 Jur. 131; 115 E. R. 283.

**1583. —.]**—The affidavits on motion for a *mandamus* to sessions to hear an appeal should state all the material facts that occurred at the sessions.—*R. v. WEST RIDING OF YORKSHIRE JJ., St. Pancras v. Bradford* (1845), 3 Dow. & L. 152; 2 New Sess. Cas. 1; 14 L. J. M. C. 119; 5 L. T. O. S. 152; 9 J. P. 822; 9 Jur. 790.

**Direction of writ—To what justices.]**—*See CROWN PRACTICE, Vol. XVI., p. 334, Nos. 1519, 1520.*

**SUB-SECT. 3.—COSTS.**

*See CROWN PRACTICE, Vol. XVI., pp. 347–352, Nos. 1742–1822.*

**SECT. 5.—SPECIAL CASE.**

**SUB-SECT. 1.—BEFORE HEARING AT SESSIONS—CASE STATED BY CONSENT OF PARTIES.**

*See, generally, Crown Cases Act, 1848 (c. 78); Quarter Sessions Act, 1849 (c. 45), s. 11; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 25, 63.*

**1584. Contents of case—Agreement of parties to submit to decision of court.]**—A case stated for the

opinion of the Q. B. Div., under Quarter Sessions Act, 1849 (c. 45), s. 11, should contain a statement of the agreement of the parties that judgment in conformity with the decision of the ct. may be entered at quarter sessions in the manner provided by the sect.—*PETERBOROUGH CORPN. v. THURLBY OVERSEERS* (1882), 8 Q. B. D. 586, D. C.

**1585. Practice of King's Bench Division—One counsel only heard on each side.]**—(1) On the hearing of a special case in an appeal stated for the opinion of one of the superior cts. under Quarter Sessions Act, 1849 (c. 45), s. 11, the counsel for the party in support of the rate is entitled to begin.

(2) Upon such hearing the ct. refused to hear more than one counsel upon either side.—*BEDFORDSHIRE JJ. v. ST. PAUL, BEDFORD* (1852), 7 Exch. 650; 21 L. J. M. C. 228; 16 J. P. 538; 155 E. R. 1109.

*Annotations:—As to (1) Refd.* *Sheppard v. Bradford* (1864), 12 W. R. 867. *Generally, Mentd.* *Mile End Grdns. v. Hoare*, [1903] 2 K. B. 483.

**1586. Party supporting order begins—& replies.]**—Where a case is stated for the ct. under Quarter Sessions Act, 1849 (c. 45), s. 11, & argued on *concilium*, the counsel supporting the order of the magistrates is entitled to begin & reply.—*R. v. HOLBECK OVERSEERS* (1851), 16 Q. B. 404; 10 L. T. O. S. 503; 15 J. P. 227; 117 E. R. 933.

*Annotations:—Mentd.* *Hartfield v. Rotherfield, R. v. St. Andrew, Holborn* (1852), 17 Q. B. 746; *R. v. Worcester-shire JJ., Winchcombe Union Grdns. v. Stourbridge Union Grdns.* (1865), 13 W. R. 836.

**1587. —.]**—*BEDFORDSHIRE JJ. v. ST. PAUL, BEDFORD, No. 1585, ante.*

**1588. Costs—Given to successful party as between party & party.]**—*Semble*: where on appeal to quarter sessions a case is stated for the opinion of a superior ct. under Quarter Sessions Act, 1849 (c. 45), s. 11, the practice is to give costs to the successful party as between party & party.—*CLARENDON (EARL) v. ST. JAMES'S, WESTMINSTER (RECTOR, ETC.)* (1851), 10 C. B. 806; 4 New Sess. Cas. 639; 20 L. J. M. C. 213; 17 L. T. O. S. 75; 15 J. P. 340; 138 E. R. 319.

*Annotations:—Mentd.* *R. v. Gaskell* (1851), 16 Q. B. 472; *R. v. Cockburn* (1852), 16 Q. B. 480; *R. v. Linnæan Soc.* (1854), 18 J. P. 504; *R. v. Royal Medical & Chirurgical Soc. of London* (1857), 21 J. P. 789.

**SUB-SECT. 2.—AFTER HEARING AT SESSIONS.**

**A. In General.**

*See Criminal Justice Act, 1925 (c. 86), s. 20.*

**1589. Interested magistrate—May not vote as to grant of case.]**—*R. v. GUDGRIDGE, No. 75, ante.*

**1590. Case offered by magistrate—Party not bound to accept.]**—*R. v. WEST RIDING JJ., Re CHORLTON TOWNSHIP, No. 1504, ante.*

**1591. Case embodying only irrelevant questions.]**—The ct. will not answer a case from the sessions which submits questions frivolous & wholly immaterial.

It is a gross abuse to send to this ct. a case . . . submitting questions, the answers to which cannot & ought not to affect the decision on the settlement (LORD DENMAN, C.J.).—*R. v. HALIFAX (INHABITANTS)* (1848), 12 L. T. O. S. 147; 12 J. P. 760.

**By licensing justices.]**—*See INTOXICATING LIQUORS, Vol. XXX., p. 70, Nos. 551–557.*

**PART XIV. SECT. 5, SUB-SECT. 2.—A.**

**1. Effect of stating case—Removal from sessions.]**—*R. v. BOULTBEE* (1864), 23 U. C. R. 457.—**CAN.**

**g. Preliminary procedure must be complied with.]**—The ct. will not hear a case from the quarter sessions unless the statute & rules of ct. prescribing

the preliminary steps have been strictly complied with.—*R. v. HATCH* (1865), 15 C. P. 461.—**CAN.**

**B. When Appeal Available.****(a) In General.**

See Criminal Justice Act, 1925 (c. 86), s. 20.

**1592. On trial of indictment—Consent of recorder.]**—At the trial of an indictment at quarter sessions a point of law was taken, & it appeared that in effect the recorder then consented to state a case. At the next quarter sessions he consented to state a case:—*Held*: the recorder had jurisdiction to state the case.—*R. v. MEAN* (1904), 69 J. P. 27; 21 T. L. R. 172, C. C. R.

*Annotation*:—*Mentd.* *R. v. Rodley*, [1913] 3 K. B. 468.

—*See, now*, Criminal Appeal Act, 1907 (c. 23), s. 20 (1).

**1593. — For repair of bridge.]**—The inhabitants of the county, being *prima facie* liable to repair all public bridges within it, are therefore, as it seems, bound to repair an ancient horse bridge, unless they show that others are bound to repair same. The ct. will take no cognisance of a special case reserved upon the trial of an indictment at the sessions.—*R. v. SALOP (INHABITANTS)* (1810), 13 East, 95; 104 E. R. 303.

*Annotation*:—*Refd.* *R. v. Sutton Coldfield Overseers* (1874), L. R. 9 Q. B. 153.

& similar matters.]—*See, now*, Supreme Court of Judicature Act, 1925 (c. 49), s. 29.

**1594. After sessions concluded—Unless power reserved with consent of all parties.]**—A chairman of quarter sessions has no power, after the sessions are over, to state a case for the opinion of the ct. upon points raised on appeal against an order of removal, unless the power to do so has been distinctly reserved to him by the ct. of quarter sessions with the consent of all parties.—*R. v. BASING (INHABITANTS)* (1849), 3 New Mag. Cas. 161; 13 L. T. O. S. 281; 13 J. P. Jo. 393.

**1595. On respiting appeal.]**—(1) Upon an application to enter & respite an appeal, the ct. of quarter sessions has no power to state a special case; & the Ct. of Q. B. will take no notice of the facts of a case so stated.

(2) Where quarter sessions state a case for the opinion of the Ct. of Q. B. they ought themselves to decide one way or the other otherwise the superior ct. will not entertain the appeal & give any decision on the merits.—*R. v. SUTTON COLD-FIELD OVERSEERS* (1874), L. R. 9 Q. B. 153; *sub nom.* *R. v. LONDON & NORTH WESTERN RY. CO.*, 43 L. J. M. C. 57; *sub nom.* *R. v. SUTTON COLD-FIELD, R. v. ASTON*, 29 L. T. 840; 38 J. P. 166 *sub nom.* *LONDON & NORTH WESTERN RY. CO. v. SUTTON COLD-FIELD, LONDON & NORTH WESTERN RY. CO. v. ASTON*, 22 W. R. 324.

*Annotations*:—*As to* (2) *Consd.* *R. v. Southampton Licensing JJ., Ex p. Cardy*, [1906] 1 K. B. 446. *Refd.* *Ex p. Curtis* (1877), 47 L. J. M. C. 35; *R. v. Brindley* (1885), 54 L. T. 435. *Generally, Refd.* *Walsall Overseers v. L. & N. W. Ry.* (1878), 4 App. Cas. 30.

—*See, also*, Sub-sect. 2, D. (b), *post*.

**No appeal on question of fact.]**—*See* Sub-sect. 2, E. (b), *post*.

**(b) Discretion of Justices.**

*See, now*, Criminal Justice Act, 1925 (c. 86), s. 20.

**1596. Whether justices will be compelled to state a case.]**—*Qu.*: whether the sessions can be compelled to state a case.—*R. v. OULTON (INHABI-*

*TANTS)* (1735), *Lee temp. Hard.* 169; *Burr. S. C.* 64; *Sess. Cas. K. B.* 209; 95 E. R. 108.

*Annotations*:—*Apprvd.* *R. v. Walsall Overseers* (1878), 3 B. D. 457. *Refd.* *Walsall Overseers v. L. & N. W. Ry.* (1878), 4 App. Cas. 30. *Mentd.* *Ex p. Tollerton Overseers* (1842), 3 Q. B. 792.

**1597. —.]**—*Ex p.* *JARVIN (INHABITANTS)*, No. 1465, *ante*.

**1598. — Where they have granted but not stated case.]**—When the sessions on determining an appeal have granted a case, but none has been stated, the ct. will, under some circumstances, direct a *mandamus* to the justices who heard the appeal, to state a case. But not where it is clear that such a proceeding could lead to no result; as where the chairman, in consequence of his own opinion & that of the ct. upon the facts, refused to sign any statement but one which would have excluded the point of law relied upon by the party demanding a case.—*R. v. PEMBROKESHIRE JJ.* (1832), 2 B. & Ad. 391; 1 L. J. M. C. 92; 109 E. R. 1188.

*Annotations*:—*Consd.* *R. v. Cheshire JJ., Ex p. Meekin* (1846), 11 J. P. 6; *R. v. Staffordshire JJ.* (1857), 7 E. & B. 935. *Refd.* *Ex p. Jarvin* (1840), 9 Dowl. 120. *Mentd.* *Kendall v. Wilkinson* (1855), 4 E. & B. 680.

**1599. — Justices unable to agree as to terms of case—Mandamus to enter continuances.]**—Where quarter sessions have confirmed an order of removal, subject to a case for the opinions of the Ct. of K. B., & the justices cannot agree for several sessions on the terms of the case, the ct. will grant a *mandamus*, compelling them to enter continuances & hear the appeal; for the order of sessions being only conditional, there is no decision, unless the case is returned.—*R. v. SUFFOLK JJ.* (1832), 1 Dowl. 163.

*Annotations*:—*Distd.* *R. v. Staffordshire JJ.* (1832), 1 Dowl. 484. *Expld.* *R. v. Hampshire JJ.* (1862), 32 L. J. M. C. 46.

**1600. — Where justices ought to grant case.]**—Nothing can be better settled than that it is entirely at the discretion of the sessions whether to grant a case, & so to submit their judgment to the opinion of the Ct. of Q. B. or not. Even though the appeal should be one in which in the proper exercise of their discretion they ought undoubtedly to grant a case in order that their judgment may be reviewed, if they refuse to do so; there are no means of compelling them (*COCKBURN, C.J.*).—*R. v. WALSALL OVERSEERS* (1878), 3 Q. B. D. 457; 47 L. J. Q. B. 711; 38 L. T. 665; 42 J. P. 644; 26 W. R. 705, C. A.; *on appeal, sub nom.* *WALSALL POOR OVERSEERS v. LONDON & NORTH WESTERN RY. CO.* (1878), 4 App. Cas. 30, H. L.

*Annotations*:—*Refd.* *R. v. Southampton Licensing JJ., Ex p. Cardy*, [1906] 1 K. B. 446; *Kydd v. Liverpool Watch Committee*, [1907] 2 K. B. 591. *Mentd.* *Monmouthshire Corpn. v. Monmouth* (1878), 38 L. T. 612; *R. v. Swindon New Town L. B.* (1880), 49 L. J. Q. B. 522; *Shubbrook v. Tufnell* (1882), 30 W. R. 740; *Peterborough Corpn. v. Wilsthorpe Parish & Stamford Union Assmt. Com.* (1883), 53 L. J. M. C. 33; *Illingworth v. Bulmer East Highway Board* (1884), 53 L. J. M. C. 60; *Holborn Grdns. v. Chertsey Grdns.* (1885), 15 Q. B. D. 76; *Cox v. Hakes* (1890), 15 App. Cas. 506; *Ex p. Kent County Council & Dover Council, Ex p. Kent County Council & Sandwich Council*, [1891] 1 Q. B. 725; *Barnardo v. Ford, Gossage's Case*, [1892] A. C. 326; *Re Knight & Tabernacle Permanent Bldg. Soc.* (1892), 41 W. R. 35; *Lodge v. Huddersfield Corpn.* (1898), 62 J. P. 515; *Re Carpenter & Bristol Corpn.* (1907), 71 J. P. 417; *Re Jude's Musical Compositions*, [1907] 1 Ch. 651; *L. & N. W. Ry. v. Thrapstone Union Assmt. Com.* (1912), 107 L. T. 788; *R. v. Nat Bell Liquors*, [1922] 2 A. C. 128.

PART XIV. SECT. 5, SUB-SECT. 2.—**B. (a).**

**h. On conviction for treason, felony or misdemeanour.]**—Applt., having

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been convicted before justices of having pretended to be a physician, contrary to 29 Vict. c. 34, appealed to quarter sessions, & was found guilty:—*Held*: the sessions had no

power to reserve a case under C. S. U. C. c. 112, applt. not being a person "convicted of treason, felony, or misdemeanour."—*POMEROY v. WILSON* (1866), 26 U. C. R. 45.—CAN.



**Sect. 5.—Special case: Sub-sect. 2, B. (c), C. & D. (a) & (b).]**

**(c) Effect of Statute Making Decision of Sessions Final.**

**1601. Whether justices can state a case—Right to certiorari taken away—Justices decision to be final.]—R. v. ALLEN, No. 1116, ante.**

**1602. ———.]—R. v. WYKEHAM, No. 1432, ante.**

**1603. ———.]—R. v. HANDLEY, No. 1433, ante.**

**1604. ———.]—On an appeal to a ct. of quarter sessions against a conviction under a statute by which the *certiorari* was taken away, the ct. affirmed the conviction subject to a special case for the Ct. of Q. B.:—Held: the *certiorari* could not issue even for the purpose of bringing the case before the ct., & the consent of the informant to the issue of the writ was immaterial.—R. v. CHANTRELL (1875), L. R. 10 Q. B. 587; 44 L. J. M. C. 94; 33 L. T. 305; 39 J. P. 472; 23 W. R. 707, D. C.**

**Annotations:—Consd. R. v. Walsall Overseers (1878), 3 Q. B. D. 457; Kydd v. Liverpool Watch Committee, [1907] 2 K. B. 591. Refd. Re Carpenter & Bristol Corpn. (1907), 71 J. P. 417.**

**1605. ——— Consent of parties.]—By consent of the parties, applt. & resp., a special case may be stated, by a ct. of quarter sessions, for the opinion of the Ct. of Q. B., though the writ of *certiorari* be taken away. But the questions submitted must be questions of substance arising upon the merits of the case; & a question of jurisdiction may conveniently be raised in this way.—R. v. DICKENSON (1857), 7 E. & B. 831; 26 L. J. M. C. 204; 29 L. T. O. S. 180; 22 J. P. 243; 3 Jur. N. S. 1076; 5 W. R. 654; 119 E. R. 1455.**

**Annotations:—Expld. R. v. Chantrell (1875), L. R. 10 Q. B. 587. Refd. Kydd v. Liverpool Watch Committee, [1907] 2 K. B. 591.**

**1606. ——— Justices' decision to be final.]—Resp. (applt. at quarter sessions), a divisional inspector of police, retired with a right to a pension to be calculated according to the Police Act, 1890 (c. 45), on the amount of his "annual pay" at the date of his retirement. At that date resp., in addition to a weekly payment of money, had a free residence, with free fuel, gas & water:—Held: there is an appeal by way of case stated on points of law from the decision of quarter sessions in an appeal to them by a police constable from a decision of the police authority in calculating the amount of pension due to such police constable on his retirement, notwithstanding the direction in Police Act, 1890 (c. 45), s. 11, that the decision of quarter sessions shall be final.—GOODWIN v. SHEFFIELD CORPN., [1902] 1 K. B. 629; 71 L. J. K. B. 492; 86 L. T. 682; 66 J. P. 533; 18 T. L. R. 441, D. C.**

**Annotations:—Consd. Kydd v. Liverpool Watch Committee, [1907] 2 K. B. 591. Mentd. Bayley v. Bayley, [1922] 2 K. B. 227.**

**1607. ———.]—By Police Act, 1890 (c. 45), s. 11, where a police constable claims a pension as of right, & the police authority do not admit the claim, the constable may apply to the police authority for a reconsideration of the claim to the pension, & if aggrieved by the decision upon such reconsideration may apply to the next practicable ct. of quarter sessions, " & that ct., after inquiry into the case, may make such order in the matter as appears to the ct. just, which order shall be final":—Held: the decision of quarter sessions is final, & they have no power to state a case for**

**the opinion of the ct.—KYDD v. LIVERPOOL WATCH COMMITTEE, [1908] A. C. 327; 77 L. J. K. B. 947; 99 L. T. 212; 72 J. P. 395; 24 T. L. R. 772; 52 Sol. Jo. 639; 6 L. G. R. 903, H. L.; revsg., [1907] 2 K. B. 591, C. A.**

**Annotations:—Expld & Distd. Lobitos Oilfields v. Admiralty Comrs., Crown S.S. Co. v. Admiralty Comrs. (1917), 86 L. J. K. B. 1444. Refd. Re Carpenter & Bristol Corpn. (1907), 5 L. G. R. 977; R. v. Salford Hundred JJ., [1912] 2 K. B. 567.**

**C. Time for Application to High Court.**

**See C. O. R., 1906, r. 25.**

**1608. Within six months of order.]—Certiorari to remove an order of sessions confirming an order of removal by two justices, must be moved for within six calendar months after such order made.—R. v. SUSSEX JJ. (1813), 1 M. & S. 631; 105 E. R. 236; subsequent proceedings, 1 M. & S. 734.**

**Annotations:—Mentd. R. v. Middlesex JJ. (1836), 5 Ad. & El. 626; R. v. Darton (1844), 14 L. J. M. C. 41.**

**at judges' chambers within time.]—This ct. refused to grant a *certiorari* to bring up an order of sessions made subject to a case, on an application more than six months after the order was made, although appcts. had attended at the judge's chambers within the time, but had failed, in consequence of the non-attendance of a judge there till after the six months had expired.—Ex p. LLANBEBLIG (INHABITANTS) (1846), 2 New Sess. Cas. 315; 15 L. J. M. C. 92.**

**1610. ——— Time computed from date of order—Not from settlement of case.]—An application for a writ of *certiorari* to bring up an order of magistrates on which a special case has been granted must be made within six months from the date of the order, & not from the settlement of the special case.—ELLIOTT v. THOMPSON (1875), 33 L. T. 339; 24 W. R. 56; sub nom. Ex p. ELLIOTT, 40 J. P. 56.**

**1611. ——— Effect of C. O. R., 1906, r. 25—Statutory enactment limiting time for certiorari to three months.]—A case stated by the London quarter sessions on an appeal to them under the Valuation (Metropolis) Act, 1869 (c. 67) may, notwithstanding the provisions of sect. 40 of that Act limiting the time for suing out a *certiorari* for the removal of orders of the assessment sessions to three months, be filed at any time within six months after the decision of the sessions under above rule.—HORNER v. STEPNEY ASSESSMENT COMMITTEE (1908), 98 L. T. 450; 72 J. P. 262; 24 T. L. R. 500; 6 L. G. R. 651; 2 Konst. Rat. App. 743.**

**Failure to state case within time—Whether mandamus to enter continuances granted.]—See CROWN PRACTICE, Vol. XVI., p. 325, No. 1384.**

**D. Form of Case.**

**(a) In General.**

**1612. Must state actual issues—Not abstract questions of law.]—Re CARDIGAN COUNTY COUNCIL, No. 1230, ante.**

**1613. Must state conclusions of fact—Not evidence.]—A special order of sessions must state facts, & not recite evidence.—R. v. MARKLEY (INHABITANTS) (1738), Andr. 151; 95 E. R. 339; sub nom. R. v. MARTLEY (INHABITANTS), Burr. S. C. 120.**

**1614. ———.]—Sessions should state as a fact, in a settlement case, whether the master dispensed with the service before the end of the**

**PART XIV. SECT. 5, SUB-SECT. 2.—D. (a).**

**k. Judge's report—Setting out evi-**

**dence on which question of law arose.]—A case stated by way of appeal from quarter sessions ought to be in the form of a judge's report, & should**

**set out fully the evidence upon which the question of law arose.—KEVIL v. LYNCH (1874), 7 I. R. Eq. 329.—IR.**

year, or whether there were a dissolution of the contract by mutual consent.

The ct. of quarter sessions should state the result of the evidence; & in a case of this kind they should state the fact one way or the other (GROSE, J.).—*R. v. ST. PETER OF MANCROFT IN NORWICH (INHABITANTS)* (1800), 8 Term Rep. 477; 101 E. R. 1499.

*Annotation*:—*Mentd. R. v. Kings Pyon* (1803), 4 East, 351.

.]—The ct. of quarter sessions in a case sent by them for the opinion of the Ct. of K. B., should state the conclusion of fact which they draw from the evidence, & not the evidence itself.—*R. v. ST. CUTHBERT WELLS (INHABITANTS)* (1834), 5 B. & Ad. 939; 3 Nev. & M. K. B. 100; 2 Nev. & M. M. C. 93; 3 L. J. M. C. 35; 110 E. R. 1038.

**1616.** ———.]—Sessions should state facts not evidence; we must order them to re-hear the case; but that will not bind them to state another case for our opinion (DENMAN, C.J.).—*R. v. MELSONBY (INHABITANTS)* (1837), 1 Jur. 52.

**1617.** ———.]—Sessions ought to find the facts specifically, & not send up the documentary & other evidence to the ct. in the shape of a case.—*R. v. SALISBURY (MARQUIS)* (1838), 8 Ad. & El. 716; 3 Nev. & P. K. B. 476; 1 Will. Woll. & H. 444; 7 L. J. M. C. 110; 2 Jur. 658; 112 E. R. 1009.

*Annotation*:—*Mentd. L. & N. W. Ry. v. Buckmaster* (1875), L. R. 10 Q. B. 444.

**1618.** ——— **Certiorari refused—Case merely asking court to draw conclusion of fact.**]—On appeal against an order for removal, on the ground among others that the examinations whereon the order was made were insufficient & did not contain legal evidence of any settlement having been gained in applt. parish, sessions overruled the objection, & after hearing evidence offered by resps., confirmed the order, subject to a case for the opinion of the Ct. of Q. B. on a matter of evidence. This ct. refused a rule for a *certiorari* to bring up the examinations on which the original order was made.—*Ex p. TOLLERTON OVERSEERS* (1842), 3 Q. B. 792; 2 Gal. & Dav. 533; 114 E. R. 711; *sub nom. R. v. WEST RIDING OF YORKSHIRE JJ., TOLLERTON v. IDLE*, 12 L. J. M. C. 15; 7 Jur. 15.

*Annotations*:—*Refd. R. v. Buckinghamshire JJ.* (1843), 3 Q. B. 800; *Ex p. Brighton Grdns.* (1850), 14 J. P. 639.

**1619.** ———.]—*R. v. TILLINGHAM (INHABITANTS)*, No. 1665, *post*.

**1620.** ———.]—The ct. of quarter sessions ought not simply to state facts & ask the opinion of the ct. as a jury upon them, but having drawn their own conclusions from the facts, they may ask whether in the opinion of the ct., the facts will warrant their finding.—*R. v. PILKINGTON (INHABITANTS)* (1844), 5 Q. B. 662; 3 Gal. & Dav. 319; 1 New Sess. Cas. 90; 13 L. J. M. C. 61; 2 L. T. O. S. 400; 8 J. P. 724; 8 Jur. 267; 114 E. R. 1398.

**1621. Parties unable to agree facts—Case settled by chairman of sessions binding.**]—*THURBORLAND v. BRIGHTSIDE BIERLOW OVERSEERS* (1859), 23 J. P. Jo. 324.

**1622. To be drawn by counsel.**]—*R. v. WOOLPIT (INHABITANTS)*, No. 1649, *post*.

(b) *Case must be Conclusive of Appeal.*

**1623. General rule.**]—The sessions should not send up a case with a view to its being reheard by them, but should decide both ways, provisionally.—*R. v. STOKE-UPON-TRENT (INHABITANTS)* (1843), 5 Q. B. 303; 1 Dav. & Mer. 357; 13 L. J. M. C.

41; 2 L. T. O. S. 148; 8 J. P. 197; 8 Jur. 34; 114 E. R. 1263.

*Annotations*:—*Refd. R. v. Kesteven JJ.* (1844), 8 Jur. 445. *Mentd. Devonald v. Rosser*, [1906] 2 K. B. 728; *Meek v. Port of London Authority* (1918), 119 L. T. 196.

**1624.** ———.]—*FULHAM UNION v. ST. MARY ABBOTTS, KENSINGTON ASSESSMENT COMMITTEE* (1886), Ryde, Rat. App. (1886–90), 86, D. C.

*Annotations*:—*Mentd. L. C. C. v. St. Giles-in-the-Fields & St. George's, Bloomsbury* (1891), Ryde, Rat. App. (1891–93), 72; *R. v. Woolwich Union Grdns.* (1891), Ryde, Rat. App. (1891–93), 279.

**1625. Provision for re-hearing at sessions.**]—Special order ought not to conclude to the opinion of the Court.—*ANON.* (1700), 2 Salk. 486; 91 E. R. 418.

*Annotations*:—*Mentd. R. v. Chantrell* (1875), L. R. 10 Q. B. 587; *R. v. Walsall Overseers* (1878), 3 Q. B. D. 457.

**1626.** ———.]—This Ct. refused to hear a case [of an appeal against an order for the removal of a pauper] sent up by quarter sessions which concluded thus: “if the Ct. of Q. B. shall be of opinion, etc., then the order to be confirmed, but, if the Ct. shall be of a contrary opinion, then the appeal to stand respite until the next sessions after the judgment of the Ct.,” because the sessions had at the same time asked this Ct. to decide the case, & had reserved the power of afterwards deciding it themselves.—*R. v. WISTOW (INHABITANTS)* (1841), 3 Q. B. 816, n.; 1 Gal. & Dav. 681; 114 E. R. 720; *sub nom. R. v. WESTOE (INHABITANTS)*, 10 L. J. M. C. 112.

*Annotation*:—*Refd. R. v. Kesteven JJ.* (1844), 8 J. P. 629.

**1627.** ———.]—*Semble*: it is not proper to annex to a case sent from the sessions for the opinion of this ct., a condition that, if the ct. think one way, the subject-matter shall be sent back to the ct. of sessions to be reheard.—*R. v. WORTH (INHABITANTS)* (1843), as reported in 4 Q. B. 132; 3 Gal. & Dav. 376; 7 J. P. 287; 114 E. R. 847.

*Annotations*:—*Mentd. R. v. Ickham* (1843), 7 J. P. 529; *R. v. Kesteven JJ.* (1844), 8 J. P. 629; *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130.

**1628.** ———.]—Notice of appeal against an order of removal described the order by its contents, but did not state the names of the removing justices. On the trial of the appeal this was argued as a preliminary objection; & the sessions, without further hearing, confirmed the order, subject to the opinion of this ct. on a case, which submitted, as the point for decision, whether the notice was defective for the reason above mentioned; directing, that, if this ct. held the notice good, the case should be sent back to the sessions, to be heard on the merits.

This ct. overruled the objection without argument, & allowed the case to go back to the sessions.—*R. v. WESTHOUGHTON (INHABITANTS)* (1843), 5 Q. B. 300; 1 Dav. & Mer. 388; 13 L. J. M. C. 41; 2 L. T. O. S. 147; 7 J. P. 738; 8 Jur. 106; 114 E. R. 1262.

*Annotation*:—*Refd. R. v. Kesteven JJ.* (1844), 8 Jur. 445.

**1629.** ———.]—*R. v. KESTIVEN JJ.*, No. 1509, *ante*.

**1630.** ———.]—The Ct. of Q. B. will not hear any case sent from the ct. of quarter sessions which contains a proviso that in a certain event the appeal is to be sent back to be heard by sessions.—*R. v. MACCLESFIELD (INHABITANTS)* (1844), 1, New Mag. Cas. 59; 3 L. T. O. S. 179; 8 J. P. Jo. 373.

———.]—*R. v. FARIBEY (INHABITANTS)* (1844), 4 L. T. O. S. 113.

**1632.** ———.]—A case from quarter sessions must not submit a question to this ct. on the sufficiency of examinations or grounds of appeal with a



*Sect. 5.—Special case: Sub-sect. 2, D. (b), & E. (a)*

direction that if the ct. should decide in favour of their sufficiency the case may be sent back to sessions to be reheard on the merits; but the merits should be heard by the sessions in the first instance, so that if any question then remain for this ct. its decision may be final.—*R. v. MARTON CUM GRAFTON (INHABITANTS)* (1847), 10 Q. B. 971; 3 New Sess. Cas. 5; 16 L. J. M. C. 159; 11 J. P. 678; 11 Jur. 927; 116 E. R. 368.

*Annotation:—Consd. R. v. Sutton Coldfield Overseers* (1874), L. R. 9 Q. B. 153.

**1633.** —.]—*R. v. SUTTON COLDFIELD OVERSEERS*, No. 1595, *ante*.

**1634.** —.]—*R. v. HEADINGTON UNION* (1883), 47 J. P. Jo. 756; *on appeal, sub nom. HEADINGTON UNION GUARDIANS v. ST. OLAVE'S UNION GUARDIANS* (1884), 13 Q. B. D. 293, C. A.

*Annotation:—Mentd. Plymouth Union v. Axminster Union* (1898), 67 L. J. Q. B. 871.

*E. Functions and Powers of High Court.**(a) In General.*

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 25 (2).

**1635. Order of justices quashed—Order of sessions falls with it.]—ANON.** (1701), No. 1426, *ante*.

**1636. When court will refuse to hear appeal—Majority of justices against case.]—R. v. MONMOUTHSHIRE JJ.**, No. 1474, *ante*.

**1637. — Point already decided in High Court—Sessions ignorant thereof.]—**Where quarter sessions sent a case for the opinion of this ct., being ignorant that the point stated in it had been previously decided, the ct. refused to review their judgment.—*R. v. ST. JOHN EVANGELIST (INHABITANTS)* (1838), 6 Ad. & El. 300, 2 Jur. 46; 112 E. R. 114.

**1638. — Decision of sessions expressed not to be on merits of case.]—**At the hearing of an appeal sessions were of opinion, upon objection taken, that the examinations were insufficient, & quashed the order, but at the request of resps., & with a view to enable them to obtain a fresh order, they stated in the order of sessions, that the order of removal was quashed, "but not on the merits":—*Held*: upon a case stated, sessions were not bound to quash the order absolutely, & this ct. would not entertain the question, whether the objection went to the merits of the settlement, though that question was raised on the case, sessions having found in terms that they quashed not on the merits.—*R. v. KINGSCLERE (INHABITANTS)* (1843), 3 Q. B. 388; 3 Gal. & Dav. 186; 13 L. J. M. C. 22; 2 L. T. O. S. 147; 8 J. P. 72; 7 Jur. 1085; 114 E. R. 555.

*Annotations:—Reid. Ex p. Ackworth Overseers* (1843), 3 Q. B. 397; *R. v. Perranzabuloe* (1844), 1 New Sess. Cas.

See, also, Sub-sect. 2, D. (b), *ante*.

**1639. Construction of written document.]—**If the ct. of quarter sessions send up a case for the opinion of the Ct. of K. B. & desire to have their order confirmed or quashed, according as the ct. shall think their construction of a written instrument right or wrong, but omit to set out sufficient to show whether their order is on the whole correct or not; the Ct. of K. B. will nevertheless confirm or quash the order, as they think the construction right or wrong.

A case sent by sessions for the opinion of the Ct. of K. B. stated, that at the hearing of an appeal touching the settlement of a pauper it was proposed to give in evidence conversations between the parties to a written agreement, but did not

state what those conversations were; also that it was proposed to give in evidence an indorsement upon the agreement, but that it was not proved that the indorsement was in existence when the agreement was signed. The question stated for the opinion of the ct. was the construction of the agreement. The ct. refused to send the case to be restated.—*R. v. BILLINGHAY (INHABITANTS)* (1836), 5 Ad. & El. 676; 2 Har. & W. 419; 1 Nev. & P. K. B. 149; 1 Nev. & P. M. C. 29; 6 L. J. M. C. 38; 111 E. R. 1321.

*Annotation:—Mentd. R. v. Northowram* (1846), 9 Q. B. 24.

**1640. Point already decided in High Court—Case dismissed—On ex parte application of party setting down.]—R. v. HOLYWELL (INHABITANTS) (1840), 13 J. P. Jo. 313.**

**1641. Refusal of appellant to set down case.]—CROCKER v. RAYMOND** (1886), 3 T. L. R. 181.

*Annotation:—Mentd. Pickering v. Willoughby* (1907), 97 L. T. 244.

**1642. Consent of recorder to state case—Death of recorder before case stated.]—LIVERPOOL CORPN. v. WEST DERBY UNION**, No. 1560, *ante*.

**1643. Power to draw inferences of fact.]—**On a case stated by quarter sessions:—*Held*: the High Ct. had power to draw the proper inference from the facts stated in the case, & the justices ought to have come to the conclusion on the facts that applts. had reason to believe that the statements contained in the warranty were true, & therefore the conviction must be quashed.—*DAIRY SUPPLY CO., LTD. v. HOUGHTON* (1911), 106 L. T. 220; 76 J. P. 43; 28 T. L. R. 94; 10 L. G. R. 208; 22 Cox, C. C. 704.

*Annotation:—Reid. Hickton v. Hodgson* (1913), 110 L. T. 380.

**1644. —.]—**An appeal from quarter sessions is in a different position from an appeal taken directly from the justices to the High Ct. In that case points of law, including, of course, the submission that the finding of fact has no evidence to support it, alone are open. In this case the Div. Ct. has the right & duty to draw inferences of fact from the facts stated, & that right & duty passes to each appellate ct. in turn (*LORD DUNEDIN*).—*CABABI v. WALTON-ON-THAMES URBAN COUNCIL*, [1914] A. C. 102; 83 L. J. K. B. 243; 110 L. T. 674; 78 J. P. 129; 58 Sol. Jo. 270; 12 L. G. R. 104, II. L.

**1645. —.]—**It is open to the ct. to draw inferences of fact, even if the question were not in form determined by the ct. of quarter sessions (*SWINFEN EADY, L.J.*).—*DAVIS (D.) & SONS, LTD. v. PONTYPRIDD UNION ASSESSMENT COMMITTEE, RHONDDA OVERSEERS & RHONDDA URBAN COUNCIL*, [1916] 85 L. J. K. B. 1545; 115 L. T. 259; 80 J. P. 377; 14 L. G. R. 932, C. A.

*(b) Findings of Fact by Sessions.**i. In General.*

**1646. Whether High Court will interfere—General rule.]—**Where, upon a case for the opinion of this ct., the sessions state the facts & draw their conclusion, this ct. will not disturb the finding, unless it appear that the evidence was contrary to the finding, or that there was no evidence to support it.—*R. v. GREAT WISHFORD (INHABITANTS)* (1835), 4 Ad. & El. 216; 1 Har. & W. 489; 5 Nev. & M. K. B. 540; 3 Nev. & M. M. C. 367; 5 L. J. M. C. 25; 111 E. R. 768.

*Annotations:—Reid. R. v. Ightham* (1836), 4 Ad. & El. 937; *Ex p. Tollerton Overseers* (1842), 3 Q. B. 792.

**1647. — When of opinion finding is wrong.]—**The Ct. of K. B. will not enter into a discussion of the facts upon which the sessions have arrived at a conclusion upon a question of mere fact; & though

they should think the sessions have arrived at a wrong conclusion upon the question of fact, they will confirm the sessions order.—*R. v. ST. COLUMB MINOR (INHABITANTS)* (1827), 6 L. J. O. S. M. C. 18.

**1648.** ———.]—The examination in support of an order of removal stated that a marriage had been solemnised at the church in B. The grounds of appeal denied the fact of the marriage, & impeached the examination on the grounds that there were two parish churches in B., viz. B. St. P. & B. St. A. At the trial of the appeal, a witness proved that there were two parishes in B. & two parish churches, each commonly called B. church. On this evidence, the sessions refused to allow resps. to go into their case, & quashed the order of removal:—*Held*: the question was one for the decision of the sessions, with which the ct. would not interfere, though it disapproved of the result.—*R. v. BAKEWELL (INHABITANTS)* (1845), 7 Q. B. 601; 1 New Sess. Cas. 571; 5 L. T. O. S. 53; 9 J. P. 502; 115 E. R. 615.

*Annotation*:—*Refd.* *R. v. Totley* (1845), 7 Q. B. 596.

**1649.** ——— **Finding clearly wrong.**—(1) Where, upon a case stating the facts, sessions find in the negative, this ct. will not interfere with that finding, unless they see that upon the facts stated the finding is necessarily wrong.

Sessions found that A. hired & paid for lodgings for the pauper in D., that the pauper came to D., & resided in the lodgings for a week, married, & continued afterwards to reside in the lodgings until his removal under the order appealed against:—*Held*: a finding by sessions that the pauper did not come to settle in D. within Poor Relief Act, 1662 (c. 12), was repugnant to the fact found, & was therefore necessarily wrong.

(2) Special cases from the sessions should be drawn by counsel.—*R. v. WOOLPIT (INHABITANTS)* (1835), 4 Ad. & El. 205; 1 Har. & W. 483; 5 Nev. & M. K. B. 526; 3 Nev. & M. M. C. 353; 5 L. J. M. C. 14; 111 E. R. 764.

*Annotations*:—*As to* (1) *Refd.* *R. v. Great Wishford* (1835), 4 Ad. & El. 216. *Generally, Mentd.* *R. v. Mashiter* (1837), 1 Nev. & P. K. B. 314; *R. v. West Riding of Yorkshire JJ., Tollerton v. Idle* (1842), 12 L. J. M. C. 15; *R. v. Barnsley* (1849), 12 Q. B. 193.

**1650.** ———.]—The pauper was asked by a horsekeeper, whether he would have the ostler's place, & he said he would, & entered into the service. Nothing was said as to the duration of the service, & it did not appear, whether the former ostler was a yearly servant. The pauper remained in the service five years, & considered that he was at liberty to leave, & was liable to be turned away at any time. The ct. of quarter sessions having found that this was not a yearly hiring which conferred a settlement:—*Held*: as the finding was not necessarily wrong, the ct. would not disturb it.—*R. v. ALL SAINTS, STAMFORD (INHABITANTS)* (1837), Will. Woll. & Dav. 40 1 T. P. 71; 1 Jur. 52.

is a question of fact for the determination of the justices at sessions, from the nature of the trees & the mode & purpose of their cultivation, whether they are saleable under-wood, within Poor Relief Act, 1601 (c. 2), & this ct. will not disturb their decision, unless it appear clearly wrong.—*R. v. NARBERTH NORTH (INHABITANTS)* (1839), 9 Ad. & El. 815; 1 Per. & Dav. 590; 8 L. J. M. C. 46; 3 T. P. 1423.

*Fitzhardinge v. Pritchett* (1867), L. R.

**1652.** ——— **Where any evidence in support.**—Where the ct of quarter sessions have found, upon a case stated, that there was no general hiring, this ct. will not disturb their decision, if there appear

to have been any premises to warrant it.—*R. v. ROSLISTON (INHABITANTS)* (1828), 8 B. & C. 668; 3 Man. & Ry. K. B. 420; 2 Man. & Ry. M. C. 37; 7 L. J. O. S. M. C. 33; 108 E. R. 1191.

**1653.** ———.]—When quarter sessions confirm an order of removal, the validity of which turns upon a question of fact, that fact must be taken to have been found, although the evidence of the fact be stated in a case reserved; & the Ct. of K. B. will not disturb such finding if there were any evidence from which the fact might be inferred.—*R. v. ST. ANDREW THE GREAT, CAMBRIDGE (INHABITANTS)* (1828), 8 B. & C. 664; 3 Man. & Ry. K. B. 374; 2 Man. & Ry. M. C. 19; 7 L. J. O. S. M. C. 28; 108 E. R. 1190.

*Annotation*:—*Refd.* *R. v. Rosliston* (1828), 3 Man. & Ry. K. B. 420.

**1654.** ———.]—Where the ct. of quarter sessions have, from facts proved before them, drawn the conclusion, that there was an implied hiring for a year, this ct. will not, upon a case sent to them by the sessions stating those facts, disturb that decision, if there appear any promise whatever to warrant it.—*R. v. ST. MARTIN, LEICESTER (INHABITANTS)* (1828), 8 B. & C. 674; 3 Man. & Ry. K. B. 377; 2 Man. & Ry. M. C. 22; 7 L. J. O. S. M. C. 31; 108 E. R. 1194.

**1655.** ———.]—*MITCHELL v. CROYDON JJ.*, No. 145, *ante*.

**1656.** ——— **No evidence in support.**—Although a case stated by quarter sessions is not, under Supreme Court of Procedure Act, 1894 (c. 16), s. 2, an appeal upon facts as well as upon law, nevertheless it is within the powers of the High Ct. to determine whether upon the evidence quarter sessions were justified in arriving at the conclusion stated in the case, & as there was no evidence that the brewery co. had been selling their own liquor upon the premises, the appeal must be allowed.—*HICKTON v. HODGSON* (1913), 110 L. T. 380; 78 J. P. 93; 30 T. L. R. 221, D. C.

*Annotation*:—*Refd.* *Mitchell v. Croydon JJ.* (1914), 111 L. T. 632.

**1657.** ——— **Both finding & facts stated in case.**—*R. v. ST. ANDREW THE GREAT, CAMBRIDGE (INHABITANTS)*, No. 1653, *ante*.

**1658.** ———.]—Although the sessions draw a conclusion from facts proved before them, yet if they afterwards state the facts for the opinion of this ct., the finding of the sessions is not conclusive, but it will be presumed that the sessions desire the opinion of the ct.—*R. v. ALNWICK CORPN.* (1839), 9 Ad. & El. 444; 1 Per. & Dav. 343; 2 Will. Woll. & H. 72; 8 L. J. M. C. 50; 112 E. R. 1279.

**1659.** ———.]—*R. v. PILKINGTON (INHABITANTS)*, No. 1620, *ante*.

**1660.** ———.]—Notice of appeal against an order for maintenance of a lunatic pauper was given on June 30, after the time limited by law had expired. On July 4, a notice to produce documents was served on applts. by the attorney for resps. At the trial, on July 8, the sessions found as a fact that the notice to produce was a waiver of the irregularity in the notice of appeal:—*Held*: the question was one of fact for the sessions, & their decision on it ought not to be disturbed.—*R. v. WICKENBY (INHABITANTS)* (1852), 19 L. T. O. S. 105; 16 J. P. 583.

**1661.** ———.]—*R. v. BAXENDALE* (1880), 44 J. P. Jo. 763, D. C.

**1662.** ———.]—The question whether a person has been guilty of behaving in a riotous or indecent manner within Vagrancy Act, 1824 (c. 83), s. 3, is a question of fact for the justice or justices to determine, & from such determination no appeal



## SECT. 4.—MANDAMUS.

## SUB-SECT. 1.—WHEN WRIT WILL OR WILL NOT ISSUE.

## A. In General.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 308 *et seq.*

**1452. To restore clerk of peace improperly removed.]—***R. v. EVANS*, No. 882, *ante*.

**1453. To hand over effects of discharged prisoner to creditors.]—***R. v. SURRY JJ.* (1734), Sess. Cas. K. B. 71; 2 Barn. K. B. 410; Cunn. 27; 93 E. R. 72.

**1454. To admit claimant to office of clerk of peace.]—***Mandamus* will not lie to admit to office one of several claimants until the right is settled between them.—*R. v. SURRY JJ.* (1754), Dunning, 40; Say. 144; 96 E. R. 832.

**1455. To allow costs of maintenance pending appeal—Removal order quashed.]—***ST. MARY'S NOTTINGHAM PARISH v. KIRKLINGTON PARISH* (1730), Sess. Cas. K. B. 143; 2 Bott. 6th ed. 776; 93 E. R. 145.

**1456. To enrol order of petty sessions—Allegation of fraud.]—**The ct. will not issue a peremptory *mandamus* to enrol an order of sessions, in respect to which there is an allegation of fraud; but will enjoin the inferior ct. to hear & determine upon the merits of the question.

Upon a rule for a *mandamus* to compel the sessions to enrol an order of petty sessions, for stopping up a footway, there being fair ground for believing that many persons had been misled by the published description of the footway, & had therefore neglected to give notice of appeal, the ct. made a rule to let in the appeal.—*R. v. SUFFOLK JJ.* (1826), 6 B. & C. 110; 9 Dow. & Ry. K. B. 111; 4 Dow. & Ry. M. C. 215; 5 L. J. O. S. M. C. 27; 108 E. R. 394.

**1457. To issue distress warrant for costs.]—**(1) In case of an appeal against a conviction, the informer, & not the justice, is the party appealed against, though the notice of appeal is to be served upon the latter; &, although the informer do not appear at the sessions to support the conviction, costs may be awarded to applt. against him. (2) If the sessions award such costs, the Ct. of K. B. will, by *mandamus*, compel them to issue a warrant of distress for their payment.—*R. v. HANTS JJ.* (1830), 1 B. & Ad. 654; 9 L. J. O. S. M. C. 109; 109 E. R. 930.

*Annotations:—As to (1) Apld. R. v. Purdey* (1864), 5 B. & S. 909; *R. v. Davidson, Nanson & Morley* (1871), 24 L. T. 22. *Consd. R. v. Ashton, Ex p. Walker* (1915), 85 L. J. K. B. 27. *Refd. R. v. Goodall* (1874), L. R. 9 Q. B. 557; *R. v. London JJ.*, [1895] 1 Q. B. 616. *As to (2) Apld. R. v. Smith* (1860), 29 L. J. M. C. 216.

**1458. To issue process—To enforce judgment of previous sessions.]—**In the absence of any particular restriction, a subsequent quarter session has power to enforce by process the judgment of a preceding one; & this ct. will grant a *mandamus* to the subsequent session to issue such process, if there appears to have been no unnecessary delay in applying for it. A party convicted by a justice under Vagrancy Act, 1824 (c. 83), s. 3, appealed under sect. 14, which gives an appeal to the next general or quarter sessions, & enacts that the ct. at such general or quarter sessions shall hear & determine the appeal, &, if the conviction be affirmed, shall issue process for the apprehension & punishment of the offender. The conviction was quashed, subject to a case which the justice brought up by *certiorari*; & this ct. sent it back to be reheard by the sessions. They, in July,

1833, affirmed the conviction, again subject to a case; but a question being raised before this ct. on motion, whether or not the party convicted was bound to take out a *certiorari* to remove the case as restated, none was sent up, & the time for suing out a *certiorari* expired. Afterwards, this ct. decided against the convicted party on the point of practice; & a motion was made to the next sessions, July, 1834, for process to enforce the conviction, which being refused, this ct. was applied to, in the next term, for a *mandamus*:—*Held*: the appeal had not been heard & determined within the statute, before the last-mentioned decision of this ct.; & the sessions, in July, 1834, ought to have issued the process. *Mandamus* granted.—*R. v. WARWICKSHIRE JJ.* (1835), 2 Ad. & El. 768; 1 Har. & W. 18; 4 Nev. & M. K. B. 370; 2 Nev. & M. M. C. 543; 4 L. J. M. C. 62; 111 E. R. 296.

**1459. Where order rescinded at subsequent sessions.]—***R. v. EAST RIDING OF YORKSHIRE JJ. & TREASURER* (1855), 19 J. P. Jo. 52.

**1460. No existing rights—When mandamus applied for.]—***R. v. BIRMINGHAM RECORDER* (1855), 24 L. T. O. S. 256; 3 W. R. 236; 19 J. P. Jo. 99.

**1461. To tax costs—Order quashed in Queen's Bench.]—***R. v. HAMPSHIRE JJ.*, No. 1691, *post*.

## B. Exercise of Discretion by Sessions.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 309 *et seq.*

**1462. General rule.]—**Where the quarter sessions have a discretion, this ct. has no jurisdiction to control it. Where, therefore, the quarter sessions have, by their practice, a discretion as to allowing or refusing the entry of appeals after the time fixed by their rules, & in the injudicious exercise of that discretion refuse to allow an appeal to be entered, this ct. will not order them to receive it. Where, however, it was left in doubt what the practice of the sessions on the subject was, & whether it had been acted upon in the particular case, this ct. granted a rule for a *mandamus* to the justices to receive the appeal.—*R. v. DERBYSHIRE JJ.* (1852), Bail Ct. Cas. 113; 22 L. J. M. C. 31; 17 J. P. 86; 16 Jur. 1071; *sub nom. R. v. DERBYSHIRE JJ.*, *Ex p. GREEN*, 20 L. T. O. S. 116.

**1463. Refusal to respite.]—**Applt. against an order of filiation, moved the ct. of quarter sessions for a postponement of the appeal, on account of the absence of material witnesses. They rejected the application, upon which applt. declined going into his case, & the order was confirmed. On motion for a *mandamus* to the justices to hear the appeal, & affidavits tending to show that they had acted unjustly in not granting the postponement, this ct. refused to interfere, the matter being one peculiarly within the discretion of the magistrates.—*Ex p. BECKE* (1832), 3 B. & Ad. 704; 110 E. R. 257; *sub nom. R. v. MIDDLESEX JJ.*, *Ex p. BECKE*, 1 L. J. M. C. 95.

*Annotation:—Refd. R. v. West Riding of Yorkshire JJ.* (1833), 3 L. J. M. C. 21.

**1464. —.]—**Notice of appeal was given against a poor rate, stating, as one of the grounds of appeal, that certain parties enumerated in a schedule attached to the notice were improperly rated. These parties were not served with the notice; & the sessions refused to respite the appeal for the purpose of such service, & dismissed the appeal with costs. The Ct. of Q. B. afterwards made absolute a rule commanding the sessions to enter

## PART XIV. SECT. 4, SUB-SECT. 1.—A.

*tithe rentcharge.]—R. (NORCOTT) v. CORK RECORDER & JJ.*, *R. (NASON) v. SAME* (1890), 28 L. R. Ir.

*Sect. 5.—Special case: Sub-sect. 2, E. (b) i. & ii., (c), & F.]*

lies to the High Ct. by case stated.—**BONNER v. LUSHINGTON** (1893), 68 L. T. 91; 57 J. P. 168; 37 Sol. Jo. 216; 5 R. 180, D. C.

## ii. *Fraud.*

**1663. Whether court will interfere.] — Qu. :** whether when sessions state facts fully & particularly, from whence they infer fraud, this ct. can draw their own conclusion from those facts, without having regard to the adjudication of the ct. of sessions.—**R. v. WOODLAND (INHABITANTS)** (1786), 1 Term Rep. 261; 99 E. R. 1084.

*Annotation:—Mentd.* **R. v. St. Mary Magdalen, Bermondsey** (1802), 3 East, 7.

**1664. —.]**—It has been said that the ct. may presume fraud in the first taking; but there is no rule better established than that fraud is never to be presumed; & I believe in a case sent for the opinion of this ct. which was pregnant with fraud, they would not presume fraud, because it was not stated (**LORD KENYON, C.J.**).—**R. v. FILLONGLEY (INHABITANTS)** (1788), 2 Term Rep. 709; 100 E. R. 381.

*Annotations:—Mentd.* **Mann v. Davers** (1819), 3 B. & Ald. 103; **R. v. Barham** (1828), 8 B. & C. 99; **R. v. Willoughby** (1835), 1 Har. & W. 493.

**1665. —.]**—It is not for this ct. to draw the conclusion of fraud from the facts stated. It was a question for the justices at sessions, whether there was fraud or not. . . . I think that this case should go back to sessions in order that they may state that there was fraud or that there was none (**BAYLEY, J.**).—**R. v. TILLINGHAM (INHABITANTS)** (1830), 1 B. & Ad. 180; 9 L. J. O. S. M. C. 3; 109 E. R. 754.

**1666. — Remission for restatement.]**—Where fraud is not expressly found by sessions, this ct. cannot infer it from any state of facts. But in case where the facts stated were such as to render it almost certain that the decision of the justices at sessions must have proceeded on the ground of fraud, the ct. sent back the case to be restated.—**R. v. LLANFIHANGEL-ABERCOWIN (INHABITANTS)** (1835), 4 Nev. & M. K. B. 355; 2 Nev. & M. M. C. 531.

## (c) *Remission and Restatement.*

**1667. Remission—For restatement—Formal objection—Court able to decide on merits.]**—A deed, coming out of the hands of the opposite party after notice to produce it, must *prima facie* be taken to be duly executed, & must be received in evidence without proof of the execution. The ct. will not send a case down to the sessions to be restated on a mere formal objection, if enough appear to enable them to decide according to the merits of the case.—**R. v. MIDDLEZOY (INHABITANTS)** (1787), 2 Term Rep. 41; 100 E. R. 23.

*Annotations:—Mentd.* **Bowles v. Langworthy** (1793), 5 Term Rep. 366; **Doe d. St. John v. Hore** (1799), 2 Esp. 724; **Gordon v. Secretan** (1807), 8 East, 548; **Johnson v. Lewellin** (1807), 6 Esp. 101; **Orr v. Morice** (1821), 3 Brod. & Bing. 139.

**1668. — Judgment warranted by facts.]**—Where, upon a special case, facts are stated which warrant the judgment of the ct. below, but that ct. has drawn an inference which is not warranted by the statement, the order will be confirmed without sending the case back to be restated.—**R. v. RICKINGHALL-SUPERIOR (INHABITANTS)** (1832), 1 Nev. & M. K. B. 47; 1 Nev. & M. M. C. 36; 2 L. J. M. C. 22.

**1669. — Doubt whether chairman signed case.]**—Where it has been referred to the chairman at sessions, on an appeal, to state a case, & a

case has afterwards, on *certiorari*, been returned to this ct. by the clerk of the peace, purporting to be signed by the chairman, this ct. will not send it back to be restated, or quash the *certiorari*, on the ground of the chairman having said that he did not recollect signing the case, & upon a suggestion by the attorney for one of the litigating parties, in an affidavit, that such case does not agree with the facts proved, & that deponent believes the chairman did not settle the case.—**R. v. MATLOCK (INHABITANTS)** (1833), 5 B. & Ad. 883; 110 E. R. 1018.

*Annotation:—Refd.* **Thurborland v. Brightside Biorlow Overseers** (1859), 23 J. P. 324.

**1670. — Decision grounded on fraud.]**—**R. v. LLANFIHANGEL-ABERCOWIN (INHABITANTS)**, No. 1666, *ante*.

**1671. — Notice of application.]**—Where the sessions have quashed or confirmed an order subject to a case, & the Ct. of Q. B., on argument, sends back the case to be restated, it is the duty of those contesting the original order to give notice to those who support it, before proceeding to have the case reheard; & where an order had been so quashed, & the case stated & sent back, & resps., without giving notice of trial, attended the sessions, & in the absence of appls., obtained a confirmation of the order, this ct., on *certiorari*, quashed the last mentioned order, though resps. had given appls. notice of the order of this ct. sending the case back for restatement.—**R. v. BARNES** (1842), 3 Q. B. 437; 2 Gal. & Dav. 233; 11 L. J. M. C. 128; 6 J. P. 716; 6 Jur. 945; 114 E. R. 574; *subsequent proceedings, sub nom.* **R. v. WHITE** (1843), 4 Q. B. 101.

**1672. — To find further facts.]**—As the widow was not only entitled, but bound by law, to take out administration, there was no fraud in the transaction which could prevent her from taking, as administratrix, her husband's interest as yearly tenant, & thereby acquiring a settlement. But the ct. referred it back to the sessions as a question of fact, whether the widow, after administration granted, continued a weekly tenant, or became a tenant from year to year, in her husband's right.—**R. v. GREAT GLENN (INHABITANTS)** (1833), 5 B. & Ad. 188; 2 Nev. & M. K. B. 91; 1 Nev. & M. M. C. 158; 2 L. J. M. C. 69; 110 E. R. 762.

*Annotation:—Mentd.* **R. v. Halifax** (1855), 4 E. & B. 647.

**1673. — To consider fresh evidence—Discovered since hearing at sessions.]**—On the hearing of a special case stated by quarter sessions on an appeal from a decision by justices on an objection under 55 & 56 Vict. c. 57, raising the question whether the alleged street was a highway repairable by the inhabitants at large, it appeared that fresh evidence bearing on the question, consisting in deposited plans & a book of reference referred to in a turnpike Act, had been discovered since the hearing at quarter sessions; & the ct. remitted the case to quarter sessions in order that the fresh evidence might be considered.—**VYNER v. WIRRAL RURAL DISTRICT COUNCIL** (1909), 73 J. P. 242; 7 L. G. R. 628, D. C.

*Annotations:—Refd.* **Cababé v. Walton-upon-Thames U. D. C.** (1912), 107 L. T. 159. *Mentd.* **A.-G. v. Horner** (No. 2), [1913] 2 Ch. 140.

**1674. — For rehearing—Fresh evidence may be heard.]**—A case sent back to the sessions to be restated must be reheard; & the sessions may receive further evidence & make a new order on such rehearing.—**R. v. BLOXAM** (1834), 1 Ad. & El. 386; 3 Nev. & M. K. B. 385; 2 Nev. & M. M. C. 269; 3 L. J. M. C. 115; 110 E. R. 1254.

*Annotation:—Mentd.* **R. v. Anglesea JJ.** (1845), 10 J. P. 665.



**1675.** ———. **No obligation to state another case.]—***R. v. MELSONBY (INHABITANTS)*, No. 1616, *ante*.

**1676.** ———. **]**—The examination of a pauper disclosed the following settlement in applt. parish. "When I was fifteen years old, I was bound apprentice to J. of Playden, until the age of twenty-one years, & I produce the indenture dated Aug. 30, 1821, executed by both parties & by my father; the consideration was £15. I served the whole time & resided in my master's house at Playden during the service." Appls. delivered the following notice of the grounds of their appeal against the order of removal, "that the said pauper did not acquire a settlement in the parish of Playden, by reason of his being bound an apprentice by indenture, dated Aug. 30, 1821, to J. & serving under the same indenture, because the premium of £15 paid to the said J. was paid by the parish officers of R. & not by the father of the said pauper, & that the requisites of the statute made for the regulation & binding of parish apprentices then in force had not been complied with." At the hearing of the appeal, appls. required resps. to prove the execution of the indenture of apprenticeship as a part of their case, & resps. not being prepared to do so, the ct. of quarter sessions quashed the order of removal without going into the merits, but granted a special case stating the above objection, & directing that if the opinion of the sessions was wrong in requiring the evidence, the case was to be sent back to be reheard:—*Held*: (1) the decision of the sessions was wrong, because the grounds of appeal admitted the execution of the indenture of apprenticeship; (2) this ct. would not send down the case to be reheard by the court of quarter sessions.—*R. v. ST. JOHN, MARGATE (INHABITANTS)* (1841), 1 Q. B. 252; 4 Per. & Dav. 653; 5 J. P. 79; 5 Jur. 839; 113 E. R. 1125.

**1677. Restatement—No power to compel.]—**The ct. has no power to compel a chairman of quarter sessions to restate a case which he has stated for the opinion of the ct.—*WEST HAM GUARDIANS v. BARTON-UPON-IRWELL GUARDIANS* (1891), 8 T. L. R. 5, C. A.

#### F. Practice of High Court.

**1678. Right to begin.]—**A case from quarter sessions comes before the Ct. of Q. B. on a rule to quash the order of sessions, & the party supporting the order of sessions therefore begins by showing cause against the rule to quash.—*R. v. WHITBY UNION GUARDIANS* (1870), L. R. 5 Q. B. 325; 39 L. J. M. C. 97; 34 J. P. 725; 18 W. R. 785; *sub nom. R. v. WHITBY UNION, YORKSHIRE, GUARDIANS, Re MARSHALL*, 22 L. T. 336.

*Annotations*:—*Mentd. Guildford Union Grdns. v. St. Olave's Union Grdns.* (1872), 36 J. P. Jo. 53; *Newark Union Grdns. v. Glanford Brigg Union Grdns.* (1877), 2 Q. B. D. 522; *Hendon Union v. Hampstead Grdns.* (1893), 62 L. J. M. C. 170; *Richmond Union Grdns. v. Brentford Union Grdns.* (1899), 63 J. P. 118.

**1679. Points which may be argued—Only those stated in case.]—**A case was granted by the ct. of quarter sessions on certain points therein enumerated. Counsel for appls. was not allowed to travel out of the case, & argue other points different from those so stated in the case.—*R. v. BLOXHAM (INHABITANTS)* (1843), 1 L. T. O. S. 107; 7 J. P. 256.

**1680.** ———. **]**—On an appeal against a conviction under Highway Act, 1835 (c. 50), for

obstructing of a highway, the quarter sessions reserved a case for the opinion of this ct. as to whether there was evidence of the road in question being a highway compulsorily repairable by the parish. By sect. 108 the proceedings are thereupon brought into this ct. by *certiorari*, & among them appeared the order of sessions now alleged by applt. to be defective upon the face of it:—*Held*: the ct. could not quash the order of sessions on the grounds on which it was alleged to be bad, & its jurisdiction was limited to the questions arising on the case submitted for its opinion.—*R. v. THOMAS* (1857), 7 E. & B. 399; 28 L. T. O. S. 303; 21 J. P. 661; 3 Jur. N. S. 713; 5 W. R. 321; 119 E. R. 1295.

*Annotations*:—*Mentd. Leigh U. D. C. v. King*, [1901] 1 K. B. 747; *North Staffordshire Ry. v. Hanley Corpn.* (1909), 73 J. P. 477; *Cababé v. Walton-on-Thames U. D. C.*, [1914] A. C. 102.

**1681.** ———. **Effect of special leave of court—Granted on motion for certiorari.]—**Where the sessions have reserved a case for the opinion of this ct.; & the order of sessions & the original order are brought up by *certiorari* in the ordinary manner, this ct. will only consider the question reserved by the case for its opinion; & it is not competent for the party impugning the decision of the sessions to take any other objections to the orders, unless the objections have been stated to the ct., & the ct. have given leave to take them.—*R. v. HEYOP (INHABITANTS)* (1846), 8 Q. B. 547; 1 New Mag. Cas. 497; 2 New Sess. Cas. 270; 15 L. J. M. C. 70; 6 L. T. O. S. 392; 10 J. P. 165; 10 Jur. 200; 115 E. R. 981; *subsequent proceedings, sub nom. R. v. RADNORSHIRE JJ.*, 9 Q. B. 159.

*Annotations*:—*Consd. R. v. St. Anne's, Westminster, Jones's Settlmt.* (1847), 8 L. T. O. S. 363. *Expld. & Distd. R. v. St. Pancras* (1849), 12 Q. B. 298.

**1682.** ———. **]**—Where a case is granted by the sessions, the party taking it must rely on the objections there stated, or may abandon the case & rely on such other objections as may be raised on a *certiorari*, but he cannot do both.—*R. v. ST. ANNE, WESTMINSTER (INHABITANTS), Re JONES* (1847), 8 Q. B. 561; 2 New Mag. Cas. 75; 2 New Sess. Cas. 517; 16 L. J. M. C. 33; 8 L. T. O. S. 363; 11 J. P. 167; 11 Jur. 124; 115 E. R. 986.

*Annotation*:—*Refd. R. v. Hartpury* (1847), 11 Jur. 486.

**1683.** ———. **]**—Where a writ of *certiorari* has been granted to bring up an original order, & also a special case from the ct. of quarter sessions, this ct. will not permit any other objections to be taken than those reserved by the special case, although it was mentioned to the ct. when the writ was moved for, that it was intended to make such other objections; & although the rule upon which the argument took place was to show cause why the original order, as well as the order of sessions, should be quashed, the points reserved by the special case not applying to the original order at all.—*R. v. HARTPURY (INHABITANTS)* (1847), 8 Q. B. 566; 2 New Mag. Cas. 185; 2 New Sess. Cas. 648; 16 L. J. M. C. 105; 9 L. T. O. S. 196; 11 J. P. 458; 11 Jur. 486; 115 E. R. 989.

*Annotation*:—*Refd. R. v. Heyop* (1846), 8 Q. B. 547.

**1684.** ———. **Points not raised in court below.]—**Although as a general rule a point cannot be taken on the argument of a special case stated by a ct. of quarter sessions, which was not taken in that ct., the special case may be so stated, as to compel the Div. Ct. to decide it.—

#### PART XIV. SECT. 5, SUB-SECT. 2.—F.

**16791. Points which may be argued—Only those stated in case.]—***TAYLOR v. GUILFOYLE*, [1925] V. L. R. 213 46 A. L. T. 158; 31 Argus L. R. 111.—AUS.

sect. 5.—Special case: sub-sect. 2, r. & g. 1. **XV.]**

**SMITH'S DOCK CO., LTD. v. TYNEMOUTH CORPN.,** [1908] 1 K. B. 315; 77 L. J. K. B. 175; 99 L. T. 136; 72 J. P. 64; 24 T. L. R. 197; 6 L. G. R. 223; 2 Konst. Rat. App. 1683, D. C.; *on appeal*, [1908] 1 K. B. 948, C. A.

*Annotation*:—**Mentd.** Mersey Docks & Harbour Board v. Birkenhead Corpn., [1916] 1 K. B. 695.

**1685. No addition allowed to case stated—Even with consent of counsel.**—The ct. will not, even with the consent of the counsel, make any addition to the case sent up.—**R. v. WIDECOMBE-IN-THE-MOOR (INHABITANTS)** (1847), 9 Q. B. 894; 2 New Mag. Cas. 64; 2 New Sess. Cas. 539; 16 L. J. M. C. 44; 8 L. T. O. S. 364; 11 J. P. 213; 11 Jur. 227; 115 E. R. 1518.

*Annotations*:—**Expld.** R. v. St. Giles, Colchester (1848), 12 Q. B. 13. **Refd.** R. v. Landkey (1847), 11 J. P. 440.

**Form of judgment.**—See CROWN PRACTICE, Vol. XVI., p. 480, No. 3622.

**Enforcement of judgment.**—See CROWN PRACTICE, Vol. XVI., p. 480, No. 3623.

#### G. Costs.

See Supreme Court of Judicature Act, 1925 (c. 49), s. 25 (3).

**1686. Jurisdiction of High Court—Quarter Sessions Act, 1731 (c. 19), s. 2—Order of sessions confirmed.**—If the rule is discharged, the effect of the judgment is to confirm the order of sessions, & to fix the costs on the party bringing up the case, under above sect.—**R. v. LATCHFORD (INHABITANTS)** (1844), 6 Q. B. 567; 1 Dav. & Mer. 290; 1 New Mag. Cas. 147; 1 New Sess. Cas. 387; 14 L. J. M. C. 20; 4 L. T. O. S. 133 A.; 9 J. P. 132; 8 Jur. 1094; 115 E. R. 212.

*Annotations*:—**Mentd.** R. v. St. Margaret's, Westminster (1845), 1 New Mag. Cas. 328; R. v. Ellesmere (1849), 12 Q. B. 19; R. v. St. Mary in Bungay (1849), 12 Q. B. 38.

**1687. — Costs of successful appellant.**—This being a special case from quarter sessions, & a civil proceeding, the ct. can give costs to successful applt.—**CLARK v. ALDERBURY UNION ASSESSMENT COMMITTEE** (1880), 50 L. J. M. C. 33; 45 J. P. 358; 29 W. R. 334, D. C.

*Annotations*:—**Mentd.** Dodds v. South Shields Poor Law Union Assmt. Com. (1895), 64 L. J. Q. B. 508; Mersey Docks & Harbour Board v. Birkenhead Union Assmt. Com. (1899), 69 L. J. Q. B. 260.

**1688. —**—The practice on the Crown side of the Q. B. Div., is preserved unaltered by Judicature Act, 1890 (c. 44); & there is, therefore, no power to give costs to successful applt. in a case stated by quarter sessions.—**LONDON COUNTY COUNCIL v. WEST HAM (2) (CHURCHWARDENS, ETC.)**, [1892] 2 Q. B. 173; 61 L. J. M. C. 210; 56 J. P. 662; 40 W. R. 662; 8 T. L. R. 593; 36 Sol. Jo. 522, C. A.

*Annotations*:—**Folld.** Halkyn District Mines Drainage Co. v. Holywell Union (1893), 9 R. 779; James v. Jones (1894), 10 T. L. R. 208. **Distd.** R. v. County of London JJ. & L. C. C., [1894] 1 Q. B. 453. **Folld.** R. v. Egerton, *Ex p.* Munby (1902), 46 Sol. Jo. 452. **N.F.** R. v. Woodhouse, [1906] 2 K. B. 501. **Refd.** *Re* Fisher, [1894] 1 Ch. 53; R. v. Jones, [1894] 2 Q. B. 382. **Mentd.** L. C. C. v. Woolwich Union Assmt. Com., L. C. C. v. St. George's Union Assmt. Com., [1893] 1 Q. B. 210.

**1689. —**—Where, upon a case reserved on a poor rate appeal, the order of quarter sessions is quashed, there is no power to give the successful party costs.—**HALKYN DISTRICT MINES DRAINAGE CO. v. HOLYWELL UNION** (1893), as reported in 9 R. 779, C. A.; *on appeal*, *sub nom.*

**DRAINAGE CO.,** [1895] A. C. 117, H. L.

*Annotations*:—**Mentd.** M. S. & L. Ry. v. Kingston-upon-Hull Grdns., etc. (1896), 75 L. T. 127; Bootle Overseers v. Liverpool Warehousing Co., Same v. Webster (1901), 85 L. T. 45; Ystradfydwg & Pontypridd Main Sewerage Board v. Newport (Mon.) Assmt. Com. (1901), 70 L. J. K. B. 318; Percy v. Hall (1903), 88 L. T. 830; Mitchell v. Workop Union Assmt. Com. (1904), 92 L. T. 62; Swansea Union Assmt. Com. v. Swansea Harbour Trustees (1907), 97 L. T. 585; Winstanley v. North Manchester Overseers, [1910] A. C. 7; Young v. Liverpool Assmt. Com., [1911] 2 K. B. 195; Margate Corpn. v. Pettman (1912), 106 L. T. 104; Liverpool Corpn. v. Chorley Union Assmt. Com., [1913] A. C. 197; *Re* Nott & Cardiff Corpn., [1918] 2 K. B. 146; Cleveland Bridge & Engineering Co. v. Darlington Union Assmt. Com. (1923), 21 L. G. R. 511; Hackney B. C. v. Metropolitan Asylums Board (1924), 131 L. T. 136; Back v. Daniels, [1925] 1 K. B. 526.

**1690. —**—**JAMES v. JONES**, [1894] 1 Q. B. 304; 63 L. J. M. C. 41; 58 J. P. 230; 42 W. R. 400; 10 T. L. R. 208; 10 R. 410; *sub nom.* JONES v. JAMES, 70 L. T. 351; 17 Cox, C. C. 726, D. C. See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 25 (3).

**1691. Jurisdiction of sessions—After order quashed in High Court.**—A. having appealed to the quarter sessions against an order of two justices, convicting him of a nuisance, & prohibiting its continuance; the ct. of quarter sessions, on hearing the appeal on Jan. 3, 1859, made an order confirming the conviction, subject to the case, & ordering that the costs of the appeal should abide the result of the decision of the Ct. of Q. B. The order & case were brought up by *certiorari*, & removed into the Q. B., & after argument that ct. quashed the order, saying nothing about costs. A protracted negotiation about the costs took place between the attorneys of A. & B., resp. in which it was for a long time assumed on both sides, that B. was liable to pay costs; but B. afterwards protesting against such liability, the clerk of the peace refused to tax the costs, & in Apr. 1862, the ct. of quarter sessions refused to order such taxation, considering that they had no longer any jurisdiction:—**Held**: the taxation of the costs could only be ordered as ancillary to the giving of final judgment; &, as there remained nothing of a judicial nature to be done by the ct. of quarter sessions in the matter of the appeal, the order having been removed from that ct. & entirely quashed, that ct. had no longer any power to tax the costs.—**R. v. HAMPSHIRE JJ.** (1862), 1 New Rep. 106; 32 L. J. M. C. 46; 8 Jur. N. S. 1212; *sub nom.* ISLE OF WIGHT FERRY CO. v. RYDE COMRS., 7 L. T. 391; 26 J. P. 807; *sub nom.* R. v. HAMPSHIRE JJ., ISLE OF WIGHT FERRY CO. v. RYDE COMRS., 11 W. R. 122.

**1692. —**—The quarter sessions, on appeal, quashed an order made against deft. by the petty sessions subject to a case for the consideration of the Q. B. Div., & further ordered that the costs of the appeal then before it should abide the event of the decision of that ct. The case, which was stated & signed by the chairman of the quarter sessions, after stating the question submitted to the Q. B. Div., contained (*inter alia*) the following clause: "The ct. are . . . in all respects to exercise the power of the sessions to confirm, amend, alter, vary, modify, or reverse their decision in such manner & to such extent as to such ct. shall seem expedient & proper; costs to follow the event." At the hearing of the case the Q. B. Div. quashed the order of the quarter sessions, but the judgment was silent as to costs. In an action brought to recover the

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**1687 i. Jurisdiction of High Court—Costs of successful appellant.**—**MUSQUODOBOIT TOWNSHIP OVERSEERS v. BRYSON** (1853), 2 N. S. R. (James) 152.—CAN.



**1693. Restatement of case—Subsequent abandonment—Discharge of recognisances.]**—If a session case be sent down to be restated, & prosecutor abandon it when it is returned, this ct. will discharge his recognisance for the costs; but if he dispute the amended order, they will not.—*R. v. EDGEWORTH (INHABITANTS)* (1791), 4 Term Rep. 218; 100 E. R. 982.

**1697. Evidence of order of sessions—Variation between case & minute book.]—R. v. CAMBRIDGE-SHIRE JJ. (1856), 27 L. T. O. S. 104; 20 J. P. Jo. 324.**

**Annotations:—***Refd. R. v. Middlesex JJ.* (1871), *L. R.* 6 Q. B. 220; *Southampton Gas Light & Coke Co. v. Southampton Grdns.* (1877), 25 *W. R.* 671.

**1704. — Taxation out of sessions.]—** An appeal to quarter sessions against a rate was referred by consent under Quarter Sessions Act, 1849 (c. 45), s. 13. By the order of reference the costs of the appeal & reference were to be in the discretion of the arbitrator. The arbitrator determined the matter of the appeal in favour of resps. & awarded them the costs of the appeal & reference. The award was thereupon entered as the judgment of the sessions under the above sect., & the costs having been taxed after the sessions, an order of sessions was subsequently drawn up confirming the rate & ordering appls. to pay the costs so ascertained by taxation. Appls. objecting that the order was made without jurisdiction because the costs had not been taxed

in sessions :—*Held* : it was implied in the terms of the reference that the costs should be taxed out of sessions & the order was therefore valid.—**SOUTHAMPTON GAS CO. v. SOUTHAMPTON GUARDIANS** (1877), 2 Q. B. D. 371; 46 L. J. M. C. 238; 36 L. T. 548; 41 J. P. 645; 25 W. R. 671, D. C.

*Annotations* :—**Consd.** Mid. Ry. v. Edmonton Union (1893), 63 L. J. M. C. 38. **Mentd.** Clode v. L. C. C., [1914] 3 K. B. 852.

**1705. Award must be entered at next sessions—Without alteration.]—R. v. WEST RIDING OF YORKSHIRE JJ., SHEFFIELD UNITED GAS LIGHT CO. v. SHEFFIELD OVERSEERS**, No. 1701, *ante*.

**1706. —.]—R. v. MIDDLESEX JJ., WEST LONDON EXTENSION RY. CO. v. FULHAM OVERSEERS**, No. 1702, *ante*.

## Part XVI.—Appeal to Court of Appeal.

### SECT. 1.—WHEN APPEAL LIES.

#### SUB-SECT. 1.—IN GENERAL.

See Quarter Sessions Act, 1849 (c. 45), s. 11; Supreme Court of Judicature Act, 1925 (c. 49), s. 25 (1).

“**Criminal cause or matter.**”]—See **CRIMINAL LAW**, Vol. XIV., pp. 551–554, Nos. 6271–6297; **CROWN PRACTICE**, pp. 347, 396, 476, 477, Nos. 1735–1739, 2402, 3573–3581.

#### SUB-SECT. 2.—CASES STATED UNDER QUARTER SESSIONS ACT, 1849, s. 11.

See Quarter Sessions Act, 1849 (c. 45); Jud. Act, 1873 (c. 66), s. 19; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 25 (1).

**1707. Appeal lies—Against poor rate.]—**An appeal will lie to the Ct. of Appeal from the decision of the Q. B. Div. upon a case stated under above sect. in an appeal against a poor rate; for the decision of the Q. B. Div. is an “order” within Jud. Act, 1873 (c. 66), s. 19.—**PETERBOROUGH CORPN. v. WILSTHORPE OVERSEERS** (1883), 12 Q. B. D. 1; 53 L. J. M. C. 33; 50 L. T. 189; 48 J. P. 373; 32 W. R. 548, C. A.

*Annotations* :—**Folld.** Holborn Grdns. v. Chertsey Grdns. (1885), 15 Q. B. D. 76; **Dewsbury & Heckmondwike Waterworks Board v. Penistone Union Assmt. Com.** (1886), 2 T. L. R. 375. **Appld.** Lodge v. Huddersfield Corpn., [1898] 1 Q. B. 859. **Mentd.** West Bromwich School Board v. West Bromwich Overseers (1884), 13 Q. B. D. 929; **Dewsbury Waterworks Board v. Penistone Union Assmt. Com.** (1886), 17 Q. B. D. 384; **Kingston Union Assmt. Com. v. Metropolitan Water Board**, [1926] A. C. 331.

**1708. —.]—**An appeal lies to the Ct. of Appeal from the decision of the Div. Ct. upon a case stated under above sect., on an appeal from an order of the justices to quarter sessions, it not being a decision of the Div. Ct. on an appeal from petty or quarter sessions within Jud. Act, 1873 (c. 66), s. 45, & it being an “order” within sect. 19 of that Act.—**HOLBORN GUARDIANS v. CHERTSEY GUARDIANS** (1885), 15 Q. B. D. 76; 54 L. J. M. C. 137; 53 L. T. 656; 33 W. R. 698; 1 T. L. R. 479; *sub nom.* **CHERTSEY UNION v. HOLBORN UNION**, 50 J. P. 36, C. A.

*Annotations* :—**Folld.** Dewsbury & Heckmondwike Waterworks Board v. Penistone Union Assmt. Com. (1886), 2 T. L. R. 375. **Appld.** Lodge v. Huddersfield Corpn., [1898] 1 Q. B. 859. **Refd.** Tendring Union v. Woolwich Union, [1923] 1 K. B. 121. **Mentd.** Highworth & Swindon Union v. Westbury-on-Severn Union Grdns. (1888), 1 K. B. 597.

**1709. — No leave required.]—**An appeal will lie without leave of the Div. Ct. from a judgment of that ct. on a case stated by consent under above sect.—**DEWSBURY & HECKMONDWIKE WATERWORKS BOARD v. PENISTONE UNION ASSESSMENT COMMITTEE** (1886), 2 T. L. R. 375, C. A.

*Annotation* :—**Appld.** Lodge v. Huddersfield Corpn., [1898] 1 Q. B. 859.

**1710. — After entry of judgment at quarter sessions.]—**The entry of judgment in an appeal at quarter sessions in accordance with the decision of a Div. Ct. on a case stated under above sect. does not prevent an appeal against the decision to the Ct. of Appeal under Jud. Act, 1873 (c. 66), s. 19.—**LODGE v. HUDDERSFIELD CORPN.**, [1898] 1 Q. B. 859; 67 L. J. Q. B. 571; 78 L. T. 582; 62 J. P. 515; 46 W. R. 482, C. A.

### SECT. 2.—WHETHER LEAVE TO APPEAL NECESSARY.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 25 (1), 31 (1), (f).

**1711. Under Public Health Act, 1875 (c. 55), s. 269.]—**An appeal does not lie from the decision of a Div. Ct. on a special case stated by a ct. of quarter sessions under above sect., sub-sect 7, unless the Div. Ct. gives leave to appeal.—**R. v. SWINDON NEW TOWN LOCAL BOARD** (1880), 49 L. J. Q. B. 522; 28 W. R. 804; *sub nom.* **HINTON v. SWINDON NEW TOWN LOCAL BOARD**, 42 L. T. 614; 44 J. P. 505, C. A.

*Annotations* :—**Distd.** Illingworth v. Bulmer East Highway Board (1884), 53 L. J. M. C. 60. **Mentd.** Hyde v. Marylebone Vestry (1887), 4 T. L. R. 163; **R. v. St. Marylebone Vestry** (1887), 20 Q. B. D. 415; **Re Bettesworth & Richer** (1888), 37 Ch. D. 535; **Tottenham L. B. v. Williamson** (1893), 62 L. J. Q. B. 322; **West Hartlepool Corpn. v. Robinson** (1897), 77 L. T. 387; **Re Allen & Driscoll's Contract**, [1904] 1 Ch. 493; **East Ham District Council v. Aylett** (1905), 74 L. J. K. B. 471; **Millard v. Balby-with-Hexthorpe U. C.**, [1905] 1 K. B. 60.

**1712. Queen's Bench exercising original common law jurisdiction.]—**No leave is necessary to appeal from a decision of the Q. B. Div. upon a special case stated by quarter sessions where the ct. is exercising its original common law jurisdiction.—**R. v. SAVIN** (1880), 6 Q. B. D. 309; 29 W. R. 638, C. A.

*Annotation* :—**Folld.** Illingworth v. Bulmer East Highway Board (1884), 53 L. J. M. C. 60.

**1713. —.]—**No leave is necessary to appeal from a judgment of the Q. B. Div. upon a special



case stated by a ct. of quarter sessions under Highway Act, 1835 (c. 50), s. 108, for the jurisdiction of the Div. Ct. is an original jurisdiction which has, in such circumstances, been expressly reserved by sect. 107 of that Act.—*ILLINGWORTH v. BULMER EAST HIGHWAY BOARD* (1884), 53 L. J. M. C. 60; *sub nom.* *R. v. ILLINGWORTH*, 32 W. R. 451, C. A.

*See, now*, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 25 (1).

### SECT. 3.—RIGHT OF JUSTICES TO APPEAR.

**1714. Should only appear in special circumstances—Appearance by licensing justices.]**—In appeals from justices the justices ought not, except under very special circumstances, to appear by counsel in the Ct. of Appeal; & if they do so their costs will be disallowed.—*R. v. THORNTON, ETC., JJ.* (1898), as reported in 67 L. J. Q. B. 249; *sub nom.* *R. v. THORNTON, ETC., WANDSWORTH JJ., Ex p. LACON & Co., LTD.*, 62 J. P. 196, C. A.; *on appeal*,

*sub nom.* *LACEBY v. LACON & Co.*, [1899] A. C. 222, H. L.

*Annotations*:—*Mentd.* *R. v. Nicholson*, [1899] 2 Q. B. 455; *R. v. Johnson* (1905), 74 L. J. K. B. 585; *R. v. Woodhouse*, [1906] 2 K. B. 501; *R. v. Shaw* (1911), 6 Cr. App. Rep. 103.

**Costs of justices appearing.]**—*See* No. 1715, *post*.

### SECT. 4.—COSTS.

**1715. Costs of justices appearing—Licensing justices.]**—Where the ct. of quarter sessions has reversed a decision of the licensing justices, but has stated a case, to which the justices are parties, for the opinion of the High Ct. & the Div. Ct. allows the appeal, but the Ct. of Appeal in turn allows an appeal from the Div. Ct., & restores the decision of quarter sessions, the Ct. of Appeal, in accordance with the usual practice in such cases will order the justices to pay the costs.—*JONES v. HATHERTON*, [1917] 2 K. B. 412; 86 L. J. K. B. 1206; 116 L. T. 657; 81 J. P. 101; 61 Sol. Jo. 383, C. A.

## Part XVII.—Penalties.

### SECT. 1.—SINGLE AND CUMULATIVE PENALTIES.

*See, generally*, REVENUE.

**Animals.]**—*See* ANIMALS, Vol. II., p. 302, Nos. 703, 704.

**Copyright.]**—*See* COPYRIGHT, Vol. XIII., p. 228, Nos. 689, 690.

**Food & drugs.]**—*See* FOOD & DRUGS, Vol. XXV., pp. 102, 110, Nos. 250, 337.

**Game.]**—*See* GAME, Vol. XXV., pp. 388, 389, Nos. 384–387, 395.

**Highways.]**—*See* HIGHWAYS, Vol. XXVI., p. 559, No. 2538.

### SECT. 2.—APPROPRIATION OF PENALTIES.

*See* Municipal Corporations Act, 1882 (c. 50), s. 221; Justices' Clerks Act, 1877 (c. 43) s. 6; Criminal Justice Administration Act, 1914 (c. 58), s. 34 (6).

**1716. When payable to borough fund.]**—By Municipal Corporations Act, 1835 (c. 76), s. 126, all penalties recovered before any justice of a borough, except those under any Act relating (*inter alia*) to trade or navigation, go to the borough fund. By 7 & 8 Vict. c. 112, s. 62, which regulates merchant seamen, a moiety of all penalties recovered thereunder goes to the seamen's hospital society:—*Held*: 7 & 8 Vict. c. 112, was an Act relating to trade or navigation, & the penalties recovered under it fell within the proviso to Municipal Corporations Act, 1835 (c. 76), s. 126, & do not go to the borough fund.—*SEAMEN'S HOSPITAL SOCIETY v. LIVERPOOL CORPN.* (1849), 4 Exch. 180; 18 L. J. Ex. 371; 13 L. T. O. S. 238; 13 J. P. 588; 154 E. R. 1173.

*Annotation*:—*Consd.* *Wray v. Ellis* (1858), 1 E. & E. 276.

**1717. — Or to county fund.]**—By Summary Jurisdiction Act, 1848 (c. 43), s. 31, when persons are convicted by justices under statutes which

contain no directions for the payment of the penalties to any person, the penalties are to be paid to the clerk of the division for which the justices usually act, & he is to pay them over to the treasurer of the county, riding, . . . city, borough, or place, for which such justices shall have acted; & a return is to be made by the clerk to the clerk of the peace for the county, borough, etc., in which the division is situate, when & as the ct. of quarter sessions for the same shall order. The municipal borough of R., in the county of S., has no separate commission of the peace, & no ct. of quarter sessions. The mayor & ex-mayor of R. have jurisdiction in R. as justices, & the justices of the county at large have concurrent jurisdiction. There is a treasurer for the borough:—*Held*: the justices in & for the borough acted as county justices, with their powers limited to a particular locality; & the word "borough" in above sect. meant a borough which has a ct. of quarter sessions; & therefore penalties imposed by justices acting in & for the borough were to be paid to the treasurer of the county, & not to the treasurer of the borough.—*REIGATE CORPN. v. HART* (1868), L. R. 3 Q. B. 244; 9 B. & S. 129; 37 L. J. M. C. 70; 18 L. T. 237; 32 J. P. 342; 16 W. R. 896.

*Annotations*:—*Folld.* *Winn v. Mossman* (1869), L. R. 4 Exch. 292. *Refd.* *R. v. West Riding JJ.*, [1900] 1 Q. B. 291; *R. v. Warwickshire JJ.*, [1902] 2 K. B. 101. *Mentd.* *Lawson v. Reynolds*, [1904] 1 Ch. 718.

**1718. — — —.]**—Penalties imposed by justices acting in & for a municipal borough, having a separate commission of the peace but no separate ct. of quarter sessions, in respect of offences against the general law of the land, are, under Summary Jurisdiction Act, 1848 (c. 43), s. 31, to be paid to the treasurer of the county & not of the borough. Penalties imposed by such justices, under 9 Geo. 4, c. 61, & not awarded to prosecutor under s. 20 of that Act, are to be paid to the treasurer of the county & not of the borough, notwithstanding Municipal Corporations Act Amendment Act, 1861 (c. 75), s. 4.—*WINN v. MOSSMAN* (1869),

### PART XVII. SECT. 2.

**17171. When payable to borough fund—Or to county fund.]**—*Ex p.* *FREDERICTON CITY* (1888), 27 N. B. R. 195.—CAN.

**Sect. 2.—Appropriation of penalties. Sect. 3: Sub-sects. 1 & 2.]**

L. R. 4 Exch. 292; 38 L. J. Ex. 200; 20 L. T. 672; 33 J. P. 743; 17 W. R. 924.

*Annotations:—*Refd. R. v. West Riding JJ., [1900] 1 Q. B. 291; R. v. Warwickshire JJ., [1902] 2 K. B. 101.

**1719.** ———.]—*ALISON v. FOYSTER*, [1871] W. N. 48.

*Annotation:—*Distd. *Alison v. Charlesworth* (1885), 49 J. P. 294.

**1720.** ———.]—In the borough of O., a borough having a separate commission of the peace, it is provided by a local Act that any penalty recovered upon the information or complaint of any peace officer or constable within the borough is to be paid to the treasurer & carried to the borough fund, or to the police superannuation fund, as the corpn. may decide. In an action by the treasurer of the county of L. to enforce the provisions of Summary Jurisdiction Act, 1848 (c. 43), s. 31:—*Held*: the effect of the provisions in the local Act was, so far as the borough of O. was concerned, to repeal the provisions of the general Act; & penalties imposed by the borough justices for offences against the general law under statutes containing no directions as to the application of the penalties were payable to the treasurer of the borough.—*ALISON v. CHARLESWORTH* (1885), 49 J. P. 294, D. C.

*Annotation:—*Refd. *Alison v. Hall* (1888), 4 T. L. R. 524.

**1721.** ———.]—*ALISON v. HALL* (1888), 4 T. L. R. 524, C. A.

**1722.** ———.]—Under Local Government Act, 1888 (c. 41), where the population of a borough having a separate commission of the peace, but not a separate ct. of quarter sessions, is less than ten thousand, the salary of the clerk to the justices for such borough is payable by the county council; & the fines & fees received by such clerk for business done in petty sessions & under Summary Jurisdiction Acts, must be paid by him to the county fund of the county council.—*Re HEREFORDSHIRE COUNTY COUNCIL & LEOMINSTER TOWN COUNCIL*, [1895] 1 Q. B. 43; 64 L. J. M. C. 26; 71 L. T. 576; 15 R. 77; *sub nom.* *HEREFORDSHIRE COUNTY COUNCIL v. LEOMINSTER TOWN COUNCIL*, 59 J. P. 38, D. C.

*Annotation:—*Mentd. *Thetford Corpn. v. Norfolk County Council*, [1898] 2 Q. B. 468.

**1723.** ———.]—*HUNTINGDON CORPN. v. HUNTINGDON COUNTY COUNCIL*, No. 797, *ante*.

**1724.** ——— **Or to Crown.**]—An offender having been convicted under 3 & 4 Vict. c. 97, before justices in a borough having a separate ct. of quarter sessions, was sentenced to pay a fine:—*Held*: the provisions of Municipal Corporations Act, 1835 (c. 76), must be read as incorporated in the subsequent Act, & the fine was therefore payable to the borough treasurer.—*A.-G. v. MOORE* (1878), 3 Ex. D. 276; 47 L. J. M. C. 103; 38 L. T. 251; 42 J. P. 372; 26 W. R. 366, C. A.

*Annotations:—*Mentd. *Haigh v. West* (1893), 62 L. J. Q. B. 532; *R. v. Titterton*, [1895] 2 Q. B. 61; *Nichol v. Fearby*, *Nichol v. Robinson*, [1923] 1 K. B. 480.

**1725. When payable to receiver of metropolitan police district.**]—By Metropolitan Police Courts Act, 1839 (c. 71), s. 47, "When by any Act penalties or shares of penalties are or shall hereafter be made recoverable in a summary manner before any justices of the peace, & by the Act the same are or

shall be limited to the Queen, or some person other than the informer or party aggrieved, in every such case the same, if recovered or adjudged before any of the said" (metropolitan police) "magistrates, shall be received for & adjudged to be paid to the receiver" (of the metropolitan police district) "for the time being." By Metropolitan Police Courts Act, 1840 (c. 84), s. 6, any two justices having jurisdiction within the metropolitan police district shall have, while sitting together publicly in the petty sessions court or room, except in divisions assigned to the police courts, all the powers, privileges, & duties which any one magistrate of the police cts. has by Metropolitan Police Courts Act, 1839 (c. 71), s. 47:—*Held*: this did not make penalties, which were recovered before two justices sitting as above, penalties recovered before a police magistrate; & therefore the shares of such penalties unappropriated to the informer or party aggrieved did not go to the receiver of the metropolitan police district.—*METROPOLITAN POLICE DISTRICT RECEIVER v. BELL* (1872), L. R. 7 Q. B. 433; 41 L. J. M. C. 153; 37 J. P. 55.

*Annotation:—*Mentd. *R. v. Titterton, Ex p. Quelch* (1895), 43 W. R. 603.

**1726. Appropriation in summary conviction.**]—In summary convictions by justices of the peace, if any discretionary power is reserved to the justices relative to the application of the penalty, the conviction should show in what manner they have exercised it; but, where the application of the penalty is fixed by law, it is enough to say they award the penalty to be applied as the law directs, without specifying how it is to be distributed.—*Re BOOTHROYD* (1846), 15 M. & W. 1; 2 New Sess. Cas. 250; 15 L. J. M. C. 57; 6 L. T. O. S. 323; 10 J. P. 484; 10 Jur. 117; 153 E. R. 736.

*Annotation:—*Mentd. *R. v. Shipperbottom* (1847), 16 L. J. M. C. 113.

— **Validity of conviction.**]—*See* Nos. 619-622, *ante*.

**Offences against sale of food & drugs.**]—*See* *FOOD & DRUGS*, Vol. XXV., p. 126, No. 473.

**Gaming offences.**]—*See* *GAMING & WAGERING*, Vol. XXV., p. 429, No. 291.

**Highway offence.**]—*See* *HIGHWAYS*, Vol. XXVI., p. 349, No. 766.

**Intoxicating liquor offences.**]—*See* *INTOXICATING LIQUORS*, Vol. XXX., p. 104, Nos. 803, 804.

### SECT. 3.—UNDER SUMMARY JURISDICTION.

#### SUB-SECT. 1.—IN GENERAL.

*See* Summary Jurisdiction Act, 1848 (c. 43), s. 28; Summary Jurisdiction Act, 1879 (c. 49), ss. 4, 7, 21; Criminal Justice Administration Act, 1914 (c. 58), ss. 3, 5, 30; Summary Jurisdiction Rules, 1915, rr. 19, 20-22, 24, 25, 46, 48.

**1727. Imprisonment in default of payment—Immediate payment ordered.**]—(1) In the liberty of A., which is situated within the county of H., there is a gaol & house of correction, used only for offenders within the liberty. It is entirely supported by a rate in the nature of a county rate levied on the inhabitants of the liberty, who do not contribute to the general county rate. The keeper of the liberty house of correction is appointed by the justices of the liberty, who act under a separate

#### PART XVII.

**1727 i. Imprisonment in default of payment—Immediate payment ordered.**]—*HALIFAX CITY v. BROWN* (1885), 6 R. & G. 103; 6 C. L. T. 144.—**CAN.**

**1727 ii.** ———.]—Although com-

pensation awarded under Code of Criminal Procedure, s. 560, is recoverable as if it were a fine, it is not competent to a magistrate, immediately upon ordering a complainant to pay compensation, to direct that he should in default be sentenced to imprison-

ment.—*R. v. PUNNA* (1895), 1 L. L. R. 18 All. 96.—**IND.**

**i.** ———.]—*R. v. ELLIOTT* (1886), 12 O. R. 524.—**CAN.**

**m.** ———.]—*Ex p. YOUNG* (1893), 32 N. B. R. 178.—**CAN.**



commission, which does not give them exclusive jurisdiction. There is a ct. of quarter sessions held for the liberty. The commission under which the justices of the county of H. act gives them jurisdiction as well within liberties as without:—*Held*: the county justices sitting out of the liberty were authorised to commit to the house of correction of the liberty a person guilty of an assault within the liberty, & were not bound to send him to the county house of correction. *Qu*: whether they could commit to the liberty gaol for offences committed out of the liberty.

(2) The party charged, though duly summoned, did not appear before the justices at the time appointed for the hearing. The justices heard the case, adjudged the party to pay a fine & costs immediately, & on the same day, before any demand or notice, ordered him to be committed for non-payment to the house of correction, under 9 Geo. 4, c. 31, ss. 27, 33:—*Held*: the justices might order the payment to be made either “immediately,” which means in this statute “on the spot,” or might give time, in their discretion; & as they had ordered immediate payment, they were authorised, the money not being then paid, at once to order the party’s committal before any demand, & without serving him with any summons to show cause why he should not be committed.—*ARNOLD v. DIMSDALE* (1853), 2 E. & B. 580; 22 L. J. M. C. 161; 22 L. T. O. S. 65; 17 J. P. 712; 17 Jur. 1157; 1 W. R. 430; 118 E. R. 885.

**1728. — Whether hard labour authorised—Hard labour authorised as punishment for offence.**—Summary Jurisdiction Act, 1879 (c. 49), s. 5, authorises the infliction of imprisonment with hard labour for default in payment of a penalty adjudged to be paid by a summary conviction where the Act on which the conviction is founded authorises the infliction of imprisonment with hard labour as a punishment for the offence.—*R. v. TYNEMOUTH JJ.* (1886), 16 Q. B. D. 647; 55 L. J. M. C. 181; 54 L. T. 386; 50 J. P. 454; 16 Cox, C. C. 74.

*Annotation*:—*N.F. R. v. Turnbull, etc., Tynemouth JJ.* (1886), 16 Cox, C. C. 110.

**1729. — — — — —.**—*Qu*: whether a statute which authorises the punishment of an offence with a penalty, or, in the discretion of the ct., with imprisonment with or without hard labour, is an Act which authorises the punishment of imprisonment with hard labour within the meaning of the exceptions in Summary Jurisdiction Act, 1879 (c. 49), s. 5.—*R. v. TURNBULL, ETC., TYNEMOUTH JJ.* (1886), 16 Cox, C. C. 110.

**1730. — May exceed term fixed for offence.**—A street musician was convicted under Street

Music Act, 1864 (c. 55), s. 1, & was sentenced to pay a fine of forty shillings & in default of payment to be imprisoned for a month:—*Held*: Street Music Act, 1864 (c. 55), did not operate to repeal Metropolitan Police Act, 1839 (c. 47), s. 77, impliedly; the penalty was therefore capable of being enforced by imprisonment as provided by that sect. & the conviction was good.—*R. v. HOPKINS*, [1893] 1 Q. B. 621; 62 L. J. M. C. 57; 68 L. T. 292; 57 J. P. 152; 41 W. R. 431; 9 T. L. R. 294; 37 Sol. Jo. 286; 5 R. 315, D. C.

*Annotations*:—*Folld. R. v. Leach, Ex p. Fritchley*, [1913] 3 K. B. 40. *Mentd. Shields v. Howard* (1896), 60 J. P. 727; *Bingley v. Quest* (1907), 97 L. T. 394.

**1731. — — — — —.**—Deft. was convicted of an offence under Licensing (Consolidation) Act, 1910 (c. 24), s. 65, & ordered to pay a fine of £25, & in default of payment & of sufficient distress to be imprisoned for three months:—*Held*: although under s. 56 a sentence of imprisonment for the offence could not have exceeded one month, there was power under Summary Jurisdiction Act, 1879 (c. 49), s. 5, to impose a sentence of three months’ imprisonment for non-payment of the fine & in default of sufficient distress.—*R. v. LEACH, Ex p. FRITCHLEY*, [1913] 3 K. B. 40; 82 L. J. K. B. 897; 109 L. T. 313; 77 J. P. 255; 29 T. L. R. 569; 23 Cox, C. C. 535, D. C.

— **Penalty for improper charges on distress.**—See *DISTRESS*, Vol. XVIII., p. 356, No. 937.

— **Insufficient distress.**—See *DISTRESS*, Vol. XVIII., pp. 433 *et seq.*

**1732. Increase of fine—To facilitate appeal.**—It is an improper practice for justices to increase a fine for the purpose of enabling an appeal to be brought.—*Ex p. HORLICK* (1908), 24 T. L. R. 747; 72 J. P. Jo. 280, D. C.

**Appropriation.**—See Sect. 2, *ante*.

#### SUB-SECT. 2.—REDUCTION OF PENALTY.

See Summary Jurisdiction Act, 1879 (c. 49), ss. 4, 54.

**1733. Power of justices to reduce fine—Where no previous conviction—What amounts to previous conviction.**—Where at the hearing of a summons for keeping a dog without a licence it is proved that deft. has been convicted on a former occasion of a similar offence, but such previous conviction is not stated in the information, the case cannot be treated as the case of a first offence within Summary Jurisdiction Act, 1879 (c. 49), s. 4, & therefore the magistrate has no power under that sect. to reduce the amount of the fine imposed for the offence by Dog Licences Act, 1867 (c. 5), s. 8, & the only power to reduce such fine is that given by Excise Management Act, 1827 (c. 53), s. 78,

n. — — — — —.]—*R. v. PETERSKY* (1897), 5 B. C. R. 549.—CAN.

o. — — — — —.]—*R. v. ROCHE* (1900), 20 C. L. T. 307; 32 O. R. 20.—CAN.

p. — — — — —.]—*R. v. MYERS* (1903), 23 C. L. T. 286; 6 O. L. R. 120; 2 O. W. R. 533.—CAN.

q. — — — — —.]—A conviction ordering deft. to be imprisoned for sixty days in default of payment of a fine cannot be supported under a sect. of the Act which authorises imprisonment for not less than three months in case of such default.—*R. v. CHAREST, Ex p. DAIGLE* (1906), 37 N. B. R. 492; 2 E. L. R. 12.—CAN.

r. — — — — —.]—*Corporations.*—A penalty can be enforced against a co. under Summary Convictions Act, & the fact that the form of conviction under the Act provides for imprisonment in default of distress, which would be

inapplicable to corpora. does not displace the remedy under the Act.—*R. v. DOMINION COAL CO.* (1907), 41 N. S. R. 137.—CAN.

t. — — — — —.]—*No power to suspend sentence.*—A sentence cannot be suspended under Criminal Code in the case of an offence punishable only by a fine, even though the offender may be imprisoned in default of payment.—*R. v. WARNER* (Alta.), [1924] 4 D. L. R. 916; 3 W. W. R. 512.—CAN.

a. *No power to inflict consolidated penalty.*—Justices have no jurisdiction to inflict a consolidated penalty on convicting a deft. of more than one offence.—*WATERMAN v. OLIVER* (1911), 13 W. A. L. R. 109.—AUS.

b. *To whom paid.*—The penalty & costs adjudged to be paid by a conviction under Summary Convictions Act, must be paid to the convicting justices & not to the prosecutor.—

*Ex p. WALLACE* (1889), 29 N. B. R. 123.—CAN.

c. *Imposition of unauthorised penalty—Effect of.*—Conviction & commitment bad for imposing an unauthorised penalty.—*R. v. RANDOLPH* (1900), 20 C. L. T. 439; 32 O. R. 212.—CAN.

d. *Time for payment not fixed—Payable forthwith.*—Where a fine is imposed & no time for payment is fixed it is payable forthwith.—*R. v. FRASER, R. v. ROSENOFF* (Alta.), [1923] 2 W. W. R. 395; 39 Can. Crim. Cas. 366.—CAN.

#### PART XVII. SECT. 3, SUB-SECT. 2.

e. *Power of justices to reduce fine.*—No general rule can be laid down that there is power to reduce the minimum penalty prescribed by a special Act. Each case must be decided on the

*Sect. 3.—Under summary jurisdiction: Sub-sects.*

under which statute, it cannot be reduced to less than one-fourth of the amount.—*MURRAY v. THOMPSON* (1888), 22 Q. B. D. 142; 58 L. J. M. C. 41; 60 L. T. 151; 53 J. P. 70; 37 W. R. 221; 5 T. L. R. 125; 16 Cox, C. C. 554, D. C.

*Annotation*:—*Consd. R. v. Beesby*, [1909] 1 K. B. 849.

**1734.** ———.]—In the case of an offence of keeping a carriage without a licence contrary to Revenue Act, 1869 (c. 14), s. 27, in order to prevent such offence being dealt with as a first offence within Summary Jurisdiction Act, 1879 (c. 49), s. 4, it is not necessary that the previous conviction should have occurred within the same year.—*PHILLIPS v. STEVENS* (1898), 79 L. T. 280; 62 J. P. 789; 15 T. L. R. 5; 43 Sol. Jo. 14; 19 Cox, C. C. 172, D. C.

**1735.** ——— **Fine under Cotton Cloth Factories Act, 1889 (c. 62), s. 13.**]—The power given to cts. of summary jurisdiction by Summary Jurisdiction Act, 1879 (c. 49), s. 4, to reduce the prescribed amount of a fine, if it be imposed as in respect of a first offence, does not enable them to reduce the prescribed amount of the fine imposed by Cotton Cloth Factories Act, 1889 (c. 62), s. 13, which enacts that where there is a contravention of or non-compliance with the provisions of the

construction of the special Act, regard being had to the nature of the offence which it creates & the language which it uses.—*GILES v. BIGHAM*, [1925] S. A. S. R. 27.—**AUS.**

**f.** ———.]—A conviction for a second offence against Liquor Act, 1916, may be awarded by striking out the declaration of a second offence & the reference to a former conviction &

by reducing the amount of the fine to that proper for a first conviction.—*R. v. VAN FLEET* (Alta.), [1918] 1 W. W. R. 332; 38 D. L. R. 592; 29 Can. Crim. Cas. 218.—**CAN.**

**g.** ———.]—The magistrate before whom the person in default is tried & convicted has no power to reduce the amount of the penalty prescribed by Income War Tax Act, 1917, s. 9.—

Act, & after written notice from the inspector the acts are continued or not remedied, the occupier of the factory is to be liable, on summary conviction, for the first offence to a penalty of not less than £5 nor more than £10.—*OSBORN v. WOOD BROTHERS*, [1897] 1 Q. B. 197; 66 L. J. Q. B. 178; 76 L. T. 60; 61 J. P. 118; 45 W. R. 319; 41 Sol. Jo. 143; 18 Cox, C. C. 494, D. C.

**1736.** ———.]—By a local Act, a co. were made liable in the event of failure to deliver compensation water in accordance with the Act, to a penalty of £5 a day, recoverable summarily by & payable to those interested in the delivery of the water, or the mill owners using the water:—*Held*: the penalty could be reduced by the justices, in the case of a first offence by the co., under Summary Jurisdiction Act, 1879 (c. 49), s. 4.—*DAVIES-COOKE v. HAWARDEN & DISTRICT WATERWORKS CO.*, *HAWARDEN & DISTRICT WATERWORKS CO. v. DAVIES-COOKE* (1907), 71 J. P. 223; 5 L. G. R. 731; *sub nom.* *COOKE v. HAWARDEN & DISTRICT WATERWORKS CO.*, *HAWARDEN & DISTRICT WATERWORKS CO. v. COOKE*, 96 L. T. 906, D. C.

**SUB-SECT. 3.—RECOVERY BY DISTRESS.**

*See DISTRESS*, Vol. XVIII., pp. 428 *et seq.*

*R. v. SMITH*, [1923] 1 D. L. R. 820; 38 Can. Crim. Cas. 327; 56 N. S. R. 72.—**CAN.**

**h.** ———.]—A conviction is erroneous which imposes a penalty of an amount less than the sum fixed by the Act of Parliament under which the conviction purports to have been made.—*BROPHY v. WARD* (1859), 11 Ir. Jur. 235.—**IR.**

**MAIN ROADS.**

*See HIGHWAYS, STREETS, AND BRIDGES; STREET AND AERIAL TRAFFIC.*

**MAINTENANCE.**

*See BASTARDY; HUSBAND AND WIFE; INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND; POOR LAW; SETTLEMENTS; WILLS.*

**MAINTENANCE AND CHAMPERTY.**

*See ACTION; CRIMINAL LAW AND PROCEDURE.*

**MALICIOUS DAMAGE.**

*See AGRICULTURE; CRIMINAL LAW AND PROCEDURE; DAMAGES; TORT.*



# MALICIOUS PROSECUTION AND PROCEDURE.

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continuances & hear the said appeal, on the ground that they were bound to respite for the purpose of notice being served on all the parties interested. Applt. then gave a second notice, in which the schedule, & the objections in respect of the parties named therein, were omitted. The sessions, when the appeal came on for hearing, held that this was not a proper notice, & dismissed the appeal with costs:—*Held*: they were right in so doing, inasmuch as, by the omission of the schedule & the objections in respect of the parties named therein, the character of the appeal was materially altered, so that it was not the said appeal which the sessions were ordered to hear & determine.—*R. v. EYRE* (1857), 7 E. & B. 619; 26 L. J. M. C. 125; 29 L. T. O. S. 91; 22 J. P. 38; 3 Jur. N. S. 912; 5 W. R. 533; 119 E. R. 1375.

*Annotations*:—*Refd.* *R. v. Lancashire JJ.* (1857), 8 E. & B. 563; *R. v. Surrey JJ.* (1880), 6 Q. B. D. 100; *R. v. De Grey*, [1900] 1 Q. B. 521.

**1465. Refusal to state case.**—Where the ct. of quarter sessions decided clearly against law holding that a hiring for a less period than a year conferred a settlement, & refused to grant a case for the opinion of the Ct. of Q. B., the latter ct. refused to interfere by *mandamus* to compel a case to be stated.—*Ex p. JARVIN (INHABITANTS)* (1840), 9 Dowl. 120; Woll. 67.

**1466. Refusal to convict surveyor—Highway out of repair.**—When an information is laid under the Highway Act, 1835 (c. 50), s. 94, that a highway is out of repair, & the magistrates, pursuant to that sect., appoint a viewer who reports it out of repair, the magistrates at the special sessions are not bound by that report, but may exercise their discretion whether they will convict the surveyor or not.—*R. v. WILTSHIRE JJ.* (1840), 8 Dowl. 717; *sub nom. R. v. RADNOR (EARL), ETC., WILTS JJ.*, 4 J. P. 346; 4 Jur. 460.

*Annotation*:—*Refd.* *R. v. Arnould, etc., Berkshire JJ.* (1857), 22 J. P. 545.

**1467. Refusal to entertain appeal—Non-compliance with statute.**—Where an appeal came on to be heard before the justices at quarter sessions, it appeared the order of removal had been obtained on the ground that the pauper had acquired a settlement in applt. parish by renting a tenement. The pauper's examination which was sent to applt. stated, that the tenancy commenced in June, 1827, & terminated in June, 1828, but the first witness that was called, proved that the tenancy commenced in June, 1828, & terminated in Aug. 1829. The sessions held this variance between the proof & the examination of the pauper not to be a compliance with the provisions of Poor Law Amendment Act, 1834 (c. 76), s. 81, & therefore refused to hear the appeal. An application was now made for a *mandamus* to compel the sessions to enter continuances & hear the appeal, but refused on the ground that the sessions had a discretionary power in these matters, & having exercised that power on the present occasion, the Ct. of Q. B. would not call it in question.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1840), 10 Ad. & El. 685; 3 Per. & Dav. 462; 4 J. P. 333; 4 Jur. 533; 113 E. R. 260; *sub nom. R. v. WEST RIDING JJ., Ex p. BIRSTWITH (INHABITANTS)*, 9 L. J. M. C. 57.

*Annotations*:—*Refd.* *R. v. Kesteven JJ.* (1844), 3 L. T. O. S. 55. *Mentd.* *R. v. Bridgewater* (1841), 10 Ad. & El. 693.

**1468. — Entered after time.**—*R. v. DERBYSHIRE JJ.*, No. 1580, *post*.

**1469. Refusal to widen bridge—Bridges Act, 1808 (c. 59), s. 2.**—The above sect. provides that where any bridge repaired at the expense of the county shall be narrow & inconvenient, it shall

& may be lawful for the justices at their general quarter sessions to order & direct such bridge to be widened, etc., & that no money shall be applied to the alteration of any such bridge until presentment shall have been made according to one of the statutes relating to public bridges:—*Held*: the power so given to the justices is discretionary, & the ct. therefore refused a *mandamus* to compel them to widen a bridge.—*Re NEWPORT BRIDGE* (1859), 2 E. & E. 377; 29 L. J. M. C. 52; 24 J. P. 133; 6 Jur. N. S. 97; 121 E. R. 142; *sub nom. Re MONMOUTHSHIRE JJ.*, 1 L. T. 131; 8 W. R. 62.

*Annotations*:—*Mentd.* *Forbes v. Lee Conservancy Board* (1879), 4 Ex. D. 116; *Julius v. Oxford (Bp.)* (1880), 5 App. Cas. 214.

**1470. Conditional exercise—Acceded to by appellant.**—On an appeal against an order of removal, a notice of appeal having been given in due time, but to the wrong sessions, for county instead of a borough, the notice was amended too late for the next sessions, & application was made to enter & respite the appeal, which was acceded to conditionally on the ct. at the next sessions, being of opinion that the notice for those sessions would not be too late, & the ct. at such sessions held that it was, & refused to hear the appeal:—*Held*: it was discretionary to grant the application; & there had not been a declining to exercise a discretion, but a conditional exercise of it, which had been accepted by applt., & a *mandamus* to the sessions to hear the appeal was refused.—*R. v. BERWICK RECORDER* (1863), 7 L. T. 670; 27 J. P. 87; 11 W. R. 265.

**1471. Refusal to award costs.**—The writ of *mandamus* will not lie to compel a ct. of quarter sessions to award costs under 9 Geo. 4, c. 61, s. 29, to justices who appear & actively oppose an appeal from their decision in a licensing case; for such justices are a party to the appeal, & under the Summary Jurisdiction Acts, 1879 (c. 49), & 1884 (c. 43), the ct. has a discretion to give or refuse costs *inter partes* as it thinks just.

Licensing justices, who either do not appear on an appeal, or appear only to inform the ct. of the grounds of their decision, are not a party to the appeal, & are entitled to their costs under 9 Geo. 4, c. 61, s. 29. But the question whether they have made themselves a party to an appeal or not is one which the ct. of quarter sessions has jurisdiction to decide; & if it decides that question, however, erroneously, in the affirmative, & refuses costs, its decision cannot be reviewed by the High Ct. upon an application for a *mandamus* to award costs.—*R. v. LONDON JJ.*, [1895] 1 Q. B. 616; 64 L. J. M. C. 100; 72 L. T. 211; 59 J. P. 820; 43 W. R. 387; 11 T. L. R. 193; 39 Sol. Jo. 231; 14 R. 246, C. A.

*Annotations*:—*Refd.* *R. v. Kent JJ.*, [1896] 2 Q. B. 306; *R. v. Staffordshire JJ.*, [1898] 2 Q. B. 231; *R. v. Ashton, Ex p. Walker* (1915), 85 L. J. K. B. 27. *Mentd.* *R. v. London & Strand Division JJ. & Dalton, Ex p. L. C. C.* (1898), 78 L. T. 559; *R. v. Customs & Excise Comrs.*, [1913] 3 K. B. 483.

**1472. —**—The ct. will not interfere with the discretion of quarter sessions in refusing to award costs under Quarter Sessions Act, 1849 (c. 45), s. 5, if that discretion has been exercised judicially.—*R. v. NOTTINGHAMSHIRE JJ., Ex p. PITNEY* (1909), 73 J. P. 183, D.

#### C. Exercise of Jurisdiction by Sessions.

##### (a) In General.

**1473. Matter properly before court.**—When the ct. of quarter sessions confirmed an order of two justices for stopping up a highway without proof that the order was previously made at a special



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<i>Action</i> . . . . .	<i>See</i> ACTION ; LIMITATION OF ACTIONS.	<i>Malicious Injury to Property</i> . . . . .	<i>See</i> CRIMINAL LAW.
<i>Bailiffs</i> . . . . .	„ COUNTY COURTS ; DISTRESS ; SHERIFFS AND BAILIFFS.	<i>Misrepresentation</i> . . . . .	„ AUCTION AND AUCTIONEERS ; COMPANIES ; CONTRACT ; INSURANCE ; MISREPRESENTATION AND FRAUD.
<i>Conspiracy</i> . . . . .	„ CRIMINAL LAW ; TORT ; TRADE AND TRADE UNIONS.		
<i>Contempt of Court</i> . . . . .	„ CONTEMPT OF COURT.	<i>Mistake</i> . . . . .	„ AUCTION AND AUCTIONEERS ; BILLS OF EXCHANGE ; CONTRACTS ; MISTAKE.
<i>Criminal Law and Procedure</i> . . . . .	„ CRIMINAL LAW.	<i>Negligence</i> . . . . .	„ NEGLIGENCE.
<i>Damages</i> . . . . .	„ DAMAGES.	<i>Public Authorities and Public Officers</i> . . . . .	„ PUBLIC AUTHORITIES.
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<i>Distress</i> . . . . .	„ DISTRESS.	<i>Sheriffs</i> . . . . .	„ EXECUTION ; SHERIFFS AND BAILIFFS ; AND TITLES <i>passim</i> .
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<i>Libel</i> . . . . .	„ LIBEL AND SLANDER.	<i>Trespass</i> . . . . .	„ TRESPASS.
<i>Malice</i> . . . . .	„ DAMAGES ; LIBEL AND SLANDER ; TORT.		

## Part I.—Distinguished from Trespass and False Imprisonment.

*See, generally, TRESPASS.*

1. **Legal process.**]—If a serjeant at mace of London arrest A. on a plaint in the sheriff's ct., & A. tenders him good bail, which he refuses to accept, A. may have an action on the case for refusing the bail ; but he cannot maintain trespass for false imprisonment, the caption being by legal process.—*SALMON v. PERCIVALL* (1630), Cro. Car. 196 ; W. Jo. 226 ; 79 E. R. 772.

*Annotations* :—*Distd.* *Moore v. Rose* (1869), L. R. 4 Q. B. 486. *Reid.* *Bealy v. Sampson* (1889), 2 Vent. 93 ; *Smith v. Egginton* (1837), 7 Ad. & El. 167.

2. —.]—(1) There is no similitude or analogy between an action of trespass, or false imprisonment, & this kind of action. An action of trespass is for deft.'s having done that, which,

upon the stating of it, is manifestly illegal. This kind of action is for a prosecution, which, upon the stating of it, is manifestly legal. The essential ground of this action is, that a legal prosecution was carried on without a probable cause. We say this is emphatically the essential ground ; because every other allegation may be implied from this ; but this must be substantively & expressly proved, & cannot be implied. From the want of probable cause, malice may be, & most commonly is, implied. The knowledge of deft. is also implied. From the most express malice, the want of probable cause cannot be implied. A man, from a malicious motive, may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt ; & in neither

### PART I.

a. *Distinct causes of action.*]—*DOOLAN v. MARTIN* (1870), 6 P. R. 319.—CAN.

b. —.]—*THOMPSON v. MOTT* (1893), 32 N. B. R. 350.—CAN.



case is he liable to this kind of action. After a verdict, the presumption is, that such parts of the declaration, without proof of which pltf. ought not to have had a verdict, were proved to the satisfaction of the jury. In this case, to support the verdict, there was nothing necessary to be proved, but that there was no probable cause, from whence the jury might imply malice, & might imply that deft. knew there was no probable cause (*per CUR.*).

(2) The question of probable cause is a mixed proposition of law & fact. Whether the circumstances alleged to show it probable, or not probable, are true & existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law; & upon this distinction proceeded the case of *Reynolds v. Kennedy*, No. 350, *post* (*per CUR.*).—*JOHNSTONE v. SUTTON* (1786), 1 Term Rep. 510; 99 E. R. 1225, Ex. Ch.; *affd. sub nom. SUTTON v. JOHNSTONE* (1787), 1 Bro. Parl. Cas. 76, H. L.

*Annotations*:—As to (1) *Consd. Mitchell v. Jenkins* (1833), 5 B. & Ad. 588; *Musgrove v. Newell* (1836), 1 M. & W. 582; *Michell v. Williams* (1843), 11 M. & W. 205; *Ellis v. Abrahams* (1846), 10 J. P. 820; *Heddon v. Evans* (1919), 35 T. L. R. 642. *Refd. Warden v. Bailey* (1811), 4 Taunt. 67; *Whitelegg v. Richards* (1822), 6 Moore, C. P. 501; *Broad v. Ham* (1839), 5 Bing. N. C. 722; *Abraham v. N. E. Ry.* (1886), 55 L. T. 63; *Brown v. Hawkes*, [1891] 2 Q. B. 718. As to (2) *Consd. Willans v. Taylor* (1829), 6 Bing. 183. *Apprvd. Taylor v. Willans* (1831), 2 B. & Ad. 845. *Consd. Panton v. Williams* (1841), 2 Q. B. 169. *Refd. Hill v. Yates* (1818), 2 Moore, C. P. 80; *Mitchell v. Jenkins* (1833), 5 B. & Ad. 588; *Musgrove v. Newell* (1836), 1 M. & W. 582; *Perryman v. Lister* (1868), L. R. 3 Exch. 197; *Lister v. Perryman* (1870), L. R. 4 H. L. 521; *Brown v. Hawkes*, [1891] 2 Q. B. 718. *Generally, Mentd. Cane v. Chapman* (1836), 6 L. J. K. B. 49; *Ferguson v. Kinnoull* (1842), 4 State Tr. N. S. 785; *Hodgkinson v. Fernie* (1857), 2 C. B. N. S. 415; *Feather v. R.* (1865), 6 B. & S. 257; *Dawkins v. Rokeby* (1866), 4 F. & F. 806; *Dawkins v. Paulet* (1869), L. R. 5 Q. B. 94; *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255; *Grant v. Secretary of State for India* (1877), 2 C. P. D. 445; *Ex p. Marais*, [1902] A. C. 109; *R. v. Army Council*, *Ex p. Ravenscroft*, [1917] 2 K. B. 504; *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116.

**3. Intervention of judicial proceedings.]—**(1) A declaration in an action for a malicious prosecution for felony, must state that the prosecution is at an end; & alleging "that pltf. was discharged from his imprisonment" is not sufficient.

Saying that pltf. was "discharged" is not sufficient; it is not equal to the word "acquitted" which has a definite meaning. Where the word "acquitted" is used, it must be understood in the legal sense, namely, by a jury on the trial. But there are various ways by which a man may be discharged from his imprisonment without putting an end to the suit (*BULLER, J.*).

(2) The distinction between the actions of trespass & case has long been settled. . . . The gravamen in the present case is, that deft. personally took & arrested pltf. illegally, & imprisoned him; this is false imprisonment, & is an immediate injury to the person of pltf. . . . The grounds of a malicious prosecution are, that it was done maliciously; & without probable cause. The want of probable cause is the gist of the action (*BULLER, J.*).

The general distinction is this: where the immediate act of imprisonment proceeds from deft., the action must be trespass, & trespass only; but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other (*ASHHURST, J.*).—*MORGAN v. HUGHES* (1788), 2 Term Rep. 225; 100 E. R. 123.

*Annotations*:—As to (2) *Refd. Basten v. Carew* (1825), 3 B. & C. 649; *Grocock v. Cooper* (1828), 8 B. & C. 211; *R. v. Hughes* (1879), 4 Q. B. D. 614; *R. v. Whitfield & Thorne* (1885), 49 J. P. 230.

**4. —.]—***STONEHOUSE v. ELLIOT* (1795), 1 Esp. 272, N. P.; *subsequent proceedings*, 6 Term Rep. 315.

*Annotation*:—*Refd. Hedges v. Chapman* (1825), 2 Bing. 523.

**5. —.]—**Falsely, maliciously, & without any probable cause, procuring the warrant of a justice to search the premises, & apprehend the person of A. on suspicion of felony, & thereby causing his premises to be searched, & his person imprisoned, is properly the subject of an action on the case, & not trespass. A positive oath that a felony is actually committed, is not necessary to justify a magistrate in granting his warrant to search the premises, & apprehend the person of a party suspected of felony; & though it may be trespass in the magistrate to grant an illegal warrant, yet it is case in the person who causes & procures such warrant to issue, if it is done maliciously, & without reasonable or probable cause.—*ELSEE v. SMITH* (1822), 2 Chit. 304; 1 Dow. & Ry. K. B. 97; 1 Dow. & Ry. M. C. 28.

*Annotations*:—*Refd. Wyatt v. White* (1860), 5 H. & N. 371; *Jones v. German*, [1897] 1 Q. B. 374.

**6. —.]—**A party who sues another for arresting him on an illegal warrant is not bound to produce the warrant.

The warrant not having been produced, there is no legitimate evidence on which it can be presumed that it had ever issued, or that the action ought, in consequence, to have been case; & with respect to the production of the warrant, it is equally clear that a party who took upon himself to imprison another was *prima facie* guilty of a trespass, the *onus* of justifying which rested entirely with himself (*per CUR.*).—*HOLROYD v. DONCASTER* (1826), 3 Bing. 492; 11 Moore, C. P. 440; 4 Dow. & Ry. M. C. 537; 4 L. J. O. S. C. P. 178; 130 E. R. 603.

**7. —.]—**Deft. having charged pltf. with felony, pltf. was taken up for it under a justices' warrant. At the hearing before the justice pltf. was let go on his promise to reappear in a week. Upon which deft. said he had another charge of forgery against him. Pltf. was stopped by an officer, & again put to the bar, but dismissed on a similar promise:—*Held*: pltf.'s remedy against deft. was in case, & not in trespass.—*BARBER v. ROLLINSON* (1833), 1 Cr. & M. 330; 3 Tyr. 266; 2 L. J. Ex. 101; 149 E. R. 426.

*Annotations*:—*Appld. Brown v. Chapman* (1848), 6 C. B. 365. *Expld. Lock v. Ashton* (1848), 13 Jur. 167.

**8. —.]—**If a party make a complaint of another to a magistrate in a matter over which he has a general jurisdiction, who thereupon issues his warrant, by force of which an arrest is made, neither the party complaining nor the magistrate is liable in trespass, & the only remedy for the party aggrieved is in case for malicious prosecution. But if the matter were one in which the magistrate had no jurisdiction at all, then the latter is a trespasser.—*WEST v. SMALLWOOD* (1838), 3 M. & W. 418; 6 Dowl. 580; 1 Horn & H. 117; 7 L. J. Ex. 144; 2 J. P. 251; 2 Jur. 328; 150 E. R. 1208.

*Annotations*:—*Consd. Re Martin, Ex p. Sandau* (1846), 7 L. T. O. S. 133. *Appld. Brown v. Chapman* (1848), 6 C. B. 365. *Consd. Austin v. Dowling* (1870), L. R. 5 C. P. 534. *Refd. Eggington v. Lichfield Corpn.* (1855), 5 E. & B. 100.

**9. —.]—**A party who had inserted in his schedule a judgment obtained against him in one of the cts. at Westminster, was discharged from custody in Ireland under 3 & 4 Vict. c. 107. He was afterwards arrested in England, & a *ca. sa* issued by pltf. in the original suit, but was discharged on application to a judge:—*Held* insolvent could not maintain trespass against

pltf. for the imprisonment, but if he had wilfully abused the process of the ct., insolvent had a remedy against him by action on the case.—**EWART v. JONES** (1845), 14 M. & W. 774; 3 Dow. & L. 252; 15 L. J. Ex. 18; 9 Jur. 1015; 9 J. P. Jo. 788; 153 E. R. 688.

*Annotations*:—**Reid**. **Abley v. Dale** (1851), 11 C. B. 378; **Shepherd v. Beresford** (1851), 17 L. T. O. S. 295.

10. —.]—**BROWN v. CHAPMAN** (1848), 6 C. B. 365; 3 New Mag. Cas. 14; 17 L. J. C. P. 329; 11 L. T. O. S. 453; 12 Jur. 799; 136 E. R. 1292; *previous proceedings* (1847), 8 L. T. O. S. 391.

*Annotation*:—**Reid**. **Warner v. Riddiford** (1858), 4 C. B. N. S. 180.

11. —.]—The particulars attached to a county ct. summons were as follows: To damages sustained by me by reason of your making a false charge of stealing a tobacco pouch, & silk pocket handkerchief, at the Clerkenwell police ct., & loss of character, £50:—*Held*: these particulars did not disclose a cause of action for false imprisonment, but rather for malicious prosecution or slander, & the judge had no power to amend them by substituting the words “false imprisonment.”—**HOPPER v. WARBURTON** (1863), 1 New Rep. 371; 32 L. J. Q. B. 104; 7 L. T. 722; 11 W. R. 384.

12. —.]—Plaint in a county ct. for false imprisonment. Evidence that pltf. was given into custody by deft. on a groundless charge of felony; that deft. signed the charge sheet, without which, as he knew, the police would not have detained pltf., & that, when taken before a magistrate, pltf. was discharged:—*Held*: the evidence, though it would support a charge of malicious prosecution, was severable, & there was good evidence of a false imprisonment up to the time of pltf. being taken before the magistrate.

The distinction between false imprisonment & malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody & detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion & judgment of a judicial officer are interposed between the charge & the imprisonment. There is, therefore, at once a line drawn between the end of the imprisonment by the ministerial officer & the commencement of the proceedings before the judicial officer. It is fallacious to inquire whether or not the one is severable from the other, until you find some inseparable connection between them. It may very well happen in the superior cts., which have jurisdiction over both descriptions of action, where pltf., having been at once taken before a magistrate, may be content to bring his action for false imprisonment only. In such a case, which must be within the memory of all of us, the judge would tell the jury to give damages for the false imprisonment only, & not for what came under the cognisance of the magistrate (**WILLES, J.**).—**AUSTIN v. DOWLING** (1870), L. R. 5 C. P. 534; 39 L. J. C. P. 260; 22 L. T. 721; 18 W. R. 1003.

*Annotations*:—**Consd.** **Sewell v. National Telephone Co.**, [1907] 1 K. B. 557. **Reid**. **Marks v. Frogley** (1898), 67 L. J. Q. B. 605.

13. *Necessity for malice.*—In trespass, innocence of intention is no excuse; in case, the whole turns upon it; malice, or the *quo animo*, is the very gist of the action (**LORD MANSFIELD**).—**TARLTON v. FISHER** (1781), 2 Doug. K. B. 671; 99 E. R. 426.

*Annotations*:—**Consd.** **Newton v. Constable** (1841), 10

L. J. Q. B. 349; **Ames v. Waterlow** (1869), L. R. 5 C. P. 53. **Reid**. **Stokes v. White** (1834), 4 Tyr. 786; **Noel v. Isaac** (1835), 4 L. J. Ex. 56; **Watson v. Carroll** (1839), 8 L. J. Ex. 97; **Aga Kurboolie Mahomed v. R.** (1843), 3 Moo. Ind. App. 164; **Magnay v. Burt** (1843), 5 Q. B. 381; **Ewart v. Jones** (1845), 14 M. & W. 774. *Mentd.* **Whitworth v. Clifton** (1836), 1 Mood. & R. 531; **Yearsley v. Heane** (1845), 14 M. & W. 322.

14. —.]—When the gist of the action is malice, the action should be on the case & not in trespass; malice does not make a party a trespasser *ab initio* (**PATTESON, J.**).—**MAGNAY v. BURT** (1843), 5 Q. B. at p. 384; 114 E. R. 1294; *sub nom.* **BURT v. MAGNAY**, 12 L. J. Q. B. 225; *sub nom.* **BIRT v. MAGNAY**, 7 Jur. 127.

*Annotation*:—**Consd.** **Ames v. Waterlow** (1869), L. R. 5 C. P. 53.

15. —.]—A count, that deft. caused pltf. to be arrested & imprisoned, without reasonable or probable cause, on a false & malicious charge of felony, is a count in trespass for an assault & false imprisonment, & not an informal count for a malicious prosecution; & therefore requires no evidence of malice, or want of reasonable & probable cause.—**BRANDT v. CRADDOCK** (1858), 27 L. J. Ex. 314.

16. —.]—A solr., who had an office in London with a branch office in the country, sued out in London a writ of *fi. fa.* upon an order for costs made in favour of his client against pltf. in the High Ct., & indorsed the writ, in accordance with R. S. C., Ord. 42, r. 16, with a direction to the sheriff to levy the amount of the debt. The debt had in fact been paid at the solr.'s country office, to a clerk having authority to receive it, on the same day as, & about three hours before, the writ of *fi. fa.* was sued out. Neither the solr. nor his client knew of the payment of the debt. Execution having been levied on pltf.'s goods, the solr. was then informed that the debt had been paid, & he withdrew the execution. In an action against the solr. & his client on the case to recover damages for improperly levying execution, & in the alternative for trespass, it was found that neither the client nor the solr. who sued out the writ acted maliciously:—*Held*: defts. were liable in trespass, though in the absence of malice they were not liable in an action on the case.—**CLISSOLD v. CRATCHLEY**, [1910] 2 K. B. 244; 79 L. J. K. B. 635; 102 L. T. 520; 26 T. L. R. 409; 54 Sol. Jo. 442, C. A.

*Annotation*:—*Mentd.* **Cubitt v. Gamble** (1919), 35 T. L. R. 223.

17. *Necessity for want of reasonable & probable cause.*—**BRANDT v. CRADDOCK**, No. 15, *ante*.

18. — *Onus of proof.*—(1) To succeed in an action for malicious prosecution, pltf. must allege & establish two things, absence of reasonable & probable cause, & malice. The affirmative of these allegations is upon him. Failing to establish both of them, he fails altogether (**HAWKINS, J.**).

(2) I should define reasonable & probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent & cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly mentioned belief must be based upon reasonable grounds; by this I mean such grounds as



lead any fairly cautious man in deft.'s situation so to believe; fourthly, the circumstances so believed & relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused. The belief of the accuser in the guilt of the accused; his belief in the existence of the facts on which he acted, & the reasonableness of such last-mentioned belief, are questions of fact for the jury, whose findings upon them become so many facts from which the judge is to draw the inference, & determine whether they do or do not amount to reasonable & probable cause. This also is an inference of fact, not of law as is sometimes erroneously supposed; & the judge is to draw it from all the circumstances of the case. . . . The question of reasonable & probable cause depends in all cases, not upon the actual existence, but upon the reasonable *bond fide* belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of, no matter whether this belief arises out of the recollection & memory of the accuser, or out of information furnished to him by another (HAWKINS, J.).

(3) It is true, as a general proposition, that want of probable cause is evidence of malice; but this general proposition is apt to be misunder-

stood. In an action of this description the question of malice is an independent one, of fact purely, & altogether for the consideration of the jury, & not at all for the judge. The malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act, but malice in fact, *malus animus*; indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody. . . . Want of reasonable cause is for the judge alone to determine, upon the facts found by the jury (HAWKINS, J.).—HICKS v. FAULKNER (1881), 8 Q. B. D. 167; 51 L. J. Q. B. 268; 46 L. T. 127; 46 J. P. 420; 30 W. R. 545, D. C.; *affd.* (1882), 46 L. T. 130, C. A.

*Annotation*:—As to (3) *Reid*. Quartz Hill Consolidated Gold Mining Co. v. Eyre (1883), 11 Q. B. D. 674.

19. *Joinder of causes.*]—It appeared by the plaint & particulars in an action in the county ct., that the cause of action was stated to be for "having assaulted the wife of pltf., & maliciously charged her with stealing a shawl," etc.:—*Held*: this was a proceeding for a malicious prosecution, & not an assault, & prohibition ought to go.—*Ex p.* CARREY (1851), 17 L. T. O. S. 189.

## Part II.—Malicious Prosecution and Abuse of Criminal Proceedings.

### SECT. 1.—WHAT IS A PROSECUTION.

20. *General rule.*]—"Laying" a prosecution, in common parlance, means, not bringing an action, but preferring an indictment or information (PATTESON, J.).—RAWLINS v. JENKINS (1843). 4 Q. B. 419; 1 Dav. & Mer. 219; 12 L. J. Q. B. 151; 7 Jur. 153, 114 E. R. 956.

21. *Preferring indictment.*]—(1) An action will lie for falsely & maliciously & without reasonable or probable cause presenting a petition under Companies Acts, 1862 (c. 89), 1867 (c. 131), to wind up a trading co., even although no pecuniary loss or special damage to the co. can be proved, for the presentation of the petition is, from its very nature, calculated to injure the credit of the co.

Deft., who had been a shareholder in pltf. co., instructed certain brokers to sell his shares, & signed a transfer. The brokers informed him that they could not sell the shares, but the transfer was not returned to him. After waiting ten or eleven days he presented a petition to wind up the co. on the ground of fraud in its formation, & of the impossibility that it could carry on business at a profit. At the time of presenting the petition the co., which was a trading co., had property of a large amount, & its debts were trifling. Deft. was not then in fact a shareholder; his shares had been sold, & the transfer had been registered. Upon discovering that his shares had been sold, he gave notice that the petition would be withdrawn, & it was ultimately dismissed without costs. The co. having brought an action for falsely & maliciously & without reasonable or probable cause presenting the petition, at the trial no proof of damage to the co. was given beyond the liability to pay its own costs of defending itself against the petition; & upon this ground the co. was non-suited at the close of its case:—*Held*: although the liability to pay "extra costs" was not a ground of legal damage,

nevertheless the non-suit was wrong, & a new trial must be had, because an action would lie for falsely & maliciously & without reasonable or probable cause presenting the petition to wind up, which was necessarily injurious to the credit of the co.; as at the time of presenting the petition the co. was an existing & going concern, & had valuable property & was solvent, unless other facts could be shown, there was a want of reasonable & probable cause for presenting the petition, & the opinion of the jury ought to have been taken whether deft. had been actuated by malice; if deft. as a matter of business ought, in the opinion of the jury, to have inferred from the failure of the brokers to return the transfer, that the shares had been sold, deft. would have had no reasonable or probable cause to suppose that he was still a shareholder.

(2) I entirely agree that even although civil proceedings are taken falsely & maliciously & without reasonable or probable cause, nevertheless no action will lie in respect of them, unless they produce some damage of which the law will take notice. . . . The obligation to pay extra costs is not damage of that kind (BRETT, M.R.).

(3) It is not a good answer to an action for maliciously procuring an adjudication in bkpcy. to say, that the alleged creditor has only asked for a judicial decision. It seems to me that an action can be maintained for maliciously procuring an adjudication under Bankruptcy Act, 1869 (c. 71), because by the petition, which is the first process, the credit of the person against whom it is presented is injured before he can show that the accusation made against him is false; he is injured in his fair fame, even although he does not suffer a pecuniary loss. By proceedings in bkpcy. a man's fair fame is injured just as much since Bankruptcy Act, 1869 (c. 71), as it was before,

because he is openly charged with insolvency before he can defend himself (BRETT, M.R.).

(4) Before a judge can rule as matter of law, whether or not there has been a want of reasonable & probable cause, he must ask of the jury a question as to the facts. . . . Whenever in an action for malicious prosecution the judge holds that there is a want of reasonable & probable cause, there is evidence to go to the jury of malice. When there is no other evidence of malice except what the judge has stated to be in his opinion a want of reasonable or probable cause, I incline to agree with HUDDLESTON, B., & HAWKINS, J., in *Hicks v. Faulkner*, No. 18, ante, that upon the question of malice the jury are not bound by the holding of the judge as to the absence of reasonable cause, but they may consider whether in their own view there was a want of reasonable or probable cause (BRETT, M.R.).

(5) In its very nature the presentation or the prosecution of an indictment involves damage, which cannot be afterwards repaired by the failure of the proceedings, to the fair fame of the person assailed, & for that reason, as it seems to me, the law considers that to present & prosecute an indictment falsely & without reasonable or probable cause, is a foundation for a subsequent action for a malicious prosecution (BOWEN, L.J.).—*QUARTZ HILL GOLD MINING CO. v. EYRE* (1883), 11 Q. B. D. 674; 52 L. J. Q. B. 488; 49 L. T. 249; 31 W. R. 668, C. A.

Annotations:—As to (1) *Reid*. *Allen v. Flood*, [1898] A. C. 1; *Wyatt v. Palmer*, [1899] 2 Q. B. 106. As to (5) *Reid*. *Wiffen v. Bailey & Romford U. C.*, [1915] 1 K. B. 600.

22. — When bill thrown out by grand jury.]—An action will lie for maliciously prosecuting a man for felony, although the grand jury throw out the bill.—*PAYNE v. PORTER* (1618), Cro. Jac. 490; 79 E. R. 418.

Annotation:—*Reid*. *Jones v. Givin* (1713), Gilb. 185.

23. — —.]—*WRIGHT v. BLACK* (1622), Win. 28, 54; 124 E. R. 46.

Annotation:—*Reid*. *Traverse v. Daws* (1673), Freem. K. B. 324.

24. — —.]—*POLLARD v. EVANS*, No. 162, post.

25. — —.]—(1) Where there is no probability of guilt, nor reasonable cause, nor honest occasion of complaint, but yet, though this must be the case to maintain the action, it is not necessary to be expressly alleged in the declaration, nor need pltf. use the words *sine probabili causa* or *sine rationabili causa*. . . . When it is alleged to be false & malicious, to add after it *sine probabili causa* be but tautology. In conspiracy for falsely & maliciously indicting a man, it is never laid to be *sine rationabili* or *probabili causa*, & yet a reasonable cause is as much an excuse there, as in an action upon the case (PARKER, C.J.).

(2) The expense upon an indictment for a rescue is as good a ground for an action on the case, as the slander upon an indictment for a matter scandalous. . . . The damage that a man may sustain by a false accusation is of three sorts: in his person, imprisonment; in his fame, scandal; in his property, expense. Any one of these three sorts of damage, without any one of the other, is sufficient to entitle pltf. to his action (PARKER, C.J.).

(3) In all cases before an action, unless brought for a malicious prosecution, the prosecution must

be either determined or deserted. . . . If there be an indictment which is bad, & upon not guilty pleaded is falsified, this is a good determination of that prosecution, & a good acquittal from the indictment *tiel quell* (PARKER, C.J.).

(4) When an indictment is preferred, there may be, & frequently are, three cases, wherein there can be no acquittal which can be pleaded in bar: if the bill be returned *ignoramus*; if it be *coram non judice*, there not being a complete authority; if the indictment be insufficient. In an action for a malicious prosecution the slander is only the damage, & wrong is the malice, & therefore if the matter were probable, nay if there were any just grounds to complain, deft. shall be acquitted on not guilty (PARKER, C.J.).—*JONES v. GIVIN* (1713), Gilb. 185; 93 E. R. 300; *sub nom.* *JONES v. GWYNN*, 10 Mod. Rep. 214.

Annotations:—As to (2) *Reid*. *Smith v. Hickson* (1734), Leo temp. Hard. 54; *Chapman v. Pickersgill* (1762), 2 Wils. 145. As to (4) *Reid*. *Wicks v. Fentham* (1791), 4 Term Rep. 247. Generally, *Reid*. *Chambers v. Robinson* (1726), 2 Stra. 691; *Sutton v. Johnstone* (1786), 1 Term Rep. 493; *Dawkins v. Paulet* (1869), 18 W. R. 336.

26. — —.]—Where in an action for maliciously indicting for an assault, pltf. gave no other evidence than the bill returned "not found," & was thereupon nonsuited, the ct. refused to set aside the nonsuit.

I feel a difficulty to understand how pltf. could recover in the present action, wherein he could recover no damages, because he clearly has not proved that he has sustained any: I can understand the ground upon which an action shall be maintained for an indictment which contains scandal, but this contains none, nor does any danger of imprisonment result from it (MANSFIELD, C.J.).—*BYNE v. MOORE* (1813), 5 Taunt. 187; 1 Marsh. 12; 128 E. R. 658.

Annotation:—*Consd.* *Wiffen v. Bailey & Romford U. C.*, [1915] 1 K. B. 600.

27. Information before magistrate—Warrant for felony issued in error.]—If a party makes a complaint before a justice of peace, which the justice conceives to amount to a felony, & issues his warrant accordingly to arrest the party complained against, & the facts do not amount to felony, no action for a malicious prosecution will lie against the party who made the complaint.—*LEIGH v. WEBB* (1800), 3 Esp. 165, N. P.

28. — —.]—Averment that A. before a magistrate maliciously charged B. with felony; the information contains a mere charge of tortious conversion upon which a warrant for felony was improperly founded; the variance is fatal.—*TEMPEST v. CHAMBERS* (1815), 1 Stark. 67, N. P.

Annotations:—*Mentd.* *Hankinson v. Bilby* (1847), 16 M. & W. 442; *Kennedy v. Hilliard* (1859), 1 L. T. 78.

29. — Suspicion & belief.]—Where pltf. declared, in case for a malicious prosecution, that deft. maliciously, etc., charged pltf. with having feloniously stolen certain articles, his property, & it was proved that deft. laid an information before a magistrate, in which he deposed that the said articles had been feloniously stolen, & that he suspected & believed, & had good reason to suspect & believe that they had been stolen by pltf.:—*Held*: the evidence supported the declaration.—*DAVIS v. NOAKE* (1817), 6 M. & S. 29; 1 Stark. 377; 105 E. R. 1153.

Annotation:—*Reid*. *Blizard v. Kelly* (1823), 2 L. J. O. S. K. B. 6.

## PART II. SECT. 1.

felony issued in error.]—laying an information deft. only

intended to charge trespass, but in drawing the information the magistrate of his own accord used the word "feloniously," which word deft. did not know the meaning of:—*Held*:

an action for malicious prosecution would not lie.—*ROGERS v. HASSARD* (1878), 2 A. R. 507.—CAN.  
e. —.]—*POWELL v. HILTGEN* (1900), 5 Terr. L. R. 16.—CAN.



**Sect. 1.—What is a prosecution. Sect. 2: Sub-sects.**

**30. — Warrant issued in judicial discretion.]**

—Where a person having lost a bill of exchange, which he supposes to have been stolen, goes before a magistrate & relates the circumstance of the loss, & the magistrate grants his warrant to apprehend A. on a charge of having "feloniously stolen, taken & carried away" the bill of exchange, language which complainant did not use when he laid his information, & upon subsequent investigation of the case it turned out to be no felony:—*Held*: (1) case would not lie for maliciously procuring the magistrate to grant his warrant; (2) to sustain the averment of malice the charge must be wilfully false.—*COHEN v. MORGAN* (1825), 6 Dow. & Ry. K. B. 8; 3 Dow. & Ry. M. C. 320.

*Annotations*:—*Generally*, *Mentd.* *Carratt v. Morley* (1841), 1 Q. B. 18; *Saunders v. Swansea Finance Co. & Home* (1905), 21 T. L. R. 317.

**31. — —.]—A.**, the servant of B., stated before a magistrate, that C. came into the yard of his employer, & took from a stable there two geldings, the property of B., & rode them away, though he was told that he must not:—*Held* this information did not support a count in an action for malicious prosecution, which alleged that the information charged C. with having feloniously stolen & ridden away with two geldings.—*MILTON v. ELMORE* (1830), 4 C. & P. 456, N. P.

**32. — — Criminal Law Amendment Act, 1885 (c. 69), s. 10.]—Where** a justice issued a warrant of arrest of a person accused under above sect.:—*Held*: the act of the justice was a judicial act, & an answer to an action for malicious prosecution against the person laying the information upon which the justice acted.—*LEA v. CHARRINGTON* (1889), 23 Q. B. D. 45; 58 L. J. Q. B. 461; 61 L. T. 222; 53 J. P. 614; 37 W. R. 736; 5 T. L. R. 455; 16 Cox, C. C. 704, D. C.; *on appeal*, 23 Q. B. D. 272, C. A.

**33. — Though not acted upon.]—To** maintain an action against a person for having made a false charge of felony before a magistrate, it is not necessary to show that the charge was taken down in writing & acted upon by the magistrate. But it is necessary that the jury should be satisfied that it was made to the magistrate, with a view to induce him to entertain it as a charge of felony.—*CLARKE v. POSTAN* (1834), 6 C. & P. 423.

*Annotation*:—*Mentd.* *Yates v. R.* (1885), 14 Q. B. D. 648.

**34. Signing & swearing to printed form of deposition.]—In** an action for malicious prosecution, the charge having been for stealing a horse left with a servant to show, with a view to a sale, & the horse having been bought honestly & openly:—*Held*: there was no reasonable cause; the facts, not having been fully & fairly stated,

& there being apparently some anger on the part of the prosecutor, there was evidence of malice; deft.'s having merely signed & sworn to a printed form of deposition, was no excuse.—*STEWART v. BEAUMONT* (1866), 4 F. & F. 1034.

**35. Signing charge sheet.]—AUSTIN v. DOWLING**, No. 12, *ante*.

**36. Proceedings under Tramways Act, 1870 (c. 78), s. 51.]—Proceedings** under above sect., against a passenger for refusing to pay his fare are proceedings in respect of a criminal offence, so that an action for malicious prosecution will lie against the person taking them.—*RAYSON v. SOUTH LONDON TRAMWAYS CO.*, [1893] 2 Q. B. 304; 62 L. J. Q. B. 593; 69 L. T. 491; 58 J. P. 20; 42 W. R. 21; 9 T. L. R. 579; 37 Sol. Jo. 630; 4 R. 522, C. A.

*Annotations*:—*Distd.* *Wiffen v. Bailey & Romford U. C.*, [1915] 1 K. B. 600. *Mentd.* *Re Solicitor, Exp. Incorporated Law Soc.* (1893), 69 L. T. 522; *Knight v. North Metropolitan Tram. Co.* (1898), 78 L. T. 227.

**37. Proceedings under Public Health Act, 1875 (c. 55), s. 95.]—A** complaint under above sect. against the occupier of a house for non-compliance with a notice stating that a nuisance existed at the house arising from the want of cleansing of certain rooms, & requiring him to abate the same by stripping the paper off the walls & cleansing & distempering the ceilings & walls of the rooms, is not a proceeding necessarily & naturally involving damage to his fair fame or putting him in peril or losing his liberty, sufficient to support an action by him for malicious prosecution in the event of the complaint having been preferred maliciously & without reasonable & probable cause.

An action for malicious prosecution will lie under the circumstances stated by LORD HOLT, C.J., in *Savile v. Roberts*, No. 510, *post*. There are three sorts of damage, any one of which is sufficient to support this action. First, damage to a man's fame, as if the matter whereof he is accused be scandalous. Secondly, damage to his person, as where a man is put in danger to lose his life, limb, or liberty. Thirdly, damage to his property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused. The action is maintainable if & only if it falls within one or other of those three heads. An action for malicious prosecution may lie where the proceedings are civil & not criminal. But, as was pointed out by BOWEN, L.J., in *Quartz Hill Gold Mining Co. v. Eyre*, No. 21, *ante*, it is in very few cases that an action for malicious prosecution will lie where the matter is one of civil proceedings. . . . So the exception of civil proceedings, so far as they are excepted, depends, not upon any essential difference between civil & criminal proceedings, but upon the fact that in civil proceedings the poison & the antidote are presented

**33 i. — Though not acted upon.]—**It is not necessary, in order to maintain an action for malicious prosecution, that the charge was acted upon by the magistrate; it is enough if the charge was made to the magistrate with a view of inducing him to entertain it.—*AHMEDBHAI v. FRAMJI EDULJI* (1904), 1 L. R. 28 Bom. 226.—IND.

**d. —.]—AVERY v. WOOD** (1872), 3 Q. S. C. R. 4.—AUS.

**e. — Whether necessary.]—In** an action for malicious prosecution for felony before magistrates, it is not necessary to prove that deft. laid an information on oath, where that is not averred in the declaration; it is enough to show that he set the magistrates in motion.—*SINCLAIR v. HAYNES* (1858), 16 U. C. R. 247.—CAN.

**f. Notice of magisterial inquiry—***But no summons or warrant issued.]—**SHEIK MEERAN SAHEB v. RATNAVELU MUDALI* (1912), 1 L. R. 37 Mad. 181.—IND.

**g. Issue of summons — Warrant for arrest unnecessary.]—It** is not essential to the maintenance of an action for malicious prosecution for a crime, that a warrant should have been issued against pltf. & that he should have been arrested. It is sufficient that he has been proceeded against by summons on deft.'s complaint.—*VINCENT v. WEST* (1868), 1 Han. 290.—CAN.

**h. Magistrate issuing warrant —***Statement not conferring jurisdiction.]—**Qu.*: whether an action for malicious prosecution will lie for making a false &

malicious statement to a magistrate, showing nothing which conferred jurisdiction on him, but on which, nevertheless, he acts by issuing a warrant.—*MACDONALD v. HENWOOD* (1882), 32 C. P. 433.—CAN.

**k. Swearing affidavit.]—GRIFFITH v. HALL** (1866), 26 U. C. R. 94.—CAN.

**l. —.]—Where** deft. had at the request of the military authorities made an affidavit in which he alleged that pltf. had been guilty of treasonable practices, & the military authorities had, on the information disclosed in this & other affidavits instituted a prosecution against pltf. for high treason:—*Held*: the making of the affidavit did not constitute setting the law in motion, & was not a ground for an action for malicious prosecution.—

simultaneously. The publicity of the proceedings is accompanied by the refutation of the unfounded charge, if it be unfounded, which was made. If there be no scandal, if there be no danger of loss of life, limb, or liberty, if there be no pecuniary damage, the action will not lie (BUCKLEY, L.J.).—WIFFEN v. BAILEY & ROMFORD URBAN COUNCIL, [1915] 1 K. B. 600; 84 L. J. K. B. 688; 112 L. T. 274; 79 J. P. 145; 31 T. L. R. 64; 59 Sol. Jo. 176; 13 L. G. R. 121, O. A.

**Giving information to police.]—See Sect. 2, sub-sect. 2, post.**

**Procuring issue of search warrant.]—See Part VI., post.**

**Prosecutions before courts martial.]—See ROYAL FORCES.**

**Malicious civil proceedings.]—See Part III., post.**

## SECT. 2.—WHO MAY BE LIABLE AS PROSECUTOR.

### SUB-SECT. 1.—IN GENERAL.

**38. Person representing himself as prosecutor—Though expenses borne by others.]—(1)** In an action for malicious prosecution, a person is liable who gives evidence in support of the charge, & who represents himself as preferring it, although it is preferred at some other persons' expense, & such other persons have told him that he shall be a witness only, & they employ the counsel & solr.; & if it be shown that, during the examination on the charge, such person is in his hearing repeatedly alluded to as prosecutor, & does not deny that character, this is evidence from which a jury may infer that he represented himself as the person preferring the charge.

(2) Similarity of handwriting is not, *per se*, & without other circumstances, "probable cause" for preferring a charge of forgery against a person whose handwriting is like that of a forged instrument.—CLEMENTS v. OHRLY (1847), 2 Car. & Kir. 686.

**39. Person referred to as prosecutor during examination of charge—Without denial.]—CLEMENTS v. OHRLY, No. 38, ante.**

**Person preferring indictment.]—See Sect. 1, ante.**

**Person laying information.]—See Sect. 1, ante.**

### SUB-SECT. 2.—PERSONS OTHER THAN NOMINAL PROSECUTOR.

**40. Person procuring indictment.]—MILES v. JACOB (1614), as reported in Hob. 6; 80 E. R. 156; sub nom. JACOB v. MILES, 1 Roll. Rep. 24, Ex. Ch.**

**Annotations:—Mentd.** Fleetwood v. Curley (1619), Hob. 267; Anon. (1641), March. 109; Oates v. Aylett (1648), Aleyn. 74; Mayne v. Digle (1672), Freem. K. B. 46; R. v. Griepo (1696), 1 Ld. Raym. 256; Cutting v. Wilkins (1702), 11 Mod. Rep. 24; Button v. Heyward (1722), 8 Mod. Rep. 24.

v. WESTERMAN (1900), 17 S. C. 432.—S. AF.

(1914), 35 N. L. R. 413.—S. AF.

### PART II. SECT. 2, SUB-SECT. 1.

**n. Police constable.]—A** police constable who is in effect prosecutor & not acting merely in his official capacity, who does not take reasonable care to inform himself of the truth of the case, & who does not honestly believe in the charge preferred by him, & is actuated by an indirect motive in preferring it, is liable in a suit for

damages for malicious prosecution.—MINAKSHISUNDRUM PILLAI v. AYYA-THORAI (1894), 1 L. R. 18 Mad. 136.—IND.

**o. Plaintiff not prosecuted by defendant—Named as having connection with offence—Prosecution initiated by magistrate suo motu.]—DUDHNATH KANDU v. MATHURA PRASAD (1902), 1 L. R. 24 All. 317.—IND.**

### PART II. SECT. 2, SUB-SECT. 2.

**40 i. Person procuring indictment.]—JONES v. ORBELL (1868) 1 C. A. 86.—N.Z.**

—.]—HORD v. CORDERY (1621), Hut. 49; 123 E. R. 1092.

**42. —.]—An** action upon the case lies for procuring one to be indicted, although the party himself do it not (*per Cur.*).—ANON. (1647), Sty. 10; 82 E. R. 490.

**43. —.]—Case** lies for procuring pltf. to be indicted for conspiring to lay a bastard child to deft.—PEDRO v. BARRETT (1696), 1 Ld. Raym. 80; 91 E. R. 951.

**44. —.]—SAVILE v. ROBERTS, No. 510, post.**

**45. Person procuring witnesses—Justice of the peace.]—GIRLINGTON v. PITFIELD (1668), 1 Vent. 47; 86 E. R. 33; sub nom. GERLINGTON v. PITFIELD, 2 Keb. 572.**

**46. Person named on indictment as witness.]—GIRLINGTON v. PITFIELD (1668), 1 Vent. 47; 86 E. R. 33; sub nom. GERLINGTON v. PITFIELD, 2 Keb. 572.**

**47. Person putting semblance of guilt on plaintiff.]—(1)** The tenour of the declaration here is, that deft., by his acts, put a semblance of guilt upon pltf., & that some one acting upon that semblance of guilt caused pltf. to be convicted. There is no precedent for such a declaration, & on principle I am of opinion that it cannot be sustained (ERLE, C.J.).

(2) The declaration . . . is wanting in two essential requisites. First, deft. is not shown to have been the prosecutor; & secondly, no termination of the proceedings is shown in favour of pltf. that the latter should be shown is necessary on two grounds, first in order that there may be no conflict between civil & criminal justice; & secondly because the existence of the conviction is some evidence of reasonable & probable cause (BYLES, J.).—BARBER v. LESITER (1859), 7 C. B. N. S. 175; 29 L. J. C. P. 161; 6 Jur. N. S. 654; 141 E. R.

**Annotations:—As to (2) Reifd.** Castrique v. Behrens (1861), 3 E. & E. 709; Basébo v. Matthews (1867), L. R. 2 C. P. 684; Bynoe v. Bank of England (1902), 86 L. T. 140. **Generally, Mentd.** Hyde v. Bulmer (1868), 18 L. T. 293; Quinn v. Leathem, [1901] A. C. 495; Giblan v. National Amalgamated Labourers Union of Great Britain & Ireland, [1903] 2 K. B. 600.

**48. Person informing police—Instigation to arrest.]—(1)** An action for malicious prosecution is not maintainable if deft. has merely instigated a police officer to attempt to arrest pltf.

(2) In actions for malicious prosecution the statement of claim must show a prosecution instituted & determined.—HARRIS v. WARRE (1879), 4 C. P. D. 125; 48 L. J. Q. B. 310; 40 L. T. 429; 43 J. P. 544; 27 W. R. 461.

**Annotations:—Generally, Mentd.** Capital & Counties Bank v. Henty (1882), 7 App. Cas. 741; Tournier v. National Provincial & Union Bank of England, [1924] 1 K. B. 461.

**49. — No further interference.]—Deft.** having missed two pairs of horse clippers from his stables, sent for a police constable & said, "I have had two pairs of clippers stolen from me, & they were last seen in the possession of D." Thereupon the constable, having made inquiry, & without

**40 ii. —.]—BRAHAM v. GOLDBERG & ADLER (1908), T. S. 841.—S. AF.**

**p. Person procuring witnesses.]—Deft.** charged pltf. with stealing, on which he was indicted & acquitted. The prosecution was conducted by the clerk of the peace; but deft. consulted with him, & procured the attendance of the witnesses.—**Held:** sufficient evidence that deft. was the prosecutor.—BURGOYNE v. MOFFATT (1861), 5 All. 13.—CAN.

**q. Person informing police.]—A** private individual upon whose information to the police a prosecution was



**Sect. 2.—Who may be liable as prosecutor: Subsects. 2, 3 & 4, A., B., C., D., E., F., G., H., I., J. & K.]**

communicating with deft., arrested pltf. who was taken before the magistrate & committed for trial:—*Held*: there was no evidence that deft. was actively instrumental in putting the criminal law in force, & therefore he was not the prosecutor, & not liable in an action for false imprisonment & malicious prosecution.—*DANBY v. BEARDSLEY* (1880), 43 L. T. 603.

**50. ——— Not liable if information given bonâ fide.]**—If a complainant does not go beyond giving what he believes to be correct information to the police, & the police, without further interference on his part, except giving such honest assistance as the police may require, think fit to prosecute, he is not responsible in an action for malicious prosecution; but if the charge is false to the knowledge of complainant, if he misleads the police by bringing suborned witnesses to support it, if he influences the police to assist him in sending an innocent man for trial, he cannot escape liability because the prosecution has not technically been conducted by him.—*PANDIT GAYA PARSHAD TEWARI v. SARDAR BHAGAT SINGH* (1908), 24 T. L. R. 884, P. C.

#### SUB-SECT. 3.—PERSONS BOUND OVER TO PROSECUTE.

**51. General rule.]**—Being bound by recognisance to prosecute is no answer to an action for malicious prosecution.

As to the point of law respecting the recognisance, we are clearly of opinion, that being bound by recognisance to prosecute does not exempt a prosecutor from an action for malice. This fact was before the jury, & it was for them to allow it due weight in fixing the amount of damages (*LORD DENMAN, C.J.*).—*BOYCE v. KEITH* (1840), 4 J. P. 58.

**52. Charge of treason.]**—*SMITH v. SPURLE* (1623), Benl. 138; 73 E. R. 995.

**53. Defendant acting without malice.]**—*MAN-KLETON v. ALLEN* (1624), Win. 73; 124 E. R. 62.

**54. ———.]**—A party bound over to prosecute on a charge made by himself, is not liable to an action for going before the grand jury & preferring a bill of indictment, which is returned a true bill, his conduct before the grand jury not being malicious, although he was aware of the innocence of the prisoner a day or two after the committal.—*HUGGINS v. BAILEY* (1848), 11 L. T. O. S. 311; *previous proceedings* (1847), 11 J. P. 680.

**55. ——— & not making charge.]**—A person having been robbed of his watch, while in a state of intoxication, was, on the following morning, compelled to go before a magistrate, by whom he was bound over to prosecute pltf. He gave no evidence, & made no charge, merely stating the fact that he had lost his watch; & the suspected party was committed for trial on the testimony of another person:—*Held*: an action for a malicious prosecution was not sustainable, as no malice was proved, & it did not appear that the person robbed had put the law in motion.—*BROWNE v. STRADLING* (1836), 5 L. J. C. P. 295.

started, cannot escape liability for damages for malicious prosecution, by urging that the police & not he prosecuted, if it appears that he himself was the real prosecutor.—*HARI CHARAN SANT v. KAILASH CHANDRA BHUYAN*

(1908), 1. L. R. 36 Calc. 278; 12 C. W. N. 817.—*IND.*

**r. ———.]**—*NARASINGA ROW v. MUTHAYA PILLAI* (1902), 1. L. R. 26 Mad. 362.—*IND.*

**56. Defendant acting maliciously.]**—*DUBOIS v. KEATS*, No. 318, *post*.

**57. ———.]**—*BOYCE v. KEITH*, No. 51, *ante*.

**58. ——— Though prosecution ordered by judge.]**—M. sued F. in the county ct. for a debt. F. claimed a set-off, in answer to which M. produced his ledger containing an acknowledgment signed, as he swore, by F. F. denied the signature, which he averred to be a forgery; but the judge, induced partly by the statement of M. & partly by the conduct of F. before him, disbelieving F.'s denial, committed him for trial for perjury, under Criminal Procedure Act, 1851 (c. 100), s. 19, & bound M. over to prosecute. F. was accordingly tried for perjury, & acquitted. F. then brought an action against M. for maliciously & without probable cause causing him to be prosecuted on an unfounded charge:—*Held*: the action was maintainable; the committal of F., & his prosecution for perjury, being the result of the wrongful & malicious act of M.

In my opinion a prosecution, though in the outset not malicious . . . from having been commenced under a *bonâ fide* belief in the guilt of the accused may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, possess *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction of the accused (*COCKBURN, C.J.*).—*FITZJOHN v. MACKINDER* (1861), 9 C. B. N. S. 505; 30 L. J. C. P. 257; 4 L. T. 149; 25 J. P. 244; 7 Jur. N. S. 1283; 9 W. R. 477; 142 E. R. 199, Ex. Ch.

*Annotations*:—*Consd.* *Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh* (1908), 24 T. L. R. 884. *Refd.* *Abrath v. N. E. Ry.* (1886), 55 L. T. 63.

**59. Joint recognisance — Several liability.]**—(1) In an action for malicious prosecution against A. & B., if it appear that both A. & B. entered into a joint recognisance to prosecute & give evidence, but if it also appear that A. only employed the attorney, & that B. attended before the magistrate & the grand jury at the request of the attorney, the judge will direct the acquittal of B.

(2) If C. be entrusted to receive money for A., with a written direction for its application, & C. write a letter to A. stating that he has not received it, when in fact he has, this is sufficient evidence of probable cause to render a prosecution of C., under 7 & 8 Geo. 4, c. 29, s. 49, not malicious.—*EAGAR v. DYOTT* (1831), 5 C. & P. 4, N. P.

#### SUB-SECT. 4.—IN PARTICULAR CASES.

##### A. Corporations.

*See, generally*, CORPORATIONS, Vol. XIII., pp. 403, 405, Nos. 1246–1251, 1265.

**Tramway company.]**—*See* TRAMWAYS & LIGHT RAILWAYS.

##### B. Husband and Wife.

*See* HUSBAND & WIFE, Vol. XXVII., p. 260, No. 2294.

##### C. Judicial and Ministerial Officers.

*See, generally*, PUBLIC AUTHORITIES.

**Colonial judicial officers.]**—*See* DEPENDENCIES, Vol. XVII., p. 452, Nos. 208–211.

**Sheriffs & bailiffs.]**—*See* SHERIFFS & BAILIFFS.

**t. ———.]**—*FANZELOW v. KERR* (1896), 14 N. Z. L. R. 660.—*N.Z.*

**s. Person assisting prosecution.]**—*RADHA, ETC. v. KIDAR* (1924), 1. L. R. 46 All. 815.—*IND.*

*D. Jurymen.*

**60. General rule—Not liable.]**—The principle of the action which is pretty clearly ascertained in the two cases of *Saville v. Roberts*, No. 510, *post*, & *Jones v. Givin*, No. 25, *ante*; is general & universal. In the cases alluded to of judges & jurors it cannot apply, because the law gives faith to credence to what they do; & therefore there must always, in what they do, be cause for it: & there can never be any malice in what they do (EYRE, B.).—*SUTTON v. JOHNSTONE* (1785), 1 Term Rep. 493; 99 E. R. 1215; *on appeal, sub nom. JOHNSTONE v. SUTTON* (1786), 1 Term Rep. 510, Ex. Ch.; *sub nom. SUTTON v. JOHNSTONE* (1787), 1 Bro. Parl. Cas. 76, H. L.

*Annotations*:—*Reid*. Taylor v. Williams (1831), 2 B. & Ad. 845; Musgrove v. Newell (1836), 1 M. & W. 582; Broad-v. Ham (1839), 5 Bing. N. C. 722; Panton v. Williams (1841), 2 Q. B. 169; Mitchell v. Williams (1843), 11 M. & W. 205; Dawkins v. Paulet (1869), L. R. 5 Q. B. 94; Abrath v. N. E. Ry. (1886), 55 L. T. 63; Brown v. Hawkes, [1891] 2 Q. B. 718. *Mentd.* Warden v. Bailey (1811), 4 Taunt. 67; Hill v. Yates (1818), 2 Moore, C. P. 80; Whitelegg v. Richards (1822), 6 Moore, C. P. 501; Mitchell v. Jenkins (1833), 5 B. & Ad. 588; Cane v. Chapman (1836), 6 L. J. K. B. 49; Ferguson v. Kinneull (1842), 11 Cl. & Fin. 251; Ellis v. Abrahams (1846), 10 J. P. 820; Hodgkinson v. Fernie (1857), 2 C. B. N. S. 415; Feather v. R. (1865), 6 B. & S. 257; Dawkins v. Rokeby (1866), 4 F. & F. 806; Lister v. Perryman (1870), L. R. 4 H. L. 521; Dawkins v. Rokeby (1873), L. R. 8 Q. B. 255; Grant v. Secretary of State for India (1877), 2 C. P. D. 445; *Ex p. Marais*, [1902] A. C. 109; R. v. Army Council, *Ex p. Ravenscroft*, [1917] 2 K. B. 504; Fraser v. Balfour (1918), 87 L. J. K. B. 1116; Heddon v. Evans (1919), 35 T. J. R. 642.

*See, generally*, CRIMINAL LAW, Vol. XIV., p. 238, Nos. 2251, 2252; JURIES Vol. XXX., pp. 217, 269, Nos. 45, 744.

*E. Landlord and Tenant.*

*See, generally*, LANDLORD & TENANT, Vols. XXX., XXXI.

**61. Liability of landlord—Procuring intervention of magistrates—Proceedings under Distress for Rent Act, 1737 (c. 19).]**—A landlord would certainly be liable to an action on the case for improperly procuring the interference of the magistrates under above Act (BAYLEY, J.).—*BASTEN v. CAREW* (1825), 3 B. & C. 649; 5 Dow. & Ry. K. B. 558; 2 Dow. & Ry. M. C. 563; 3 L. J. O. S. K. B. 111; 107 E. R. 874.

*Annotations*:—*Mentd.* Hutchinson v. Lowndes (1832), 1 Nev. & M. K. B. 674; Baylis v. Strickland (1840), 1 Man. & G. 591; Chaney v. Payne (1841), 1 Q. B. 712; Taylor v. Clemson (1844), 11 Cl. & Fin. 610; *Ex p. Kinning* (1847), 4 C. B. 507; R. v. Millard (1853), 6 Cox, C. C. 150; Kemp v. Neville (1861), 10 C. B. N. S. 523; Price v. Manning (1889), 42 Ch. D. 372.

**62. ———.]**—A record of proceedings taken by justices, under above Act, s. 16, between persons filling the relation of landlord & tenant, is a defence to an action of trespass by the tenant; although the premises, in point of fact, were not “deserted” when the justices came to view; & although their proceedings have been set aside by the judges of assize, in pursuance of the power of appeal given by that sect. Such record is a defence in such a form of action, not only to the justices, but to the landlord, & all persons acting *bonâ fide* under the authority of their jurisdiction. *Semble*: under such circumstances, the tenant may maintain an action on the case against the landlord, for causing the justices to take the proceedings.—*ASHCROFT v. BOURNE* (1832), 3 B. & Ad. 684; 1 L. J. K. B. 2097; 110 E. R. 250.

*Annotation*:—*Mentd.* Foster v. Dodd (1867), L. R. 3 Q. B. 67.

*F. Master and Servant.*

*See, generally*, MASTER & SERVANT.

**Liability of corporation for act of servant.]**—*See* CORPORATIONS, Vol. XIII., p. 405, No. 1265.

*G. Naval and Military Officers.*

*See* ROYAL FORCES.

*H. Partners.*

*See* PARTNERSHIP.

*I. Principal and Agent.*

*See, generally*, AGENCY, Vol. I., p. 602, Nos. 2322–2326.

**63. Liability of principal—Agent acting under express authority.]**—Pltf., having become tenant to deft., who resided in W., of a house & lands in C., together with the exclusive right of sporting over certain lands adjacent, belonging to deft., fished one of the ponds by cutting down the dam, & but few fish having been caught, one D., who was deft.’s local agent, suggested to pltf. that he might fish a certain pond on the estate by cutting down the bank & placing a net to catch the fish; which the pltf. accordingly afterwards did during the tenancy, & a few fish were taken. Disputes having afterwards arisen between pltf. & deft., D. laid an information before magistrates against pltf. for unlawfully & maliciously breaking down the dam & destroying the fish, under 7 & 8 Geo. 4, c. 30, s. 15, & D. having been examined, the magistrates required pltf. to find bail to appear to an indictment for that offence at the next assizes, where a bill was preferred but ignored. Deft. was not present at the hearing of the information, nor was there any evidence to show that he knew that D. had given pltf. permission. At the trial, the judge asked the jury whether in their opinion D. had given permission, & they found that he had; they also found that D. acted under deft.’s authority in instituting the proceedings; & the judge having expressed his opinion that there was an absence of reasonable & probable cause:—*Held*: (1) he was correct in so deciding; (2) independently of the permission given by D., there was no reasonable or probable cause for instituting the proceedings.

As to there being no reasonable or probable cause, I think the true way of viewing a case is this: that the judge has a right to act upon all the uncontradicted facts of the case, & that it is not necessary specifically to leave every fact to the jury, to ask them, for instance, “Do you believe this?” “Do you believe that?” “Do you think that was so & so?” It is only where some doubt is attempted to be thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that the judge is called upon to submit any question to the jury (ALDERSON, B.).—*MICHELL v. WILLIAMS* (1843), 11 M. & W. 205; 12 L. J. Ex. 193; 152 E. R. 777.

*Annotation*:—*As to* (2) *Apprvd.* Fraser v. Bill (1853), 21 L. T. O. S. 69.

*J. Trade Unions.*

*See* TRADE & TRADE UNIONS.

*K. Trustee in Bankruptcy.*

*See, generally*, BANKRUPTCY, Vol. V., pp. 992–997.

**64. Prosecution by order of court—Under Debtor’s Act, 1869 (c. 62), s. 16.]**—An action for malicious prosecution ought not to be stayed as frivolous & vexatious on the ground that deft. is the trustee under pltf.’s bkpcy., & has prosecuted him by order of the ct. under above sect.—*MITTENS v. FOREMAN & CAMERON* (1888), 58 L. J. Q. B. 40, D. C.



*Sect. 4.—Mandamus: Sub-sect. 1, C. (a).]*

sessions, & an application being made to this ct. for a *mandamus* to enter continuances:—*Held*: the ct. would not interfere where the sessions had already decided upon a point peculiarly within their jurisdiction.—*R. v. — JJ.* (1819), 1 Chit. 164.

**1474.** —.]—Upon an appeal against an order of removal, the justices at sessions were equally divided in opinion upon a question of fact, on which the settlement of the pauper depended. The sessions thinking that it lay on resp. parish to establish their case to the satisfaction of a majority of the ct., quashed the order of removal. The sessions having decided the case, this ct. refused a *mandamus*.—*R. v. MONMOUTHSHIRE JJ.* (1825), 4 B. & C. 844; 7 Dow. & Ry. K. B. 334; 3 Dow. & Ry. M. C. 410; 107 E. R. 1273.

*Annotations:—Consd. R. v. Walsall Overseers* (1878), 3 Q. B. D. 457; *Ex p. Evans*, [1894] A. C. 16. *Refd. R. v. Grant* (1849), 13 Jur. 1026; *Kinnis v. Graves* (1898), 67 L. J. Q. B. 583.

**1475.** —.]—The ct. will not grant a *mandamus* to compel the chairman of a ct. of quarter sessions to issue process against defts., against whom an indictment has been found for keeping a gaming house, where he has refused it on account of the lapse of time since the finding of the indictment.—*R. v. RUSSELL* (1842), 1 Dowl. N. S. 544; 6 Jur. 221.

**1476.** —.]—At the trial of an appeal a ct. of quarter sessions is not bound, on the application of counsel, to adjourn the hearing, with a view to curing a defect in the notice of the grounds of appeal.

Where applts., having delivered insufficient grounds of appeal, applied to the ct. of quarter sessions to adjourn the appeal, & that ct. refused, thinking they had no such power, & confirmed the order:—*Held*: a *mandamus* would not lie to compel them to enter continuances & hear the appeal.—*R. v. STAFFORDSHIRE JJ.* (1842), 2 Dowl. N. S. 353; 12 L. J. M. C. 9; 6 J. P. 746; 7 Jur. 66.

*Annotation:—Refd. R. v. Kendal* (1859), 1 E. & E. 492.

**1477.** —.]—Examinations, transmitted with an order of removal from S. to A., set out a former order of removal, unappealed against also from S. to A. The order appeared to have been suspended, & on appeal against the present order, it was objected, on the hearing, that the examinations did not show that the suspension had been regularly taken off, or the order of removal executed. The sessions held the objections fatal; but, to give an opportunity of removing again, they entered on their records that the order was discharged not on the merits; the applts.' counsel objecting, & insisting on their right to have the appeal fully tried, so as finally to dispose of the ground of removal. On motion for a *mandamus* to the sessions to erase the words not on the merit, or to enter continuances & hear the appeal:—*Held*: (1) the entry was wrong, for that the decision was a conclusive one upon the point of settlement; (2) this ct. had no power to order an erasure of the entry; (3) a *mandamus* to hear the appeal could not be granted for that the sessions had already heard & determined it.—*Ex p. ACKWORTH OVERSEERS* (1843), 3 Q. B. 397; 1 Dow. & L. 718; 13 L. J. M. C. 38; 8 J. P. 261; 114 E. R. 558; *sub nom. R. v. WEST RIDING OF YORKSHIRE JJ.*, *Ex p. ACKWORTH OVERSEERS*, 8 Jur. 291.

*Annotations:—Consd. Re Wood, R. v. St. Anne's, Westminster* (1847), 9 Q. B. 878. *Refd. Ex p. Pontefract* (1843), 3 Q. B. 391; *R. v. Charlbury & Walcott* 897;

**1478.** —.]—At the trial applts. were called upon to prove their notice & grounds of appeal. An objection was then taken to the notice as purporting to have been given by the overseers of the parish instead of the township. Pending the argument applts. applied to respite the appeal, which was assented to by resps., on the terms of payment of costs. This applts. refused, whereupon the sessions confirmed the order of removal. Upon an application to the ct. for a *mandamus* to the sessions to enter continuances, & hear the appeal:—*Held*: the application for respite was no admission of the validity of the objection, & the sessions ought still to have given judgment upon it; (2) the ct. would not interfere by *mandamus* to compel the sessions to hear the appeal, as upon the facts stated, it did not appear that they had not decided what they were called upon to do.—*R. v. WEST RIDING OF YORKSHIRE JJ.*, *SPROTBROUGH v. ATTERCLIFFE CUM DARNALL* (1844), 1 New Sess. Cas. 64; 2 L. T. O. S. 368; 8 J. P. 774.

**1479.** —.]—The decision of the sessions upon a question of fact properly before them is final, & will not be interfered with by the ct.

An appeal against an order of removal was signed by the overseers of a township. Upon an objection at the sessions that the notice was badly signed, inasmuch as it did not purport to have been signed by a majority of the parish officers, evidence was adduced on the part of applts. to show that the township was one out of several of which the parish was composed, & that each township managed its own poor distinct from the other townships. The sessions, however, after hearing all the evidence upon this fact, decided against applts. upon this point, & confirmed the order of removal. Upon motion for a *mandamus* to compel the sessions to enter continuances & hear the appeal:—*Held*: as sessions had decided upon a fact properly before them, the ct. would not interfere.—*R. v. FLINTSHIRE JJ.* (1847), 4 Dow. & L. 644; 2 New Mag. Cas. 160; 2 New Sess. Cas. 572; 1 Saund. & C. 331; 16 L. J. M. C. 55; 8 L. T. O. S. 395; 11 Jur. 185; 11 J. P. Jo. 104.

**1480.** —.]—If justices at quarter sessions have jurisdiction over the subject-matter of an appeal, & decide such appeal upon evidence properly for their consideration, the ct. will not interfere with their decision.—*R. v. STAFFORDSHIRE JJ.* (1847), 4 Dow. & L. 624; 2 New Mag. Cas. 164; 2 New Sess. Cas. 557; 16 L. J. M. C. 53; 11 Jur. 108; *sub nom. R. v. STAFFORDSHIRE JJ.*, *CAULDON v. LEEK & LOWE*, 8 L. T. O. S. 394; 11 J. P. 459.

**1481.** —.]—An order of removal having been made, applts. entered & respited an appeal, & subsequently gave resps. notice of their intention, at the next session, "to enter, prosecute, & try" the appeal. The attorney for applts., fearing, however, that this notice might be deemed bad as containing the words to enter, caused another notice to be served, similar to the former, but withdrawing it, & omitting the words to enter. At the sessions applts. proposed to stand upon their first notice, whereupon resps. produced the second notice, & applts. not being in a position to prove the time of its service, the sessions dismissed the appeal. On motion for a *mandamus* to enter continuances & hear:—*Held*: the sessions were right; also, their decision being upon a fact properly before them, the ct. could not interfere.—*R. v. SOMERSET JJ.* (1847), 2 New Mag. Cas. 178; 2 New Sess. Cas. 645; 2 Saund. & C. 62; 16 L. T. O. S. 107; 11 Jur. 251.

### SECT. 3.—REMEDY FOR MALICIOUS PROSECUTION.

#### SUB-SECT. 1.—ACTION.

65. In respect of what prosecution action lies—**General rule.**—SMITH *v.* HICKSON, No. 529, *post*.

66. — **High treason.**—An action will not lie for indicting another for high treason.—LOVET *v.* FAULKNER (1614), 2 Bulst. 270; Cro. Jac. 357; 1 Roll. Rep. 109; 80 E. R. 1114.

67. — — — — —.]—SMITH *v.* SPURLE (1623), Benl. 138; 73 E. R. 995.

68. — **Prosecuting bail.**—An action on the case lies for maliciously & deceitfully prosecuting bail, knowing the principal had surrendered in discharge.—STEER *v.* SCOBLE (1623), Cro. Jac. 667; 79 E. R. 577.

69. — — — — —.]—DAW *v.* SWAYNE (1669), 2 Keb. 546; 1 Sid. 424; 1 Mod. Rep. 4; 84 E. R. 342.

*Annotations* :—**Refd.** Savile *v.* Roberts (1698), 1 Ld. Raym. 374; Parker *v.* Langley (1713), Gilb. 163.

70. — **Felony.**—NEVE *v.* CROSS (1652), Sty. 350; 82 E. R. 769.

71. — **Rescue.**—Case does not lie for maliciously indicting one knowing that he was not present for a rescue or trespass in a case where the rescue or trespass was committed.—LOE *v.* BORDMORE (1665), 1 Lev. 169; 83 E. R. 353; *sub nom.* LOW *v.* BORDMORE, 1 Sid. 261; T. Raym. 135.

*Annotations* :—**Refd.** Roberts *v.* Savill (1698), 5 Mod. Rep. 405; Jones *v.* Givin (1713), Gilb. 185.

72. — **Trespass.**—LOE *v.* BORDMORE, No. 71, *ante*.

73. — — — — —.]—An action in the nature of conspiracy lies after acquittal, for causing a person to be falsely & maliciously indicted for trespass.—NORRIS *v.* PALMER (1675), 2 Mod. Rep. 51; 86 E. R. 935.

*Annotation* :—**Refd.** Savile *v.* Roberts (1698), 1 Ld. Raym. 374.

74. Who may bring action—**Prosecution of husband & wife.**—SMITH *v.* HICKSON, No. 529, *post*.

75. When action will be stayed—**Previous action compromised.**—Declaration contained a count for libel, & two for malicious prosecution. The cause was tried in 1852, & a verdict found for pltf. with £5 damages for the libel, & £15 for the

malicious prosecution. Deft. obtained a rule *nisi* for a new trial, upon the ground of misdirection in respect of the malicious prosecution, & the ct. were ready to make the rule absolute but suggested an arrangement between the parties. It was accordingly arranged that the rule for a new trial should be discharged, pltf. undertaking to enter a *nolle prosequi* on the counts for malicious prosecution. The costs were taxed, & with the £5 damages, paid to pltf. In 1855 pltf. commenced the present action for malicious prosecution, upon the same facts :—**Held** : deft. was entitled to stay all further proceedings thereon.—PONTING *v.* WATSON (1855), 26 L. T. O. S. 108; 1 Jur. N. S. 1139.

76. — **Prosecution compounded—Illegal agreement not to sue.**—Upon the trial of the first of three indictments for embezzlement, the verdict was not guilty; & thereupon it was agreed between counsel on both sides, with the consent of the prisoner & his attorney, that no evidence should be offered in support of the other indictments, & that verdicts of not guilty should be taken thereon, & that the prisoner should not bring any action in respect of the proceedings :—**Held** : the agreement was illegal, & the prisoner having brought an action for false imprisonment & malicious prosecution against the prosecutor, this ct. refused to stay the action.—RAWLINGS *v.* COAL CONSUMERS' ASSOCN., LTD. (1874), 43 L. J. M. C. 111; 30 L. T. 469; 38 J. P. 599; 22 W. R. 704.

*Annotation* :—**Refd.** Whitmore *v.* Farley (1880), 43 L. T. 192.

**Jurisdiction of county court.**—*See* COUNTY COURTS, Vol. XIII., p. 456, Nos. 64–6

#### SUB-SECT. 2.—FORMER REMEDIES.

77. Writ of conspiracy—**Distinguished from action on the case.**—COX *v.* WIRRALE (1607), Cro. Jac. 193; POULTERERS' CASE (1610), 9 Co. Rep. 55 b; LOVET *v.* FAULKNER (1614), 2 Bulst. 270; CRANBANCKS CASE (1618), 2 Roll. Rep. 49; ANON. (1620), 2 Roll. Rep. 188; SMITH *v.* CRASHAW (1625), Cro. Car. 15; PRICE *v.* CROFTS (1657), T. Raym. 180; SKINNER *v.* GUNTER (1669), 1 Vent. 18; POLLARD *v.* EVANS (1679), 2 Show. 51; ROBERTS *v.* SAVILL (1698), 5 Mod. Rep. 405; SUBLEY *v.* MOTT (1748), 1 Wils. 210.

Bom. 716.—IND.

e. — — — — —.]—A suit for damages for malicious prosecution of pltf. abates on his death.—PALANIAPPA CHETTIAR *v.* RAJAH OF RAMNAD (1925), I. L. R. 49 Mad. 208.—IND.

f. — — — — —.]—MALITAB SINGH *v.* HUB LAL (1926), I. L. R. 48 All. 630.—IND.

#### PART II. SECT. 3, SUB-SECT. 1.

b. In respect of what prosecution action lies—**Offence not criminal.**—Maliciously resorting to criminal procedure & thereby prosecuting a charge, although not for a criminal offence, gives the party damnified a right of action.—FLORA *v.* SHANDRO (1908), 8 W. L. R. 426; 1 Alta. L. R. 252.—CAN.

c. Effect of death of plaintiff. Whether right of action survives.] KRISHNA BEHARI SEN *v.* CALCUTTA CORPN. (1904), I. L. R. 31 Calc. 406.—IND.

d. — — — — —.]—An action for malicious prosecution does not survive beyond the lifetime of pltf.—MOTILAL *v.* HARNARAYAN (1923), I. L. R. 47



## Part III.—Malicious Abuse of Civil Proceedings.

## SECT. 1.—WHETHER ACTION MAINTAINABLE.

78. In what circumstances maintainable.]—QUARTZ HILL GOLD MINING CO. v. EYRE, No. 21, ante.

79. —.].—The reason, it would seem, that an action for malicious prosecution or arrest would not lie, without averring determination of proceedings in pltf.'s favour, is that as long as the proceedings stood adverse to pltf's. they are evidence of reasonable & probable cause, or, in other words, negative the absence of reasonable & probable cause, which is the duty of pltf's. to establish. It is usual before commencing an action for malicious prosecution, to get proceedings set aside if adverse to pltf., for it is a rule of law, as stated in *Gilding v. Eyre*, No. 150, post, that no one shall be allowed to allege of a still-depending action that it is unjust, & that this can only be decided by a judicial determination or other final event of the suit itself in its regular course. The present case is not an ordinary action for malicious prosecution or arrest; it is an action for maliciously, & without reasonable & probable cause, using the process of the ct. (SMITH, J.).—WOOLLEY v. MORGAN, COBBOLD & WOOLLEY v. MORGAN (1887), 4 T. L. R. 211, D. C.

80. —.].—WIFFEN v. BAILEY & ROMFORD URBAN COUNCIL, No. 37, ante.

81. — Civil proceedings in court having no jurisdiction.]—An action will not lie for suing in a proper ct. though there is no cause of action.

But if he sue in the Spiritual Ct. for matter which appears by his libel is not suable there, nor the said ct. has any jurisdiction thereof, but the common law has jurisdiction, there action on the case lies; for it is a suit for vexation (*per* CUR.).—WATERHOUSE (LADY) v. BAWDE (1606), Cro. Jac. 133; 79 E. R. 116.

Annotations:—*Reid*. Higginson v. Martin (1677), Freem. K. B. 322. *Mentd*. Myddelton v. Wynn (1746), Willes, 597.

82. —.].—BRADLEY & JONES' CASE (1613), Godb. 240; 78 E. R. 139.

83. —.].—HOCKING v. MATTHEWS (1670), 1 Vent. 86; 1 Sid. 463; 86 E. R. 60.

Annotations:—*Mentd*. Anon. (1703), 6 Mod. Rep. 25; Chapman v. Pickersgill (1762), 2 Wils. 145; The Walter D. Wallet, [1893] P. 202.

84. —.].—Case for prosecuting a plaint in London, when the cause of action did arise out of the jurisdiction; this ought to have been pleaded, & if the plea had been refused, then a prohibition would have been granted; so case would not lie.—TEMPLE v. KILLINGWORTH (1691), Carth. 189; 12 Mod. Rep. 4; 1 Show. 254; 90 E. R. 715; *sub nom*. BAUGH v. KILLINGWORTH, 4 Mod. Rep. 13.

85. —.].—Action of the case does not lie for a malicious suit *pendente lite*.—BIRD v. LINE (1710), 1 Com. 190; 92 E. R. 1028.

86. —.].—(1) An action lies for suing pltf. in an inferior ct. maliciously, & arresting him, when that ct. had no jurisdiction of the cause.

(2) When a party has been maliciously sued & held to bail, malice, & that it was without any probable cause, must be alleged & proved. . . . If you hold a man to bail in an inferior ct. when you know it hath not jurisdiction & with malice, an action upon the case will lie (LORD CAMDEN).—GOSLIN v. WILCOCK (1766), 2 Wils. 302; 95 E. R. 824.

Annotation:—*Generally*, *Mentd*. Revis v. Smith (1856), 20 J. P. 453.

87. — Vexatious action.]—LAMB v. DUFF (1649), Sty. 211; 82 E. R. 654.

88. —.].—An action upon the case will lie against one that brings vexatious actions against another, or for entering of actions of a great value, to force his adversary to put in great bail, where he has but small cause of action (ROLL, C.J.).—ANON. (1655), Sty. 451; 82 E. R. 855.

89. —.].—WEBSTER v. HAIGH (1685), 3 Lev. 210; 83 E. R. 654.

Annotation:—*Mentd*. Parker v. Langley (1713), Gilb. 163.

90. —.].—BIRD v. LINE (1710), 1 Com. 190; 92 E. R. 1028.

91. —.].—Though terminated by rule of court.]—An action may be brought to recover damages for a malicious suit, even where such suit is terminated by rule of ct.—BROOK v. CARPENTER (1825), 3 Bing. 297; 11 Moore, C. P. 59; 4 L. J. O. S. C. P. 70; 130 E. R. 527; *subsequent proceedings*, 3 Bing. 303.

92. —.].—Brought in name of third party.]—(1) Declaration in case stated, that before & at the committing of the grievances by defts., an action of trespass has been commenced & was depending, wherein R. was pltf., & the now pltf's. were defts.; in which action the now pltf's. appeared by P., then being their attorney in that behalf, & the said action was defended by the now pltf's. by & through the said P. as such attorney; & charged, that defts., contriving, etc., wrongfully, unjustly, maliciously, & unlawfully upheld & maintained the said action on the part of the said R. against the now pltf's.; by reason whereof the now pltf's. have been greatly injured, prejudiced & aggrieved in & about their defence in the said action, & have incurred & been obliged to pay divers large sums of money, amounting, etc., in & about their defence of the said action so by them made through the said P., so being their attorney in that behalf. At the trial, the jury found a verdict for pltf's. for the amount only of the bill of costs paid by them to P. as their attorney in the former action, & the verdict was entered upon the *postea* accordingly. On motion in arrest of judgment:—*Held*: the action was maintainable jointly by pltf's.; the expenses of the defence in the former action, to which the verdict was confined, being a joint & not a several damage.

(2) A count in case, charging that deft. unlawfully, maliciously & without reasonable or probable cause, & without having any interest in the suit

## PART III. SECT. 1.

78 i. In what circumstances maintainable.]—The bringing of a civil action, even maliciously & without reasonable & probable cause, is not a foundation for an action to recover damages for the wrong done.—EVEL v. BANK OF HAMILTON (1911), 20 O. W. R. 776; 3 O. W. N. 415.—CAN.

78 ii. —.].—No action is maintain-

able for damages occasioned by a civil action, even though brought maliciously & without reasonable & probable cause.—PRANSHANKAR SHIVSHANKAR v. GOVINDHAL PARBHUDAS (1876), I. L. R. 1 Bom. 467.—IND.

78 iii. —.].—CRAIG v. PEEBLES (1876), 3 R. (Ct. of Sess.) 441; 13 Sc. L. R. 287.—SCOT.

78 iv. —.].—When a person institutes legal proceedings maliciously, & they result in damage, an action will lie against him for damages thus caused. In such an action both malice & special damage must be alleged.—PUFFETT v. FENNELL & AUSTIN, [1906] E. D. C. 6.—S. AF.

78 v. —.].—HOOPER v. MOORE & VARTY (1921), 42 N. L. R. 96.—S. AF.

**Sect. 1.—Whether action maintainable. Sects. 2, 3 & 4.]**

therein mentioned, instigated & stirred up A., a pauper, to commence & prosecute, an action against pltf., by reason whereof A. did commence & prosecute such action, etc.; whereby pltf. was put to great trouble & vexation, & obliged to lay out a large sum in the defence of such action; is good.—**PECHELL v. WATSON** (1841), 8 M. & W. 691; 11 L. J. Ex. 225; 151 E. R. 1217.

**Annotations:—**As to (1) **Consd.** **Bradlaugh v. Newdegate** (1883), 11 Q. B. D. 1. **Refd.** **Cotterell v. Jones** (1851), 11 C. B. 713; **Ram Coomar Coondoo v. Chunder Canto Mookerjee** (1876), 2 App. Cas. 186; **Neville v. London Express Newspaper**, [1919] A. C. 368. As to (2) **Expld.** **Flight v. Leman** (1843), 4 Q. B. 883. **Refd.** **Collins v. Cave** (1860), 6 H. & N. 131; **Ram Coomar Coondoo v. Chunder Canto Mookerjee** (1876), 2 App. Cas. 186; **Bradlaugh v. Newdegate** (1883), 11 Q. B. D. 1; **Neville v. London Express Newspaper**, [1919] A. C. 368. **Generally, Mentd.** **Harris v. Brisco** (1886), 17 Q. B. D. 504; **Oram v. Hutt**, [1914] 1 Ch. 98.

**93. ————.]—Semble:** no action will lie against a party for inciting a third person to bring a civil action against pltf. without reasonable or probable cause.—**FIVAZ v. NICHOLLS** (1846), as reported in 2 C. B. 501; 135 E. R. 1042.

**Annotations:—Mentd.** **Cotterell v. Jones** (1851), 11 C. B. 713; **Keret v. Hill** (1854), 2 W. R. 493; **Taylor v. Chester** (1869), L. R. 4 Q. B. 309; **Begbie v. Phosphate Sewage Co.** (1875), L. R. 10 Q. B. 491; **Hegarty v. Shine** (1878), 14 Cox, C. C. 124; **Rourke v. Mealy** (1879), 41 L. T. 168; **Whitmore v. Farley** (1880), 43 L. T. 192; **Scott v. Brown, Doering, McNab, Slaughter & May v. Brown, Doering, McNab**, [1892] 2 Q. B. 724; **Farmers' Mart v. Milne**, [1915] A. C. 106; **Parkinson v. College of Ambulance & Harrison**, [1925] 2 K. B. 1.

**94. ————.]—COTTERELL v. JONES**, No. 505, *post*.

**Essentials in action.]—See Part IV., post.**

**Maintenance & champerty generally, see ACTION**, Vol. I., pp. 66 *et seq.*

## SECT. 2.—ARREST.

*See, now, Debtors Act, 1869 (c. 62), s. 5.*

**What amounts to arrest.]—See SHERIFFS & BAILIFFS.**

**95. When action lies—Mere non-feasance—Neglecting to countermand writ—After payment of debt.]—**An action on the case will not lie against a party suing out a writ, if he neglect to countermand it after payment of the debt; at least unless malice be averred. Reasonable time is a question of law.—**SCHEIBEL v. FAIRBAIN** (1799), 1 Bos. & P. 388; 126 E. R. 968.

**Annotations:—Appld.** **Page v. Wiple** (1803), 3 East, 314. **Distd.** **Bates v. Pilling** (1826), 6 B. & C. 38; **Phillips v. General Omnibus Co.** (1880), 50 L. J. Q. B. 112. **Consd.** **Clissold v. Cratchley**, [1910] 1 K. B. 374. **Refd.** **Lewis v. Morris** (1834), 2 Cr. & M. 712; **Saxon v. Castle** (1837), 6 Ad. & El. 652; **De Medina v. Grove** (1846), 10 Q. B. 156.

**96. ———— Failing to prevent execution of writ—When debt paid.]—**No action will lie for not preventing but permitting & suffering pltf. to be arrested, after payment of debt & costs owing to deft., upon a writ sued out before such payment. Malice is the gist of all actions for injuries of that nature.—**PAGE v. WIPLE** (1803), 3 East, 314; 102 E. R. 618.

**Annotations:—Distd.** **Bates v. Pilling** (1826), 6 B. & C. 38; **Phillips v. General Omnibus Co.** (1880), 50 L. J. Q. B. 112. **Consd.** **Lewis v. Morris** (1834), 2 Cr. & M. 712; **De Medina v. Grove** (1846), 10 Q. B. 152; **Churchill v.**

**97. ———— Refusing assent to discharge**

**from custody—After payment of debt.]—CROZER v. PILLING**, No. 251, *post*.

**98. ————.]—**Where a creditor, on his petition to the Insolvent Debtors' Ct. under Judgments Act, 1838 (c. 110), s. 36, has obtained an order vesting the estate of his insolvent debtor in the provisional assignee, such creditor is not bound, on the debtor afterwards tendering the amount of debt & costs, to assent to his discharge from custody; nor will this ct. order such discharge as to the creditor's action, on affidavit of tender & refusal.—**DRURY v. HOUNSFIELD** (1840), 11 Ad. & El. 101; 4 Per. & Dav. 386; 5 Jur. 385; 113 E. R. 352.

**Annotations:—Folld.** **Hollis v. Bryant** (1842), 4 Man. & G. 578. **Refd.** **Holloway v. Pocock** (1847), 8 L. T. O. S. 479.

**99. ————.]—**A creditor, who, upon petition to the insolvent debtors' ct. under Judgments Act, 1838 (c. 110), s. 36, obtained a vesting order, is not bound to assent to the discharge of the debtor upon his tendering the amount of the debt & costs, where it appears that such debtor has other creditors.—**HOLLIS v. BRYANT** (1842), 4 Man. & G. 578; 5 Scott, N. R. 505; 134 E. R. 238.

**100. ———— After order for protection from insolvent court.]—**A writ of *ca. sa.* at the suit of B. having been lodged with the sheriff against A., he afterwards obtained an order for the protection of his person from the insolvent ct., & the writ was allowed to remain in the hands of the sheriff. Subsequently, A. was taken on another writ, which was set aside, but the sheriff detained him under the writ of B. A. then wrote to him for his consent, but he merely answered, that he had not authorised his detainer; afterwards, on a summons, he indorsed his consent:—**Held:** an action on the case against B. for maliciously & negligently refusing to consent to his discharge, would not lie, even though he acted through malicious motives.

Deft. was not bound to do anything at all towards withdrawing his writ from the hands of the sheriff. He had lost his money by the insolvency of pltf., & he was not bound to take any steps which might involve any further expense. Deft. was bound to do nothing, & he had a right to do nothing. His motives for doing nothing at all, if the law allowed him to do nothing, & did not call upon him to take any step, are perfectly immaterial (**POLLOCK, C.B.**).—**HOLLOWAY v. PO-COCK** (1847), 8 L. T. O. S. 479.

**101. ———— Mistaken arrest—Mistake acknowledged before actual arrest—Defendant unnecessarily submitting to bail.]—**A. by mistake sued out a bailable writ against B. & gave it to C. an officer to be executed. C. said to B. he had a writ against him, but B. denied that he owed the money, C. did not take him into actual custody. On inquiry. the mistake was discovered, & B. was told he need give himself no further trouble in the matter. However, he afterwards put in bail above, & incurred an expense of £14:—**Held:** he could not maintain an action against A. for a malicious arrest.—**BIETEN v. BURRIDGE** (1811), 3 Camp. 139, N. P.

**102. ———— Arrest for sum larger than due.]—**By a *cognovit*, A. confessed the action, & that B. had sustained damage to the amount of £3,000; & that in case A. should make default in payment

## PART III. SECT. 2.

**102i. When action lies—Arrest for sum larger than due.]—VANDERVOORT v. YOUKER** (1887), 13 O. R. 417.—**CAN.**

**102ii. ————.]—WALKER v. TOWN OF SYDNEY** (1903), 36 N. S. R. 48.—**CAN.**

*Essentials to action —*

*Discharge from custody.]—ERICKSON v. BRAND* (1888), 14 A. R. 614.—**CAN.**

*Absence of reasonable*



of £259 on May 7, B. should be at liberty to enter up judgment for £3,000, & sue out execution for £259 & costs, which would have left a principal sum of £1,650 due to B. A. not having paid the £259 on May 7, B. entered up judgment, & sued out execution for £3,011, indorsed with a direction to the sheriff, requiring him to levy £1,967, & A. was arrested, & detained in prison for that sum:—*Held*: A. might maintain an action against B. for having caused him to be arrested & imprisoned for a larger sum than he ought.—*WENTWORTH v. BULLEN* (1829), 9 B. & C. 840; 9 L. J. O. S. K. B. 33; 109 E. R. 313.

*Annotations*:—*Reid*. *De Medina v. Grove* (1847), 10 Q. B. 172; *Churchill v. Siggers* (1854), 3 E. & B. 929. *Mentd.* *Porter v. Cooper* (1834), 4 Tyr. 456; *Hookpayton v. Bussell* (1854), 10 Exch. 24; *Lievelley v. Gilmore* (1866), L. R. 1 C. P. 570; *Conolan v. Leyland* (1884), 27 Ch. D. 632; *Re Ingham, Ex p. The Trustee* (1884), 52 L. T. 299.

**103. — Arrest of married woman—On judgment—In action in which wife joined with husband as plaintiff.**—A married woman is liable to be taken in execution under a *ca. sa.* issued upon a judgment for debt. in an action for libel brought by her husband, in which she is joined; & therefore an action will not lie by husband & wife against debt. for maliciously & without reasonable & probable cause suing out a *ca. sa.* against the wife upon the judgment in the action of libel.—*NEWTON v. ROWE* (1847), 9 Q. B. 948; 115 E. R. 1538; *sub nom.* *NEWTON v. ROWE*, *NEWTON v. BOODLE*, 16 L. J. Q. B. 146; 8 L. T. O. S. 364; 11 Jur. 628.

*Annotations*:—*Reid*. *Scott v. Morley* (1887), 20 Q. B. D. 120; *Edwards v. Porter*, [1925] A. C. 1.

**104. — Essentials to right of action — Existence of defined debt.**—A party cannot be held to bail unless there be a defined debt, to the existence of which the opposite party can swear; therefore, if A. & B. enter into an agreement to leave certain matters to arbitrators, whose decision shall be final, who are to strike balances, & make deductions & if the parties in the agreement refer to certain memoranda of former agreements, the matters contained in which are also referred to arbitrators with similar powers: under such circumstances if one party arrest the other whilst anything remains to be done under these various agreements such arrest is unlawful, & an action is maintainable against him by whom it is made.—*SMITH v. FIELDER* (1833), 2 L. J. C. P. 123.

**105. — Proof of arrest—Production of warrant.**—In an action for a malicious arrest,

pltf. must prove the sheriff's warrant on the writ against him.—*LLOYD v. HARRIS* (1793), Peake, 231, N. P.

**106. — — — — —**—Case for maliciously & without reasonable or probable cause, obtaining a judge's order to hold pltf. to bail, & without any reasonable or probable cause for believing & not believing that pltf. was about to quit England, suing out a *capias*, & wrongfully & maliciously causing pltf. to be arrested under & by virtue of the said writ, & to be thereupon imprisoned, etc.:—*Held*: upon the issue of not guilty, it was sufficient to show that pltf. had been arrested under the writ, without producing the warrant.—*PETRIE v. LAMONT* (1842), 3 Man. & G. 702; 4 Scott, N. R. 335; 11 L. J. C. P. 63; 133 E. R. 1322.

**107. — — — — — Action against solicitor—Knowledge that no debt due to client.**—*STOCKLEY v. HORNIDGE*, No. 236, *post*.

*See, also*, *AGENCY*, Vol. I., pp. 423, 602, Nos. 1170, 2323.

—*See, further*, Part IV., *post*.

**108. — Statute of Limitations—When time begins to run.**—Upon a plea of above Act, to an action for maliciously opposing the discharge of an insolvent debtor, it was proved that the opposition & remand of the debtor took place before the commencement of the six years, but that the imprisonment which he suffered continued to a period within the six years:—*Held*: the action was barred by above Act.—*VIOLETT v. SYMPSON* (1857), 8 E. & B. 344; 27 L. J. Q. B. 138; 30 L. T. O. S. 114; 3 Jur. N. S. 1217; 6 W. R. 12; 120 E. R. 128.

**Arrest of privileged persons.**—*See* *SHERIFFS & BAILIFFS*.

**Evidence in action for malicious arrest.**—*See* Part V., *post*.

### SECT. 3.—EXECUTION.

**Wrongful & irregular execution.**—*See* *EXECUTION*, Vol. XXI., pp. 456 *et seq.*

### SECT. 4.—DISTRESS.

**Action for illegal, irregular or excessive distress.**—*See* *DISTRESS*, Vol. XVIII., pp. 386 *et seq.*

*& probable cause.*—*SHERWOOD v. O'REILLY* (1846), 3 U. C. R. 4.—*CAN.*

**k. — — — — —**—*McINTOSH v. DEMERAY* (1849), 5 U. C. R. 343.—*CAN.*

**l. — — — — —**—*ACLAND v. ADAMS* (1850), 7 U. C. R. 139.—*CAN.*

**m. — — — — —**—*LYONS v. KELLY* (1850), 6 U. C. R. 278.—*CAN.*

**n. — — — — —**—In an action for a malicious arrest on a *ca. sa.* the question to be submitted is not whether the assignment of the property, which caused debt. to arrest, really is fraudulent or not, but whether debt. had good reason to suspect it.—*GUNN v. McDONALD* (1850), 6 U. C. R. 596.—*CAN.*

**o. — — — — —**—*DAVIS v. FORTUNE* (1850), 6 U. C. R. 597.—*CAN.*

**p. — — — — —**—*RUTTAN v. PRINGLE* (1851), 1 C. P. 244.—*CAN.*

**q. — — — — —**—*BLAKELY v. PATTERSON* (1857), 15 U. C. R. 180.—*CAN.*

**r. — — — — —**—*PHILAN v.* (1872), 8 N. S. R. 529.—*CAN.*

**t. — — — — —**—*DOBBYN v. DECOW* (1875), 25 C. P. 18.—*CAN.*

**a. — — — — —**—*BANK OF BRITISH NORTH AMERICA v. STRONG* (1876), 1 App. Cas. 307; 34 L. T. 627.—*CAN.*

**v. — — — — —**—*SHAW v. MCKENZIE* (1881), 6 S. C. R. 181.—*CAN.*

**c. — — — — —**—*PATTERSON v. MUNRO* (1905), 40 N. S. R. 550.—*CAN.*

**d. — — — — — Question for judge.**—*KNOX v. CLEVELAND* (1859), 8 C. P. 176.—*CAN.*

**e. — — — — —**—Where, in an action for malicious arrest, the facts are uncontradicted, the question of reasonable & probable cause must be decided exclusively by the judge.—*DONNELLY v. BAWDEN* (1877), 40 U. C. R. 611.—*CAN.*

**f. — — — — — Malice.**—After a bailable *ca. re.* placed in the sheriff's hands, debt. settled the suit in full; he was afterwards taken on the writ, & thereupon sued for malicious arrest:—*Held*: not maintainable without

proof of actual malice.—*McINTOSH v. STEPHENS* (1852), 9 U. C. R. 235.—*CAN.*

**g. — — — — — Writ set aside.**—*GRAHAM v. THOMPSON* (1858), 16 U. C. R. 259.—*CAN.*

**h. — — — — — Action against one joint creditor—Liability of second—Where no responsibility for arrest.**—*CAMERON v. PLAYTER* (1846), 3 U. C. R. 138.—*CAN.*

**aa. Termination of proceedings—In which arrest made—Whether necessary to allege.**—*EAKINS v. CHRISTOPHER* (1868), 18 C. P. 532.—*CAN.*

**bb. Arrest made on advice of attorney.**—Where it appeared that debt., before making the affidavit for a *ca. sa.*, had consulted his attorney, who advised the arrest, the ct. granted a new trial to debt. on payment of costs.—*NOURSE v. CALCUTT* (1856), 6 C. P. 14.—*CAN.*

### PART III. SECT. 3.

**cc. Wrongful & irregular execution—Execution for sum larger than due.**—*DEWAR v. CARRIQUE* (1864), 14 C. P. 137.—*CAN.*

## SECT. 5.—BANKRUPTCY.

**Malicious presentation of bankruptcy petition.]—**See **BANKRUPTCY**, Vol. V., pp. 1000, 1001, Nos. 8165-8174.

— **Personal liability of solicitor—As distinct from liability of client.]—**See **BANKRUPTCY**, Vol. V., p. 1000, No. 8166.

**As to appeals from & annulment of adjudication order.]—**See **BANKRUPTCY**, Vol. IV., pp. 183 et seq.

## SECT. 6.—WINDING-UP PETITION.

**Action against petitioner.]—**See **COMPANIES**, Vol. X., p. 829, No. 5400.

## SECT. 7.—ARREST OF SHIP.

**109. Re-arrest of ship without order of court—No ground for damages.]—**POULSON & MAUD v. VILLAGE BELLE (OWNERS) (1896), 12 T. L. R. 630.

See, also, **ADMIRALTY**, Vol. I., pp. 162, 165, 166, Nos. 707-713, 748-763.

**Essentials to action.]—**See No. 153, post.

## SECT. 8.—OTHER PROCEEDINGS.

**Essentials to action for abuse of lunacy procedure.]—**See No. 401, post.

**Action for infringement of patents.]—**See **PATENTS**.

**Slander of title.]—**See **TRADE & TRADE UNIONS**.

## Part IV.—Essentials to Action.

## SECT. 1.—TERMINATION OF PROCEEDINGS IN PLAINTIFF'S FAVOUR.

## SUB-SECT. 1.—NECESSITY FOR.

## A. Criminal Proceedings.

**110. Termination of prosecution.]—**An action in nature of conspiracy will lie against one person for causing another to be maliciously prosecuted; but it must show that the prosecution was before a competent jurisdiction; & how it was determined.—**THROGMORTON'S CASE** (1597), Cro. Eliz. 563; 78 E. R. 808.

*Annotation:—*Reid. **Jones v. Givin** (1714), Gilb. 185.

**111. —.]—**ARUNDELL v. TREGONO (1607), Yelv. 116; 80 E. R. 79.

*Annotations:—*Consd. **Jones v. Givin** (1714), Gilb. 185; **Parker v. Langley** (1714), Gilb. 163. *Mentd.* **Kennedy v. Hilliard** (1859), 1 L. T. 78.

**112. —.]—**POLLARD v. EVANS, No. 162, post.

**113. —.]—**JONES v. GIVIN, No. 25, ante.

**114. —.]—**In an action upon the case for a malicious prosecution, pltf., in his declaration, must show what became of the malicious prosecution.—**PARKER v. LANGLEY** (1714), 10 Mod. Rep. 209; Gilb. 163; 88 E. R. 697.

*Annotations:—*Folld. **Lewis v. Farrel** (1718), 1 Stra. 114. *Reid.* **Gilding v. Eyre** (1861), 10 C. B. N. S. 592.

**115. —.]—**WILKINSON v. HOWEL, No. 175, post.

**116. —.]—**WHITWORTH v. HALL, No. 140, post.

—.]—**COTTERELL v. JONES**, No. 505, post.

**118. —.]—**ABRATH v. NORTH EASTERN RY. Co., No. 418, post.

**119. —.]—**It is well settled that pltf. in an

action for malicious prosecution has to establish two things in addition to the fact of his or her acquittal; first, the absence of reasonable & probable cause for the prosecution; & secondly, that the prosecution was instituted by actual malice on the part of deft. The question whether there is an absence of reasonable & probable cause is for the judge to determine, & the question of malice is for the jury (**SMITH, L.J.**).—**WATSON v. SMITH** (1899), 15 T. L. R. 473, C. A.

**120. —.]—**A person, who has been convicted of a crime, & against whom the conviction stands unreversed, cannot maintain an action against a witness for negligently giving false evidence which caused him to be wrongfully so convicted.—**BYNOE v. BANK OF ENGLAND**, [1902] 1 K. B. 467; 71 L. J. K. B. 208; 86 L. T. 140; 50 W. R. 359; 18 T. L. R. 276, C. A.

*Annotations:—*Apld. **Turley v. Daw** (1906), 94 L. T. 216. *Reid.* **Norman v. Mathews** (1916), 85 L. J. K. B. 857.

**121. — By acquittal.]—**SHOTBOLTS' CASE (1586), Godb. 76; 78 E. R. 47.

**122. —.]—**GLASEOUR v. HURLESTONE (1586), Gouldsb. 51; 75 E. R. 988.

**123. — On good indictment.]—**SHERINGTON v. WARD, No. 183, post.

**124. —.]—**In case for malicious prosecution must show proceedings determined, & how.—**LEWIS v. FARREL** (1718), 1 Stra. 114; 93 E. R. 419.

**125. — Allegation of discharge insufficient.]—**MORGAN v. HUGHES, No. 3, ante.

**126. —.]—**WEBB v. HILL, No. 174, post.

**127. —.]—**BARBER v. LESITER, No. 47, ante.

## PART III. SECT. 7.

n. **Damages—Excessive bail required.]—**HAMLING & CO., LTD. (ST. CLAIR OWNERS) v. PEDERSEN (AUDNY OWNERS), [1922] S. C. 85.—SCOT.

## PART III. SECT. 8.

o. **Demanding sureties of the peace.]—**An action will lie for maliciously demanding sureties of the peace, & procuring a summons, which is obeyed, to the party charged, to appear before the justices at the hearing, if the charge be dismissed.—**GOOLEY v. CURTAIN** (1876), 2 V. L. R. 226.—AUS.

p. **Falsely swearing that plaintiff about to leave jurisdiction.]—**Case will

lie for maliciously swearing to "an apprehension that pltf. would leave the Province," if any cause for such apprehension be negatived.—**DUNN v. MCDUGALL** (1836), 5 O. S. 156.—CAN.

q. **Fraudulent claim to land.]—**An action will not lie for knowingly prosecuting a false claim before the heir & devisee commission, to pltf.'s injury, & with knowledge of his claim.—**SHIELDS v. DE BLAQUIERE** (1854), 12 U. C. R. 386.—CAN.

r. **Application for injunction.]—****COLLINS v. EVERITT**, Cass. Dig. 2nd. ed. 210.—CAN.

## PART IV. SECT. 1, SUB-SECT. 1.—A.

## 1101. Termination of prosecution.

v. **LEBEAU** (1888), 14 S. C. R. 742.—CAN.

**110 II. —.]—**BUSH v. PARK (1906), 12 O. L. R. 180; 8 O. W. R. 566.—CAN.

**110 III. —.]—**To succeed in an action for malicious prosecution, pltf. must prove that the prosecution was determined in his favour.—**MORTIMER v. FISHER** (1913), 23 W. L. R. 905; 11 D. L. R. 77; 4 W. W. R. 454; 6 Sask. L. R. 200.—CAN.

**1211. — By acquittal.]—**BOJA REDDI v. PERUMAL REDDI (1902), I. L. R. 26 Mad. 506.—IND.

t. — **By compromise—Whether action can be maintained.]—**An action for malicious prosecution, founded



128. ———.]—**BASÉBÉ v. MATTHEWS**, No. 179, *post*.

129. ———.]—**JOHNSON v. EMERSON**, No. 196, *post*.

130. ———.]—**HARRIS v. WARRE**, No. 48, *ante*.

131. ———.]—Pltfs. admit that they can get no damages for malicious prosecution because the conviction stands (**FARWELL, L.J.**).—**CAINE v. PALACE STEAM SHIPPING CO.**, [1907] 1 K. B. 670; 76 L. J. K. B. 292; 96 L. T. 410; 23 T. L. R. 203; 10 Asp. M. L. C. 380; 12 Com. Cas. 96, C. A.; *on appeal, sub nom.* **PALACE SHIPPING CO. v. CAINE**, [1907] A. C. 386, H. L.

*Annotations* :—**Mentd.** **Collins v. Simpson S.S. Co.** (1907), 24 T. L. R. 178; **Hutton v. Ras Steam Shipping Co.**, [1907] 1 K. B. 834; **Sibery v. Connelly** (1907), 96 L. T. 140; **Browning v. Crumlin Valley Collieries**, [1926] 1 K. B. 522.

132. ——— **Specific allegation necessary.**]—An action for a malicious prosecution cannot be maintained till the prosecution is terminated, which must appear upon the declaration.—**FISHER v. BRISTOW** (1779), 1 Doug. K. B. 215; 99 E. R. 140.

### B. Civil Proceedings.

#### (a) In General.

133. **General rule—Proceedings must have terminated.**]—The new action must not be brought before the first be determined, because till then it cannot appear that the first was unjust (*per CUR.*).

There must be not only a thing done amiss but also a damage either already fallen upon the party or else inevitable (*per CUR.*).—**WATERER v. FREEMAN** (1617), Hob. 266; 1 Brownl. 12; Noy, 23; 80 E. R. 412.

*Annotations* :—**Consd.** **Saville v. Roberts** (1698), 5 Mod. Rep. 394; **Parker v. Langley** (1714), Gilb. 163. **Refd.** **Traverse v. Daws** (1673), Freem. K. B. 324; **Jones v. Givin** (1714), Gilb. 185; **Reynolds v. Kennedy** (1748), 1 Wils. 232; **De Medina v. Grove** (1847), 10 Q. B. 172; **Gilding v. Eyre** (1861), 10 C. B. N. S. 592; **Wren v. Weild** (1869), L. R. 4 Q. B. 730. **Mentd.** **Turner v. Sterling** (1671), Freem. K. B. 15; **Clissold v. Cratchley**, [1910] 1 K. B. 374.

134. ———.]—**VANDERBERGH v. BLAKE** (1662), Hard. 194; 145 E. R. 447.

*Annotations* :—**Consd.** **Basébé v. Matthews** (1867), L. R. 2 C. P. 684. **Refd.** **Reynolds v. Kennedy** (1748), 1 Wils. 232; **Scott v. Shearman** (1774), 2 Wm. Bl. 977; **Barber v. Lester** (1859), 7 C. B. N. S. 175; **Bynoe v. Bank of England**, [1902] 1 K. B. 467.

135. ———.]—Case for malicious holding to bail; declaration ought to set forth the sum due, & the process specially, & that the first action is determined.—**ROBINS v. ROBINS** (1699), 1 Salk. 15; 12 Mod. Rep. 273; 91 E. R. 15; *sub nom.* **ROBBINS v. ROBBINS**, 1 Ld. Raym. 503.

*Annotations* :—**Refd.** **Reynolds v. Kennedy** (1748), 1 Wils. 232; **Chapman v. Pickersgill** (1762), 2 Wils. 145.

136. ———.]—**BIRD v. LINE**, No. 85, *ante*.

137. ———.]—Pltf., in an action for maliciously prosecuting an action, must show that the former action is determined in his favour.—**PANTSUNE v. MARSHALL** (1754), Say. 162; 96 E. R. 838.

upon criminal proceedings, cannot be maintained, where it appears that the termination of the prosecution was brought about by compromise or agreement of the parties.—**BAXTER v. GORDON IRONSIDES & FARES CO.** (1907), 9 O. W. R. 194; 13 O. L. R. 598.—**CAN.**

#### PART IV. SECT. 1, SUB-SECT. 1.— B. (a).

133 i. **General rule—Proceedings must have terminated.**]—No action is maintainable for the malicious use of legal process in suit instituted in any ct. of competent jurisdiction, whether local

or foreign, until that suit, in so far as it relates to the matter complained of, has terminated in pltf.'s favour, where such a termination is legally possible.—**VARAWA v. HOWARD SMITH CO.** (1911), 13 C. L. R. 35.—**AUS.**

133 ii. ———.]—**BISHOP v. MARTIN** (1857), 14 U. C. R. 416.—**CAN.**

133 iii. ———.]—**MAGILL v. SAMUEL** (1869), 19 C. P. 443.—**CAN.**

133 iv. ———.]—In an action for malicious prosecution pltf. must prove that he was innocent & that his innocence was pronounced by the tribunal before which the accusation

138. ———.]—**WEBB v. HILL**, No. 174, *post*.

139. ———.]—**WILKINSON v. HOWEL**, No. 175, *post*.

140. ———.]—In an action for maliciously suing out a commission of bkpt., it must be averred & proved that the commission was superseded before the commencement of the action: & if this fact be not proved, pltf. ought to be nonsuited, though it was not averred in the declaration, & though deft., who might have demurred for the omission, has not done so.

There is no distinction between an action for malicious prosecution by indictment, as for a malicious arrest, & one for maliciously suing out a commission of bkpt. In all of them, it is necessary to show that the original proceeding which formed the alleged ground of the action is at an end (**LITLEDALE, J.**).—**WHITWORTH v. HALL** (1831), 2 B. & Ad. 695; 9 L. J. O. S. K. B. 297; 109 E. R. 1302.

*Annotations* :—**Apld.** **Mellor v. Baddeley** (1834), 2 Cr. & M. 675. **Distd.** **Steward v. Gromett** (1859), 7 C. B. N. S. 191; **Gilding v. Eyre** (1861), 10 C. B. N. S. 592. **Apprvd.** **Metropolitan Bank v. Pooley** (1885), 10 App. Cas. 210. **Refd.** **Johnson v. Emerson** (1871), L. R. 6 Exch. 329. **Mentd.** **Baynes v. Brewster** (1841), 11 L. J. M. C. 5.

141. ———.]—In case for a malicious arrest, the declaration averred that deft. did not prosecute his suit, but voluntarily suffered the same to be discontinued for want of prosecution thereof, & thereupon it was considered by the ct., that deft. should take nothing by his writ. Deft. pleaded not guilty:—**Held**: the averment of the discontinuance of the suit was a material allegation, which deft. should have taken issue upon by his plea, & not having done so, the discontinuance was admitted on the record.

The plea of not guilty, in such a case, merely puts in issue the wrongful act, viz. the malicious arrest without probable cause.

**Qu.**: whether the averment, that pltf. suffered the suit to be discontinued, is proved by the production of the rule to discontinue, & proof of payment of the costs thereon, without proof of the judgment of discontinuance.

As the action cannot be maintained until the former suit is terminated, the discontinuance is a material allegation which deft. should have denied (**LORD ABINGER, C.B.**).—**WATKINS v. LEE** (1839), 5 M. & W. 270; 7 Dowl. 498; 8 L. J. Ex. 266; 3 Jur. 484; 151 E. R. 115.

*Annotations* :—**Apld.** **Atkinson v. Raleigh** (1842), 6 Jur. 731; **Haddrick v. Heslop** (1848), 12 Q. B. 267. **Consd.** **Gilding v. Eyre** (1861), 10 C. B. N. S. 592.

142. ———.]—**COTTERELL v. JONES**, No. 505, *post*.

143. ———.]—**NEVILL v. LOADMAN**, No. 358, *post*.

144. ———.]—Declaration alleging that deft. maliciously & without reasonable & probable cause procured an attachment to be issued out of the mayor's ct., to attach a debt due to pltf.:—**Held**: bad for not showing that the proceedings

was made.—**CUNNINGHAM v. EVANS**, [1920] 1 W. W. R. 289; 13 Sask. L. R. 120.—**CAN.**

133 v. ———.]—**SMITH v. RURAL MUNICIPALITY OF LACADENA** No. 228 & **McTAGGART**, [1924] 1 W. W. R. 36; 18 Sask. L. R. 23.—**CAN.**

133 vi. ———.]—**MUNCE v. BLACK** (1858), 7 I. C. L. R. 475.—**IR.**

133 vii. ———.]—**GORDON v. BUTTERY** (1910), 30 N. Z. L. R. 276.—**N.Z.**

133 viii. ———.]—**MEIKLE v. WELLINGTON LOAN CO., LTD.** (1911), 31 N. Z. L. R. 217.—**N.Z.**

*Sect. 1.—Termination of proceedings in plaintiff's favour: Sub-sect. 1, B. (a) & (b), & C. (a) & (b); sub-sect. 2.]*

in the suit in the mayor's ct. had been brought to a termination.

The suit or proceeding need not in every case terminate in pltf.'s favour, because this is not in every case possible, as in the case cited of articles of the peace maliciously exhibited against pltf.; & it need not be a final determination on the cause of action, as in the case of a nonsuit, but it must be final so far as the suit or proceeding itself is concerned (BLACKBURN, J.).—PARTON v. HILL (1864), 4 New Rep. 103; 10 L. T. 414; 12 W. R. 755.

145. ———.]—A. having issued a writ of summons against B. specially indorsed for £28, B., without appearing to the writ, paid £10 to A., on account of the debt. A. afterwards, under C. L. P. Act, 1852 (c. 76), s. 27, signed judgment for default of appearance for the full amount of £28 & costs & issued a *ca. sa.* indorsed for that amount, under which B. was arrested, & paid the sum demanded. B. having brought an action against A. for maliciously & without probable cause signing judgment & issuing execution:—*Held*: whilst the judgment stood for the full amount, it estopped pltf. from denying the correctness of the judgment or of the execution. *Qu.*: whether if the judgment had been rectified by reducing it to the amount for which it ought to have been signed, the action would have been maintainable.—HUFFER v. ALLEN (1866), L. R. 2 Exch. 15; 4 H. & C. 634; 36 L. J. Ex. 17; 15 L. T. 225; 12 Jur. N. S. 930; 15 W. R. 281.

*Annotation*:—*Expld.* Turley v. Daw (1906), 94 L. T. 216.

146. ———.]—A writ of *ne exeat* against a deft. was obtained by pltf. immediately after the commencement of an action. Deft. was arrested, but was discharged upon payment to the sheriff of the sum for which the writ was marked. By his statement of defence deft. alleged that the writ had been improperly obtained, & claimed damages for his arrest, & at the trial he insisted upon this claim:—*Held*: as deft. had not moved to discharge the writ, it must be taken to have been properly issued, & consequently, deft. was not entitled to any damages.—LEES v. PATTERSON (1878), 7 Ch. D. 866; 47 L. J. Ch. 616; 38 L. T. 451; 26 W. R. 399.

147. ———.]—WOOLLEY v. MORGAN, COBBOLD & WOOLLEY v. MORGAN, No. 79, *ante*.

148. ———.]—So long as a committal order stands, an action will not lie at the suit of judgment debtor against the high bailiff of the county ct. for not having served him, debtor, with the judgment summons upon which the order is made.—TURLEY v. DAW (1906), 94 L. T. 216; 22 T. L. R. 231.

*Annotation*:—*Mentd.* Freeborn v. Leeming, [1926] 1 K. B. 160.

149. Abusing process of law — To effect improper object.]—In an action for abusing the process of the ct. in order illegally to compel a party to give up his property, it is not necessary to prove that the action in which the process was improperly employed has been determined, or to aver that the process was sued out without reasonable or probable cause.—GRAINGER v. HILL (1838), 4 Bing. N. C. 212; 1 Arn. 42; 5 Scott, 561; 7 L. J. C. P. 85; 132 E. R. 769; *sub nom.* GRANGER v. HILL, 2 Jur. 235.

*Annotations*:—*Expld.* De Medina v. Grove (1847), 10 Q. B. 172. *Distd.* Parton v. Hill (1864), 4 New Rep. 103. *Mentd.* Powell v. Hoyland (1851), 6 Exch. 67; Warner v. Riddiford (1858), 4 C. B. N. S. 180; Assets Development Co. v. Close No. 2 (1901), 46 Sol. Jo. 12; Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600.

150. ——— Execution levied for excessive amount.]—The declaration stated that defts., the one, A., acting as attorney for B., the other, recovered a judgment against pltf. for £30 7s. 4d., that pltf. paid & satisfied to B. the debt recovered by such judgment except the sum of 15s. 8d., & that defts. sued out a *ca. sa.* upon the judgment, & wrongfully & maliciously, & without any reasonable or probable cause, indorsed the said writ with directions to levy £5 14s. 8d., & interest, & £1 7s. for the costs of execution; that pltf. tendered & offered to pay to defts. £3 8s., which was sufficient to pay & discharge all that was recoverable against pltf. upon the judgment & writ, together with the costs of the writ of execution & all other legal & incidental expenses; & that defts. wrongfully & maliciously, & without any reasonable or probable cause, procured the sheriff to arrest pltf., & detain him until he paid £7 6s. 9d., whereas £3 8s. & no more was due & owing from & recoverable against pltf. upon the said judgment:—*Held*: the declaration disclosed a good cause of action, & it was not necessary for pltf. to allege that he had obtained his discharge by order of the ct. or a judge, so as to show that the proceedings had terminated in his favour.—GILDING v. EYRE (1861), 10 C. B. N. S. 592; 31 L. J. C. P. 174; 5 L. T. 136; 7 Jur. N. S. 1105; 142 E. R. 584; *sub nom.* GELDING v. EYRE, 9 W. R. 946.

*Annotations*:—*Consd.* Parton v. Hill (1864), 4 New Rep. 103; Basébé v. Matthews (1867), L. R. 2 C. P. 684. *Apld.* Woolley v. Morgan, Cobbold & Woolley v. Morgan (1888), 4 T. L. R. 211. *Distd.* Turley v. Daw (1906), 94 L. T. 216.

151. Proceedings in foreign court.]—The principle that, in an action for maliciously & without reasonable & probable cause setting the law of this country in motion to the damage of pltf., it is essential to show that the proceeding alleged to be instituted maliciously & without reasonable & probable cause has terminated in favour of pltf., if from its nature it be capable of such a termination, applies where an action is brought for falsely & fraudulently causing a proceeding to be taken in a foreign ct. to the damage of pltf. A declaration therefore in such an action, on the face of which it appears that the foreign ct. was one of competent jurisdiction in the proceeding, & gave therein a judgment *in rem* to the damage of the now pltf., which judgment remains unreversed; & it does not appear that the now pltf., though he was not an original party to the proceeding, might not have intervened, or did not in fact intervene, & obtain a hearing therein; is bad on demurrer.

It is essential to show that the proceeding alleged to be instituted maliciously & without probable cause has terminated in favour of pltf., if, from its nature, it be capable of such a termination. The reason seems to be that if, in the proceeding complained of, the decision was against pltf. & was still unreversed, it would not be consistent with the principle on which law is administered for another ct., not being a Ct. of Appeal to hold that the decision was to come to without reasonable & probable cause (CROMPTON, J.).—CASTRIQUE v. BEHRENS (1861), 3 E. & E. 709; 30 L. J. Q. B. 163; 4 L. T. 52; 7 Jur. N. S. 1028; 1 Mar. L. C. 45; 121 E. R. 608.

*Annotations*:—*Apld.* Basébé v. Matthews (1867), L. R. 2 C. P. 684. *Refd.* Bynoe v. Bank of England, [1902] 1 K. B. 487; Turley v. Daw (1906), 94 L. T. 216. *Mentd.* Bater v. Bater, [1906] P. 209.

152. ———.]—The presumption where a foreign ct. has purported to act properly & within its jurisdiction is *omnia rite esse acta*. A pltf., to recover in an action for malicious issue of process,



must have had judgment in his favour in that process.—*TAYLOR v. FORD* (1873), 29 L. T. 392; 22 W. R. 47.

**153. Malicious arrest of ship.]**—Declaration that defts. maliciously & without reasonable or probable cause caused pltf.'s ship to be arrested for necessities supplied by H. under a warrant from a county ct. & to be detained until the proceedings in the ct. were determined & the ship released:—*Held*: it appeared by reasonable intendment that the proceedings were determined in pltf.'s favour & the declaration was therefore good.—*REDWAY v. MCANDREW* (1873), L. R. 9 Q. B. 74; 29 L. T. 421; 22 W. R. 60.

(b) *Bankruptcy Proceedings.*

See *BANKRUPTCY*, Vol. V., pp. 1000, 1001, Nos. 8165–8174.

*C. Proceedings Incapable of Terminating in Plaintiff's Favour.*

(a) *Abortive Proceedings.*

**154. Proceedings in court without jurisdiction.]**—*ATWOOD v. MONGER* (1653), Sty. 378; 82 E. R. 793.

*Annotations*:—*Refd.* *Savill v. Roberts*, (1698), 12 Mod. Rep. 208; *Jones v. Givin* (1714), Gilb. 185.

**155. —.]**—*TEMPLE v. KILLINGWORTH*, No. 84, *ante*.

**156. —.]**—*BIRD v. LINE* (1710), 1 Com. 190; 92 E. R. 1028.

**157. —.]**—*JONES v. GIVIN*, No. 25, *ante*.

**158. —.]**—*GOSLIN v. WILCOCK*, No. 86, *ante*.

**159. Defective indictment.]**—*JONES v. GIVIN*, No. 25, *ante*.

**160. —.]**—An action lies for a malicious prosecution, though pltf. be acquitted on a defect in the indictment.—*WICKS v. FENTHAM* (1791), 4 Term Rep. 247; 100 E. R. 1000.

**161. —.]**—An action lies for the malicious prosecution of a bad indictment for perjury:—*Held*: a count stating that deft. had maliciously indicted pltf. for wilful & corrupt perjury, is good after verdict, although the count did not set out any indictment.—*PIPPET v. HEARN* (1822), 5 B. & Ald. 634; 1 Dow. & Ry. K. B. 266; 106 E. R. 1322.

*Annotations*:—*Mentd.* *Draper v. Garratt* (1823), 3 Dow. & Ry. K. B. 226; *Smith v. Keating* (1848), 6 C. B. 136.

**162. Where ignoramus returned.]**—A writ of conspiracy must be against two; but an action on the case in the nature of conspiracy for a malicious prosecution will lie against one person only, although the jury do not find the bill; but the declaration must show that the prosecution is at an end.—*POILLARD v. EVANS* (1679), 2 Show. K. B. 51; 89 E. R. 786.

**163. —.]**—*JONES v. GIVIN*, No. 25, *ante*.

(b) *Ex parte Proceedings.*

**164. Exhibiting articles of peace.]**—The rule, that in an action for a malicious prosecution pltf. is bound to show a termination of the proceedings in his favour, does not apply where the proceedings, in respect of which the action is brought, are *ex parte*, & must of necessity terminate unfavourably to pltf.; as where deft. maliciously exhibits articles or demands sureties of the peace against pltf., in which cases the latter has no opportunity of controverting the oath of deft.

It is manifestly impossible to say, under those circumstances, that the existence of the proceedings, & the fact that they have not ended favourably to pltf., is evidence of reasonable & probable cause for deft.'s instituting them (*WILLIAMS, J.*).—*STEWART v. GROMETT* (1859), 7 C. B. N. S. 191, 29 L. J. C. P. 170; 6 Jur. N. S. 776; 141 E. R. 788.

*Annotations*:—*Refd.* *Gilding v. Eyre* (1861), 10 C. B. N. S. 592; *Parton v. Hill* (1864), 4 New Rep. 103.

**165. —.]**—*PARTON v. HILL*, No. 144, *ante*.

**166. Demanding sureties of peace.]**—*STEWART v. GROMETT*, No. 164, *ante*.

See, now, Summary Jurisdiction Act. 1879 (c. 49), s. 25.

SUB-SECT. 2.—WHAT AMOUNTS TO TERMINATION.

**167. General rule.]**—*BROOK v. CARPENTER*, No. 173, *post*.

**168. Entry of nolle prosequi.]**—A declaration for maliciously indicting pltf. for barratry without probable cause, stating, that he was in due manner thereupon discharged, is not maintained by evidence that he was discharged by means of a *nolle prosequi* entered by the A.-G.; but if he had pleaded not guilty, & the A.-G. had confessed the plea, that would have maintained the declaration.—*GODDARD v. SMITH* (1704), 6 Mod. Rep. 261; Bull. N. P. 14; 1 Salk. 21; 3 Salk. 245; 11 Mod. Rep. 56; Holt, K. B. 497; 87 E. R. 1007.

*Annotations*:—*Refd.* *Reynolds v. Kennedy* (1748), 1 Wils. 232. *Mentd.* *R. v. Allen* (1862), 1 B. & S. 850.

**169. Rule staying proceedings—On payment of costs.]**—In an action of malicious prosecution, a judge's order to stay proceedings in the first suit on payment of costs, & proof of such payment, is not sufficient evidence that the first suit is at an end.—*KIRK v. FRENCH* (1794), 1 Esp. 80, N. P.

*Annotation*:—*Consd.* *Bristow v. Heywood* (1815), 1 Stark. 48.

**170. —.]**—*BRISTOW v. HEYWOOD*, No. 307, *post*.

**171. —.]**—An averment that deft. had voluntarily permitted his bill to be discontinued for want of prosecution thereof, with a conclusion to the record, is not proved by showing that there had been actually a rule to discontinue, regularly taken out: the record having been averred, it must be proved. Had the allegation of the discontinuance been general, it would have been sufficiently proved by the rule to discontinue & evidence of the payment of costs.—*GADD v. BENNETT* (1818), 5 Price, 540; 146 E. R. 688.

*Annotations*:—*Consd.* *Atkinson v. Raleigh* (1842), 3 Q. B. 79. *Mentd.* *Nash v. Godmond* (1830), 2 B. & Ad. 634.

**172. —.]**—On Feb. 6 pltf. took out a rule to discontinue his action upon payment of costs, to be taxed by the master, & on Feb. 7 an appointment was given by the master, but the costs were not in fact taxed & paid until Mar. 11. On Jan. 29 preceding, deft., in that action sued out a writ against pltf., for a malicious arrest, & filed his bill on Feb. 8, & it being objected that the latter account was brought before the first was legally discontinued:—*Held*: in the negative, & the discontinuance had, upon payment of the costs, relation back to the term when the rule to discontinue was pronounced.—*BRANDT v. PEACOCK*

**153 l. Malicious arrest of ship.]**—*GRIFFITH v. WARD* (1860), 20 U. C. R. 31.—CAN.

PART IV. SECT. 1, SUB-SECT. 2.

**168 l. Entry of nolle prosequi.]**—J.—VOL. XXXIII.

*GILCHRIST v. GARDNER* (1891), 12 N. S. W. L. R. (L.) 184; 8 N. S. W. W. N. 21.—AUS.

a. *Prosecution withdrawn—On suggestion of magistrate.]*—*REED v. HALES*

(1872), 11 N. S. W. S. C. R. (L.) 317.—AUS.

b. *Informal abandonment of proceedings.]*—*REID v. MAYBEE* (1881), 31 C. P. 384.—CAN.

c. —.]—*BEEMER v. BEEMER* (1904),

*Sect. 1.—Termination of proceedings in plaintiff's favour: Sub-sect. 2. Sect. 2: Sub-sect. 1, A.]*

(1823), 1 B. & C. 649; 3 Dow. & Ry. K. B. 2; 107 E. R. 239.

*Annotation:—Refd. Drummond v. Pigou (1835), 2 Scott, 228.*

**173. —.**—Stopping the cause by rule of ct. would not, it is urged, prevent pltf. from bringing another action in another ct.; neither does a nonsuit on the merits; & yet if it were determined that when pltf. in the original cause was nonsuited, no action could be brought against him for maliciously holding to bail, such a determination would be a receipt for a safe mode of indulging in oppression or revenge. A person who had gratified his malice by immuring in a prison a fellow creature for months, by not appearing when an indignant jury were about to deliver a verdict against him, might, if this were law, avoid an action for maliciously holding to bail. All that is required in such an action is, to show that the first action is at an end, not that the cause of such action is finally decided on (BEST, C.J.).—BROOK v. CARPENTER (1825), 3 Bing. 303; 130 E. R. 530.

**174. Judgment of non pros.]—**In a declaration for a malicious arrest, the termination of the former suit was alleged thus: That defts. did not prosecute their suit, but therein wholly failed & made default, & thereupon it was considered that they should take nothing by their bill, & that their pledges should be in mercy, & pltf. go thereof without day, *prout patet per recordum*.—*Held*: the ct. cannot reject the allegation of the judgment of *non pros*, as, without that, it would not be shown how the suit was terminated.

In all actions for malicious prosecution, whether founded on a civil or criminal proceeding, you must not only show the prior proceeding ended, but must show how; if the judgment be a mere judgment of *non pros*, which is what is alleged here, the mere judgment is not enough to raise even a presumption of the want of probable cause, as a pltf. may have that judgment against him, from a mistake or from the negligence of his attorney in not proceeding with sufficient dispatch (LORD TENTERDEN, C.J.).—WEBB v. HILL (1828), 3 C. & P. 485; Mood. & M. 253; 7 L. J. O. S. K. B. 244, N. P.

*Annotations:—Refd. Drummond v. Pigou (1835), 1 Hodg. 190; Atkinson v. Raleigh (1842), 11 L. J. Q. B. 185.*

**175. Entry of stet processus—By consent of parties.]—**An action for a malicious arrest cannot be maintained where the former cause was terminated by a *stet processus* by the consent of the parties.

The general rule is, that a party cannot sue for a malicious arrest or prosecution, without showing in his declaration how the proceeding complained of was terminated (LORD TENTERDEN, C.J.).—WILKINSON v. HOWEL (1830), Mood. & M. 495, N. P.

*Annotations:—Refd. Norrish v. Richards (1835), 3 Ad. & El. 733; Steward v. Gromett (1859), 7 C. B. N. S. 191; Gilding v. Eyre (1861), 10 C. B. N. S. 592; Johnson v. Emerson (1871), L. R. 6 Exch. 329.*

**176. Conviction with right of appeal—Failure to exercise right.]—**Where, in an action on the case against a party for maliciously, & without probable cause, causing an information to be held against pltf. for trespassing on land in pursuit of game, in the day time, under Game Act, 1831 (c. 32), &

thereby causing him to be convicted & imprisoned by a justices of the peace, pltf. did not appeal against the conviction, pursuant to Game Act, 1831 (c. 32), s. 44, but suffered the imprisonment under the conviction, & the conviction was still subsisting.—*Held*: the action was not maintainable; & pltf. having been nonsuited, the ct. refused to set it aside.—MELLOR v. BADDELEY (1834), 2 Cr. & M. 675; 4 Tyr. 962; 3 Nev. & M. M. C. 137; 3 L. J. Ex. 217.

*Annotation:—Refd. Steward v. Gromett (1859), 7 C. B. N. S. 191.*

**177. Removal to superior court—Habeas corpus.]—**Proof that a pltf. had not declared in an action removed by *habeas corpus* within two terms, is not sufficient evidence of a determination of the suit to support an action for malicious arrest.

*Qu.*: whether an action for a malicious arrest can be maintained when the cause has been removed from an inferior ct. by *habeas corpus* [at instance of deft.].

*Qu.*: whether in an action for a malicious arrest, the mode in which the original action is determined must be such as in itself shows a want of reasonable cause.—NORRISH v. RICHARDS (1835), 3 Ad. & El. 733; 9 Nev. & M. K. B. 268; 1 Har. & W. 437; 4 L. J. K. B. 254; 111 E. R. 592.

*Annotations:—Refd. Steward v. Gromett (1859), 7 C. B. N. S. 191; Gilding v. Eyre (1861), 10 C. B. N. S. 592; Parton v. Hill (1864), 12 W. R. 753. Mentd. Garton v. G. W. Ry. (1858), 5 Jur. N. S. 595.*

**178. Discharge of plaintiff—Through delay of defendant.]—**An action on the case lies for maliciously & without reasonable or probable cause, arresting pltf., & detaining him until discharged by a judge's order, pending a former suit by deft. for the same cause of action, in which pltf. had been arrested & discharged out of custody by reason of deft.'s delay in declaring. To such action it is no defence that the second suit is still pending. *Semble*: the action lies, although the party arresting had a good cause of action. *Qu.*: whether it lies where deft. obtained a judge's order for the second arrest.—HEYWOOD v. COLLINGE (1838), 9 Ad. & El. 268; 1 Per. & Dav. 202; 1 Will. Woll. & H. 702; 8 L. J. Q. B. 6; 2 Jur. 1038; 112 E. R. 1213.

*Annotation:—Mentd. Gblan v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600.*

**179. Conviction without right of appeal—Summary conviction.]—**The rule that, in an action for maliciously & without reasonable or probable cause putting the law in motion to pltf.'s damage, it is essential to aver that the proceeding alleged to have been instituted maliciously, & without reasonable or probable cause, has terminated in favour of pltf., if from its nature it be capable of such a termination, applies to a case in which pltf. has been summarily convicted under a statute giving no power of appeal.

I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favour of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits. In my judgment it makes no difference that the party convicted has no power of appealing (BYLES, J.).—BASÉBÉ v.

4 O. W. R. 540; 25 C. L. T. 37; 9 O. L. R. 69.—CAN.

(1909), 18 Man. L. R. 444.—CAN.

**•. Withdrawal of information.]—**The withdrawal of an information is such a termination of a prosecution as to entitle the person against whom the information was laid to sue

for malicious prosecution.—JOHNS v. HANSEN (1900), 19 N. Z. L. R. 319.—N.Z.

**1. Statement by police authorities of intention not to proceed further.]—**



MATTHEWS (1867), L. R. 2 O. P. 684 ; 36 L. J. M. C. 93 ; 16 L. T. 417 ; 31 J. P. 391 ; 15 W. R. 839.

Annotation :—*Consd. Bynoe v. Bank of England*, [1902] 1 K. B. 467.

**180. Dismissal of charge — By magistrate—Without prejudice to either party.]**—In an action for maliciously prosecuting pltf. for an assault before a magistrate, the declaration alleged that the magistrate adjudged that pltf. was not guilty, & caused him to be discharged fully acquitted & that the said complaint & prosecution was wholly ended & determined :—*Held* : these allegations were sufficiently sustained by proof that the magistrate dismissed the charge without prejudice to either party.

The allegation, if material, was proved. The magistrate did all that he thought fit to do in the case ; so that the prosecution before him was at an end (LORD CAMPBELL, C.J.).—*AMISS v. CUNNINGTON* (1851), 16 L. T. O. S. 341 ; *sub nom. AMES v. CUNNINGHAM*, 15 J. P. Jo. 37.

**181. Conviction as to part only of indictment.]**—Pltf. was indicted under Libel Act, 1843 (c. 96), s. 4, though only committed for trial under sect. 5. He therefore brought an action for malicious prosecution :—*Held* : the conviction was no bar to an action for malicious prosecution under sect. 4 of the Act.—*BOALER v. HOLDER* (1887), 51 J. P. 277 ; 3 T. L. R. 546.

## SECT. 2.—MALICE.

### SUB-SECT. 1.—NECESSITY FOR MALICE.

#### A. Criminal Proceedings.

**182. Essential to action.]**—*KNIGHT v. JERMIN*, No. 321, *post*.

**183. —.]**—An action for maliciously procuring pltf. to be indicted of perjury, must show before what judge the oath was taken ; that it was malicious ; & that he was legally acquitted upon a good indictment.—*SHERINGTON v. WARD* (1599), Cro. Eliz. 724 ; 78 E. R. 958.

**184. —.]**—A conspiracy ought not to be only false, but *malitiose* contrived, otherwise it will not be a conspiracy, & such malice ought to be proved : for if a poor man travelling upon the highway, be robbed by another man, & he knows not the party, if afterwards he do accuse such a one of the robbery, & the party accused be found not guilty ; he shall not have an action of conspiracy against the accuser ; for although he was falsely accused, yet he was not maliciously accused ; & it might be, that he took him to be the offender, because he was like unto him who

robbed him (*per CUR.*).—*MILLER v. REIGNOLDS & BASSET* (1613), Godb. 205 ; 78 E. R. 124.

**185. —.]**—*MANKLETON v. ALLEN* (1624), Win. 73 ; 124 E. R. 62.

**186. —.]**—Upon probable proof a man might accuse another before any justice of peace of an offence ; & although his accusation be false, yet the accused shall not be punished for it. But where the accusation is malicious & false, it is otherwise ; & for such accusation he shall be punished in this ct. (HYDE, C.J.).—*TAILOR & TOWLIN'S CASE* (1628), Godb. 444 ; 78 E. R. 261. Annotation :—*Reid. R. v. Turner* (1811), 13 East, 228.

**187. —.]**—A man is not to be punished for lawful prosecution upon just ground without malice, although the practice be acquitted by law (*per CUR.*).—*ANON.* (1639), March, 26 ; 82 E. R. 396.

**188. —.]**—In an action for malicious prosecution, even if deft. proves a probable conjectural cause of action, yet if to obtain his end he prosecutes maliciously with a design to ruin pltf. or to put an indignity or a hardship or a difficulty upon him which might have been avoided by prosecuting at another time, then an action will lie.—*PRITCHARD v. PAPILLON* (1684), 10 State Tr. 319, N. P.

**189. —.]**—If a declaration for a malicious prosecution charge three persons, one of whom was the justice of the peace, with a conspiracy illegally to arrest & imprison pltf., the conspiracy may be collected by the jury from the circumstances of the case ; but if it appear that the justice of the peace was persuaded by the others that it was not a bailable offence, & that from ignorance of the law, & not from the malice of his heart, he committed pltf., he shall be acquitted.—*MURIEL v. TRACY* (1704), 6 Mod. Rep. 169 ; Holt, K. B. 151 ; 87 E. R. 925 ; *sub nom. R. v. TRACY*, 6 Mod. Rep. 30, 178.

Annotations :—*Mentd. R. v. Danell* (1704), 6 Mod. Rep. 99 ; *Linford v. Fitzroy* (1849), 13 Q. B. 240 ; *Walters v. Green*, [1899] 2 Ch. 696.

**190. —.]**—*GOLDING v. CROWLE* (1751), Say. 1 ; 96 E. R. 782.

Annotation :—*Reid. Nicholson v. Coghill* (1825), 4 B. & C. 21.

**191. —.]**—*PURCELL v. MACNAMARA*, No. 286, *post*.

**192. —.]**—*DAVIS v. HARDY*, No. 459, *post*.

**193. —.]**—Deft. in the height of altercation having jostled pltf., he went before a magistrate, & swore to an assault, on which deft. was bound over to appear at the sessions, & the grand jury threw out the bill. Deft. afterwards indicted pltf. for perjury, & he was acquitted. Pltf. then commenced an action against deft. for a malicious

*MILLS v. KELVIN & WHITE, LTD.*, [1913] S. C. 521 ; 50 Sc. L. R. 331.—SCOT.

### PART IV. SECT. 2, SUB-SECT. 1.—A.

**182 i. Essential to action.]**—*MCLEOD v. WHEATLEY* (1901), 4 W. A. L. R. 37.—AUS.

**182 ii. —.]**—Absence of reasonable & probable cause for the prosecution is not by itself sufficient to impose liability ; malice must exist.—*ST. DENIS v. SHOULTZ* (1898), 25 A. R. 131.—CAN.

**182 iii. —.]**—*CAMPBELL v. MCKAY* 1903, 38 N. S. R. 333.—CAN.

**182 iv. —.]**—To succeed in an action for malicious prosecution, pltf. must prove that deft. instituted or carried on the proceedings maliciously.—*MORTIMER v. FISHER* (1913), 23 W. I. R. 905 ; 11 D. L. R. 77 ; 4 R. 454 ; 6 Sask. L. R. 200.—

**182 v. —.]**—*KRETSUL v. PAPELLA* (Alta.), [1919] 2 W. W. R. 847.—CAN.

**182 vi. —.]**—In an action for malicious prosecution pltf. must prove that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect & improper motive, & not in furtherance of justice.—*CUNNINGHAM v. EVANS*, [1920] 1 W. W. R. 289 ; 13 Sask. L. R. 120.—CAN.

**182 vii. —.]**—A complainant who put the criminal law in motion against a person by whom he had been aggrieved, such prosecution not being malicious or groundless, should not be held civilly responsible for an injury or loss thereby sustained by the person prosecuted.—*KISHOREE LALL v. ENAETH HOSSEIN KHAN, ENAETH HOSSEIN KHAN v. KISHOREE LALL* (1869), 1 N. W. pt. 2, ed. 1873, 71.—IND.

**182 viii. —.]**—*MADHU LAL AHIR GAYAWAL v. SAHAI PANDE DHAMI*

(1900), I. L. R. 27 Calc. 532.—IND.

**182 ix. —.]**—*CRUISE v. BURKE*, [1919] 2 I. R. 528.—IR.

**182 x. —.]**—*SHEPPEARD v. FRASER* (1849), 11 Dual. (Ct. of Sess.) 446 ; 21 Sc. Jur. 123.—SCOT.

**182 xi. —.]**—*THOMSON v. ADAM* (1865), 4 Macph. (Ct. of Sess.) 29 ; 38 Sc. Jur. 25.—SCOT.

**182 xii. —.]**—*RAE v. LINTON, ETC.* (1875), 2 R. (Ct. of Sess.) 669 ; 12 Sc. L. R. 398.—SCOT.

**182 xiii. —.]**—*MACAULAY v. NORTH UIST SCHOOL BOARD* (1887), 15 R. (Ct. of Sess.) 99 ; 25 Sc. L. R. 91.—SCOT.

**182 xiv. —.]**—*M'CORMACK v. GLASGOW CORPN.*, [1910] S. C. 562.—SCOT.

**182 xv. —.]**—Acts done under the sanction of & within the limits of the authority conferred by judicial process are not actionable as injuries unless done maliciously & without reasonable & probable cause.—*HART v. COHEN* (1899), 16 S. C. 363.—S. AF.

**1482.** —.]—An appeal against an order for removal was dismissed at the borough Sessions, for which notice of appeal had been given; & an order for costs made in favour of resps. appls. not appearing pursuant to their notice. At the next sessions appls. applied to rescind the former order for costs, & to be allowed then to enter & respite this appeal to the following sessions, on the ground of *mala fides* on that part of resps. The sessions, however, after hearing all the facts, refused to grant the application:—*Held*: a *mandamus* to enter continuances & hear the appeal would not lie.—*R. v. BOLTON RECORDER* (1849), 18 L. J. M. C. 139; 13 L. T. O. S. 143; 14 Jur. 431; 13 J. P. Jo. 346.

**1483.** —.]—In an appeal against a poor rate appls. alleged in one ground of appeal that they were rated in a greater & higher proportion than twenty-five other persons, naming them. No notice of the grounds of appeal had been served on those persons. The sessions held, that for want of such notice the ground of appeal was defective. Appls. then proposed to abandon that ground of appeal & proceed on the others, but the sessions refused to permit them to do so, & dismissed the appeal. The ct. discharged a rule for a *mandamus* to compel the justices to hear the appeal.

If a document is capable of the construction which has been put upon it by a ct. of quarter sessions, this ct. will not on an application for a *mandamus* exercise a power of review. When the sessions decided in favour of resps. appls. then proposed to abandon that ground of appeal & proceed on the others, but the sessions were of opinion that it was unsafe to permit them to do so. This appears to me a matter which it was competent for the sessions to decide, & I do not feel called upon to interfere with such decision (*ERLE, J.*).—*NEWMARKET RY. CO. v. DULLINGHAM (CHURCHWARDENS, ETC.)* (1850), 4 New Sess. Cas. 87.

**1484.** —.]—Two justices made a certificate, under Highway Act, 1835 (c. 50), for the diversion of a highway. The certificate stated that the justices had on the application of the surveyor of the highways viewed the highway proposed to be diverted, etc., but did not show that the surveyors were authorised to make the application. On appeal, by a party interested, the sessions held the certificate bad on this ground, & refused to proceed further.

A rule *nisi* having been obtained for a *mandamus* to enter continuances & hear the appeal:—*Held*: the appellate jurisdiction, given to the sessions by Highway Act, 1835 (c. 50), was not limited to the points mentioned in sect. 89, but was general; & consequently the sessions had jurisdiction to entertain the question whether the certificate was good or bad; but having exercised their jurisdiction, *mandamus* did not lie, even if they were wrong.—*R. v. WORCESTERSHIRE JJ.* (1854), 3 E. & B. 477; 2 C. L. R. 1333; 23 L. J. M. C. 113; 22 L. T. O. S. 332, 18 Jur. 424; 18 J. P. Jo. 263; 118 E. R. 1221.

*Annotations*:—*Consd.* *R. v. Harvey* (1874), L. R. 10 Q. B. 46. *Refd.* *Wright v. Frant Overseers* (1863), 4 B. & S. 118. *Mentd.* *R. v. Maule* (1871), 41 L. J. M. C. 47.

**1485.** —.]—*Ex p.* *MARTIN* (1876), 40 J. P. Jo. 133.

*Annotation*:—*Consd.* *Sharp v. Wakefield* (1888), 53 J. P. 20.

**1486.** —.]—Applt. was convicted by a metropolitan police magistrate under Vagrancy Act, 1824 (c. 83), s. 4, which makes punishable as a rogue & vagabond "every person . . . using any subtle craft, means, or device, by palmistry or otherwise, to deceive & impose on any of His

Majesty's subjects." The conviction described the offence as "unlawfully using certain subtle craft, means & device," omitting the words "by palmistry or otherwise." Upon appeal to the Middlesex sessions, the proceedings commenced with an objection from applt. that the omission of the above words made the conviction bad. The justices, after hearing the point argued, retired, & on their return the assistant judge gave what purported to be the decision of sessions, quashing the conviction on the objection taken to it. Upon application for a *mandamus* to sessions to hear the appeal on the merits, it was proposed to show by affidavits from the justices that the decision given by the assistant judge was contrary to the opinion of a majority of the justices forming the ct., & that after such opinion had been communicated to him, he persisted in giving his decision as that of sessions:—*Held*: (1) the order of sessions having been duly recorded, it was too late to inquire whether it did or did not represent the opinion of the majority of the justices; & (2) the decision upon the form of the conviction was not a decision upon a preliminary matter, but a hearing & adjudication upon the merits, which upon a *mandamus* could not be reviewed.—*R. v. MIDDLESEX JJ.* (1877), 2 Q. B. D. 516; 41 J. P. 629; 25 W. R. 510; *sub nom.* *R. v. MIDDLESEX JJ., SLADE'S CASE*, 46 L. J. M. C. 225; 36 L. T. 402.

*Annotations*:—*As to* (2) *Refd.* *R. v. Essex JJ.* (1883), 49 L. T. 177; *R. v. Slade, Ex p. Saunders, R. v. London JJ., Ex p. Saunders* (1895), 64 L. J. M. C. 273; *R. v. Customs & Excise Comrs.*, [1913] 3 K. B. 483.

**1487.** —.]—Where licensing justices have refused the renewal of a license to the holder thereof in respect of a house which had been continuously licensed from a date before 1869 for the sale of beer to be consumed on the premises, the mere fact that the justices had not in writing stated the grounds for their decision as they are required to do by 32 & 33 Vict. c. 27, s. 89, does not entitle the holder of the license to have the decision reversed & the license granted.

When in such circumstances the ct. of quarter sessions has overruled the objection that the licensing justices have so failed to state their reasons & has heard the case on its merits, applt. is not entitled to a *mandamus* to the licensing justices to hear & determine the application. It has already been heard & determined.—*Ex p. GORMAN*, [1894] A. C. 23; 63 L. J. M. C. 84; 70 L. T. 46; 58 J. P. 316; 10 T. L. R. 128; 6 R. 89, H. L.; *affg.* *S. C. sub nom. Re GLAMORGANSHIRE SESSIONS, Ex p. GORMAN* (1892), 8 T. L. R. 642, C. A.

**1488.** —.]—Where quarter sessions have decided as to the sufficiency of the plan, the ct. will not interfere by *mandamus* to compel them to enrol the certificate.—*R. v. SURREY JJ.*, [1908] 1 K. B. 374; 77 L. J. K. B. 167; *sub nom.* *R. v. SURREY JJ., Ex p. LOCKE KING*, 98 L. T. 42; 72 J. P. 53; 24 T. L. R. 185; 6 L. G. R. 98, D. C.

**1489.** —]—*Reasons for decision not satisfactory.* —*R. v. LEICESTERSHIRE JJ.*, No. 1054, *ante*.

**1490.** —.]—Upon application for a *mandamus*, to enter continuances & hear an appeal, this ct., being of opinion that the sessions had rightly disposed to the case upon the facts, refused to interfere, although the reasons on which the decision rested were not satisfactory.—*R. v. WEST RIDING OF YORKSHIRE JJ., LONGWOOD v. HALIFAX* (1842), 2 Q. B. 705; 1 Gal. & Dav. 630; 11 L. J. M. C. 57; 6 J. P. 153; 6 Jur. 531; 114 E. R. 275.

*Annotations*:—*Distd.* *R. v. Brighthelmston* (1842), 3 Q. B. 342. *Refd.* *R. v. Anglessea JJ.* (1843), 12 L. J. M. C. 131; *R. v. Montgomeryshire JJ.* (1845), 14 L. J. M. C. 142. *Mentd.* *R. v. Brisby* (1849), 18 L. J. M. C. 157.



**Sect. 2.—Malice: Sub-sect. 1, A. & B. (a), (b) & (c); sub-sect. 2, A.]**

prosecution. The jury having found a verdict for pltf., on the ground that deft. was actuated by malice in indicting pltf., the ct. refused to disturb the verdict.—*HUGHES v. REEVES* (1828), 7 L. J. O. S. C. P. 81.

194. —.]—*MUSGROVE v. NEWELL*, No. 267, *post*.

195. —.]—*BROWNE v. STRADLING*, No. 55, *ante*.

196. —.]—I apprehend that, if three things concur, the person prosecuting the proceedings is liable to an action. First, if the proceeding be really without foundation; & this must be evidenced by the proceedings having finally terminated in favour of pltf., whether the proceedings be in bkpcy. or by indictment. Secondly, the proceeding must have been taken without reasonable & probable cause. Thirdly, lest persons should be deterred, by fear of the consequences, from enforcing the law with despatch upon *bonâ fide* suspicion, before a man can be made responsible, it must be shown that, in taking the proceeding, he was actuated by malice or by some bad motive. . . . In considering the question of reasonable & probable cause, it is quite right to take the opinion of the jury whether at the time when the proceeding was taken, deft. really believed it was a well-founded proceeding. . . . I apprehend that the mere fact of deft. taking the proceedings with the knowledge & belief that they could not properly be taken, would be some evidence of malice (*CLEASBY, B.*).

Malice in a legal sense means an act done without just cause or excuse (*MARTIN, B.*).—*JOHNSON v. EMERSON* (1871), L. R. 6 Exch. 329; 40 L. J. Ex. 201; 25 L. T. 337.

*Annotation:—Refd.* Quartz Hill Consolidated Gold Mining Co. v. Eyre (1883), 11 Q. B. D. 674.

197. —.]—*HICKS v. FAULKNER*, No. 18, *ante*.

198. —.]—*ABRATH v. NORTH EASTERN RY. Co.*, No. 418, *post*.

199. —.]—*VAGG v. KEMP* (1887), 4 T. L. R. 52, N. P.

200. —.]—*THARBY v. BAYFIELD & DARLING* (1887), 4 T. L. R. 62, N. P.

201. —.]—*WATSON v. SMITH*, No. 119, *ante*.

202. —.]—*QUINN v. LEATHEM*, No. 365, *post*.

203. —.]—*TREBECK v. CROUDACE*, No. 349, *post*.

204. —.]—*MEERING v. GRAHAME-WHITE AVIATION Co., LTD.*, No. 317, *post*.

**B. Civil Proceedings.**

**(a) In General.**

205. **Essential to action.**—A man shall not be punished by way of action, upon the case, or otherwise, for prosecuting a matter against another,

by a legal way, & course of justice (*COKE, C.J.*).—*ANFIELD v. FEVERHILL* (1614), 2 Bulst. 269; 1 Roll. Rep. 61; 80 E. R. 1113.

*Annotation:—Mentd.* London Corpn. v. Cox (1867), L. R. 2 H. L. 239.

206. —.]—*TRAVERSE v. DAWS* (1673), Freem. K. B. 324; 89 E. R. 240.

207. —.]—*GOSLIN v. WILCOCK*, No. 86, *ante*.

208. —.]—*SCHIEBEL v. FAIRBAIN*, No. 95, *ante*.

209. —.]—In an action for maliciously holding to bail, it is not sufficient to prove that the writ was sued out after payment of the debt, if the circumstances afford no inference of malice; but in such case evidence of actual malice must be given.—*GIBSON v. CHATERS* (1800), 2 Bos. & P. 129; 126 E. R. 1196.

*Annotations:—Consd.* Nicholson v. Coghill (1825), 6 Dow. & Ry. K. B. 12; Lewis v. Morris (1834), 4 Tyr. 907; Saxon v. Castle (1837), 6 Ad. & El. 652; Clissold v. Cratchley, [1910] 2 K. B. 244.

210. —.]—*PAGE v. WIPLE*, No. 96, *ante*.

211. —.]—*SINCLAIR v. ELDRED*, No. 306,

212. —.]—*TURNER v. TURNER*, No. 401, *post*.

213. —.]—Pltf. was arrested by the indorsee of a bill of exchange, purporting to be drawn on him, & accepted by him. In fact the acceptance was not his. This is not sufficient to support an action for a malicious arrest, defts. having acted under mistake, without malice.—*SPENCER v. JACOB* (1828), Mood. & M. 180, N. P.

214. —.]—In an action for a malicious arrest, pltf.'s counsel had closed his case, & deft.'s counsel had begun to address the jury, when the Lord Chief Justice said, he would nonsuit, on the ground that there was no evidence of malice.—*GEORGE v. RADFORD* (1828), as reported in 3 C. & P. 464, N. P.

215. —.]—*LEWIS v. MORRIS*, No. 312, *post*.

216. —.]—A. being indebted to B., B. sued out bailable process, which he delivered to the sheriff to execute, & the sheriff arrested A. whilst he was attending a trial as a witness under a subpoena:—*Held*: an action on the case was not maintainable by A. against B. for procuring A. to be illegally arrested, it not being shown that B. had any knowledge that A. was attending as a witness when he delivered the writ to the sheriff to be executed.—*STOKES v. WHITE* (1834), 1 Cr. M. & R. 223; 2 Dowl. 703; 4 Tyr. 786; 3 L. J. Ex. 321; 149 E. R. 1062.

*Annotations:—Consd.* Aga Kurhoolie Mahomed v. B. (1843), 3 Moo. Ind. App. 164. *Refd.* Lloyd v. Wood (1836) 5 Ad. & El. 228. *Mentd.* Eastern Counties Ry. v. Broor (1851), 15 Jur. 297.

217. —.]—Pltf. gave defts. a warrant to attorney to enter up judgment if certain cost should be unpaid within four days after the master should have taxed the same. Defts. procured a taxation *ex p.*; & by an incorrect representation to the master, obtained from him an *allocatur* for more costs than they were entitled to. By order

**PART IV. SECT. 2, SUB-SECT. 1.—B. (a).**

205 i. **Essential to action.**—*MITCHELL v. MCMURRICH* (1892), 22 O. R. 712.—*CAN.*

205 ii. —.]—*POLLON v. KOBZAR SCHOOL DISTRICT No. 3597 OF SASKATCHEWAN (Sask.)*, [1919] 3 W. W. R. 771.—*CAN.*

205 iii. —.]—In an action of damages for malicious prosecution:—*Held*: pursuer was not entitled to an issue of malicious prosecution as defenders were privileged in their action & there were no facts set forth from which malice & want of probable cause could be inferred.—*CHALMERS v. BARCLAY, PERKINS & Co., LTD.*, [1912]

S. C. 521.—*SCOT.*

205 iv. —.]—Where a person has set the law in motion, whether in a civil or a criminal case, if damages are claimed from him for so doing, the declaration must aver malice, & malice must be proved.—*BEUKES v. STEYN* (1877), Buch. 22.—*S. AF.*

205 v. —.]—To sustain an action for damages for having wrongfully obtained an interdict, pltf. must allege & prove that deft. obtained the interdict maliciously & without reasonable & probable cause.—*BECK v. HOLLAND & Co.* (1883), 1 S. A. R. 89.—*S. AF.*

205 vi. —.]—*CLARKE & Co. v. JOHNSON* (1883), 3 E. D. C. 248.—*S. AF.*

205 vii. —.]—*COHEN, GOLDSCHMIDT & Co. v. STANLEY* (1884), 1 S. A. R. 133.—*S. AF.*

205 viii. —.]—A person who claim damages sustained by civil proceedings must show, not merely that the proceedings were wrongful, but also that they were malicious.—*SCHREIBER PAPER*, [1906] E. D. C. 34.—*S. AF.*

205 ix. —.]—When a person institutes legal proceedings maliciously & they result in damage, an action will lie against him for damages thereby created. In such an action both malice & special damage must be alleged.—*PUFFERT v. FENNELL & AUSTIN*, [190] E. D. C. 8.—*S. AF.*

205 x. —.]—*KHAN v. DEEN* (1907), 24 S. C. 396.—*S. AF.*

of a judge, on summons, a new taxation was directed, pending which defts. arrested pltf. Afterwards the new taxation was had, & the costs were reduced. Pltf. declared in case for a wrongful arrest, & defts. pleaded that the costs had been taxed & a sum found due, for which they arrested :—*Held* : (1) pltf. might properly sue in case for a malicious arrest, & was not bound to declare for a deceitful representation to the master ; (2) judgment must be arrested, because the declaration, which set out the facts of the case, alleged only that defts. had wrongfully & injuriously delivered the writ to the sheriff, not adding maliciously.—*SAXON v. CASTLE* (1837), 6 Ad. & El. 652 ; 1 Nev. & P. K. B. 661 ; Will. Woll. & Dav. 305 ; 6 L. J. K. B. 177 ; 112 E. R. 251.

*Annotations* :—As to (2) *Consd.* *De Medina v. Grove* (1846), 10 Q. B. 152. *Refd.* *Churchill v. Siggers* (1854), 3 E. & B. 929.

218. —.]—Deft., telling a bail that his principal was likely to abscond, procured from him directions to take his affidavit of justification off the file. The directions having been given too late, deft. obtained, by means of them, an order of a judge for the surrender of the principal :—*Held* : an action did not lie against him for this proceeding, at the suit of the principal, without alleging & proving express malice.—*PORTER v. WESTON* (1839), 5 Bing. N. C. 715 ; 8 Scott, 25 ; 8 L. J. C. P. 349 ; 3 Jur. 507 ; 132 E. R. 1275.

219. —.]—Where, in a suit in equity, an order was made that G. should pay into the name of the Accountant-General, in trust in the cause, a certain sum admitted by his answer to have been the amount of the sale of a trust fund ; & the solr. for pltf. in the suit registered it under Judgments Act, 1838 (c. 110), s. 19, & G. was in consequence prevented from disposing of his lands :—*Held* : the registering of the order was not of itself a wrongful act, & no action could be maintained for it without proof of malice.—*GIBBS v. PIKE* (1842), 9 M. & W. 351 ; 1 Dowl. N. S. 409 ; 12 L. J. Ex. 257 ; 6 Jur. 465 ; 152 E. R. 149.

*Annotations* :—*Refd.* *Allen v. Flood*, [1898] A. C. 1. *Mentd.* *Kennedy v. Hilliard* (1859), 1 L. T. 78 ; *Seaman v. Nethercliff* (1876), 1 C. P. D. 540.

220. —.]—In an action for maliciously arresting pltf. for debt on a *capias*, on the ground that he was about to leave the country, the gist of the action is not that the then pltf. had no reasonable & probable ground to believe that the party arrested was about to leave the country, but it is the falsehood & fraud used to obtain the judge's order to arrest ; & unless a declaration for a malicious arrest contain allegations of falsehood & fraud in the obtaining such order, it will be bad on special demurrer. *Semble* : a declaration containing the allegation that deft. falsely procured the judge to make an order to arrest pltf. is good after verdict on a motion to arrest the judgment.—*DANIELS v. FIELDING* (1846), 16 M. & W. 200 ; 4 Dow. & L. 329 ; 16 L. J. Ex. 153 ; 8 L. T. O. S. 474 ; 11 J. P. 538 ; 153 E. R. 1159 ; *sub nom.* *GRAHAM v. SANDRINELLI*, *TALBOT v. BULKELEY*, *DANIELS v. FIELDING*, 10 Jur. 1061.

*Annotations* :—*Refd.* *Bryant v. Bobbett* (1847), 10 L. T. O. S. 208 ; *Ross v. Norman* (1850), 19 L. J. Ex. 329 ; *Seymour v. Brooks* (1867), 15 W. R. 587 ; *Johnson v. Emerson* (1871), L. R. 6 Exch. 329.

221. —.]—*DE MEDINA v. GROVE*, No. 352, *post*.

222. —.]—Pltf. was in custody under an attachment from the Ct. of Ch., for non-payment of costs to pltf. in a suit in equity, deft. in this action. After the costs were paid, the solr. of pltf. in equity, the now deft., refused to give an order to the sheriff to discharge pltf., saying, let

him go to the ct. to purge his contempt. The judge in equity discharged him on motion :—*Held* : no action was maintainable for refusing to give the order to the sheriff, & thereby prolonging pltf.'s imprisonment, except on proof of express malice.—*MOORE v. GUARDNER* (1847), 16 M. & W. 595 ; 8 L. T. O. S. 414 ; 153 E. R. 1327.

223. —.]—*CHURCHILL v. SIGGERS*, No. 527, *post*.

224. —.]—An action was brought against overseers of the poor for maliciously, & without reasonable or probable cause, obtaining a warrant for arresting pltf. for poor rates, they knowing that he was privileged from arrest pending his examination under 12 & 13 Vict. c. 106, s. 111. There was a count for false imprisonment. Pltf. owed for two poor rates before his bkpcy., & for one allowed & published after it. Pltf. obtained protection from arrest under the bkpt. law. The rates were then demanded of him, & not paid. Defts. applied to a justice. A summons was issued, calling on him to appear before the justices to show cause why he had not paid the rates. He indorsed on the summons that his goods were under the protection of the Ct. of Bkpcy. ; but did not appear to show cause. The justices issued a distress warrant against pltf. His goods having been seized under the bkpcy., a return of *nulla bona* was made to the warrant. On that return the justices issued a warrant for pltf.'s imprisonment, in default of payment, & pltf. was arrested & imprisoned under it by direction of defts., who knew all the facts :—*Held* : there was no evidence of malice, or want of reasonable or probable cause for obtaining the warrant ; & there was no ground for maintaining an action against defts. on either count.—*PHILLIPS v. NAYLOR* (1859), 4 H. & N. 565 ; 28 L. J. Ex. 225 ; 33 L. T. O. S. 167 ; 23 J. P. 660 ; 5 Jur. N. S. 966 ; 7 W. R. 504 ; 157 E. R. 962, Ex. Ch.

*Annotations* :—*Mentd.* *Re Dickens* (1862), 5 L. T. 776 ; *Ames v. Waterlow* (1869), L. R. 5 C. P. 53.

225. —.]—*SOMMERVILLE v. MIREHOUSE*, No. 359, *post*.

226. —.]—*GIBSON v. VEASEY*, No. 379, *post*.

227. —.]—*JOHNSON v. EMERSON*, No. 196, *ante*.

228. —.]—Deft., on the advice of his solr., erroneously registered as a bill of sale an inventory & receipt of pltf.'s whereby pltf. was damaged in his credit :—*Held* : to make deft. liable in an action want of reasonable & probable cause & actual malice must both be proved.—*HORSLEY v. STYLE* (1893), 69 L. T. 222 ; 58 J. P. 38 ; 9 T. L. R. 605 ; 4 R. 574, C. A.

229. —.]—*CLISSOLD v. CRATCHLEY*, No. 16, *ante*.

#### (b) Wrongful Arrest of Ship.

See ADMIRALTY, Vol. I., pp. 162, 165, Nos. 709, 710, 748–753.

#### (c) Bankruptcy Proceedings.

See BANKRUPTCY, Vol. V., pp. 1000, 1001, Nos. 8165–8174.

### SUB-SECT. 2.—WHAT CONSTITUTES MALICE.

#### A. General Rules.

230. Acting without just cause or excuse.]—*JONES v. GIVIN*, No. 25, *ante*.

231. —.]—*COHEN v. MORGAN*, No. 30, *ante*.

232. —.]—Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse (*BAYLEY, J.*).—*BROMAGE*



**Sect. 2.—Malice: Sub-sect. 2, A. & B.]**

*v. PROSSER* (1825), 4 B. & C. 247; 1 C. & P. 673; 6 Dow. & Ry. K. B. 298; 3 L. J. O. S. K. B. 203; 107 E. R. 1051.

*Annotations:—Reid. Mitchell v. Jenkins* (1833), 5 B. & Ad. 588; *Wason v. Walter* (1868), L. R. 4 Q. B. 73; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Clark v. Molyneux* (1877), 3 Q. B. D. 237; *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741; *Hicks v. Faulkner* (1882), 46 L. T. 127; *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598; *Nevill v. Fine Arts & General Insce.*, [1895] 2 Q. B. 156; *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leatham*, [1901] A. C. 495. *Mentd. Blackburn v. Blackburn* (1827), 1 Moo. & P. 33; *Padmore v. Lawrence* (1840), 4 J. P. 42; *Coxhead v. Richards* (1846), 2 C. B. 569; *Henderson v. Broomhead* (1859), 7 W. R. 492; *R. v. Munslow*, [1895] 1 Q. B. 758; *London Assocn. for Protection of Trade v. Greenlands*, [1916] 2 A. C. 15.

**233. ———.]—JOHNSON v. EMERSON**, No. 196, *ante*.

**234. ———.]—QUINN v. LEATHEM**, No. 365, *post*.

**235. Any improper or indirect motive—Not spite or hatred only.]—**(1) In an action for a malicious arrest, malice is a question of fact for the jury, who are at liberty, but not bound, to infer it from the want of probable cause; & where a creditor had caused his debtor to be arrested for £45, knowing that there was a set-off to the amount of £16 5s., but instructed the bailiff who made the arrest, to allow the set-off in case the debtor would settle the debt; & the judge, upon the proof of these facts, was of opinion that there was no probable cause for the arrest, & that there was malice in law, inasmuch as the act of causing the party to be arrested for a larger sum than he owed was wrongful, & therefore told the jury that the only question for them was the amount of damages; the ct. granted a new trial, on the ground that it ought to have been left to the jury to find whether there was malice or not.

[In an action for malicious arrest] malice is a question of fact which ought to be left to the jury (TAUNTON, J.).

I have always understood the question of reasonable & probable cause on the facts found to be a question for the opinion of the ct., & malice to be altogether a question for the jury (DENMAN, C.J.).

(2) I have always understood, since the case of *Johnstone v. Sutton*, No. 2, *ante*, that no point of law was more clearly settled than that in every action for a malicious prosecution or arrest, pltf. must prove what is averred in the declaration, viz. that the prosecution or arrest was malicious & without reasonable or probable cause; if there be reasonable or probable cause, no malice, however distinctly proved, will make deft. liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. . . . the term malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, & as denoting that the party is actuated by improper & indirect motives (PARKE, J.).—*MITCHELL v. JENKINS* (1833), 5 B. & Ad. 588; 2 Nev. & M. K. B. 301; 3 L. J. K. B. 35; 110 E. R. 908.

*Annotations:—As to* (2) *Reid. Porter v. Weston* (1839), 8 Scott, 25; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244. *Generally, Mentd. Padmore v. Lawrence* (1840), 4 J. P. 42; *Hicks v. Faulkner* (1882), 46 L. T. 127.

**236. ———.]—**In an action against an attorney for a malicious arrest, the jury must be satisfied of the absence of any just demand on the part of his client, & also that the attorney knew that there was not any such demand; & applying the law for some purpose of his own, or for some other ill purpose which the law calls malicious, committed the injury complained of by pltf. In such a case it is not necessary to prove malice in the ordinary sense of the word; any improper or sinister motive will be sufficient.—*STOCKLEY v. HORNIDGE* (1837), 8 C. & P. 11, N. P.

**237. ———.]—**E. having obtained a judgment against F. & T., he, by H., his attorney, sued out concurrent writs of *ca. sa.* into London & Surrey. F. was taken on the former writ, & on giving to H. a promissory note jointly with B. as his surety, was discharged. No notice of this was given to the sheriff of Surrey, & he took T. on the other writ of *ca. sa.* In an action against H. for maliciously omitting to give notice to the sheriff of Surrey, that the judgment had been satisfied by the arrangement with F.:—*Held*: (1) to support this action, the jury must be satisfied that there was malice; but to constitute malice it was not necessary that H. should have acted from any spite or ill will, or the like, but that, if he acted as he did from any indirect motive, such as to get the debt for his client from T., or to get more costs for himself, that would be malice for this purpose; (2) the mere fact of H. not giving notice to the sheriff of Surrey that the judgment had been satisfied was one from which alone the jury might infer malice; but if they thought that H. had been defrauded when he received the promissory note, or had taken it on a representation that the parties were solvent when they were not so, this would go to negative the malice.—*TEBBUTT v. HOLT* (1844), 1 Car. & Kir. 280, N. P.

*Annotation:—Generally, Mentd. Clissold v. Cratchley*, [1910] 2 K. B. 244.

**238. ———.]—QUINN v. LEATHEM**, No. 365, *post*.

**239. ———.]—**To satisfy the term maliciously, as used in this declaration, it is not necessary that there should have been any spite or revenge in deft. towards pltf. If from any indirect motive as to extort money to which he was not fairly entitled, deft. acted as is here complained of, that will be sufficient (*WATSON, B.*).—*CLARK v. MANSFORD* (1858), 1 F. & F. 362.

**240. ———.]—HICKS v. FAULKNER**, No. 18, *ante*.

**241. ———.]—HADDRICK v. HESLOP**, No. 409, *post*.

**242. ———.]—**Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts in that way; & it appears to me in the present case that the prosecution of a person for the purpose of frightening others, & thereby deterring them from committing depredations upon the property of the co., is not a motive of such a direct character as to afford a legitimate foundation for a criminal prosecution. I therefore think that, as against

**PART IV. SECT. 2, SUB-SECT. 2.—A.**

**241 i. Any improper or indirect motive.]—**Any motive for a prosecution, other than that of wishing to bring a guilty party to justice, is evidence of malice.—*ALWARD v. SHARP* (1868), 1 Han. 286.—CAN.

**241 ii. ———.]—MORRISON v. WILSON** (1913), 26 W. L. R. 317; 14 D. L. R. 815; *revd.*, 28 W. L. R. 202; 16

D. L. R. 852.—CAN.

**241 iii. ———.]—PRIEST v. MCGUIRE** (1915), 43 N. B. R. 469.—CAN.

**241 iv. ———.]—**In an action for malicious prosecution pltf. must prove that the proceedings were initiated in a malicious spirit, that is, from an indirect or improper motive, & not in furtherance of justice.—*SMITH v. RURAL MUNICIPALITY OF LACADENA* No. 228 & *MCTAGGART*, [1924] 1

W. W. R. 36; 18 Sask. L. R. 23.—CAN.

**241 v. ———.]—**Malice, in an action for malicious prosecution, is not to be considered in the sense of spite or hatred against an individual but of *malus animus*, & as denoting that the party is actuated by improper & indirect motives.—*BHIM SEN v. SITA RAM* (1902), 1 L. R. 24 All. 363.—IND.

deft. there was abundant evidence of malice to support the action (ALDERSON, B.).

I think that the fact of deft. prosecuting pltf., not for the purpose of punishing him, but to make him an example to others, is ample evidence of malice (MARTIN, B.).—**STEVENS v. MIDLAND COUNTIES RY. CO.** (1854), 10 Exch. 352; 2 C. L. R. 1300; 23 L. J. Ex. 328; 23 L. T. O. S. 70; 18 J. P. 713; 18 Jur. 932; 156 E. R. 480.

*Annotations* :—**Refd.** Bank of New South Wales v. Owston, (1879), 4 App. Cas. 270; Edwards v. Mid. Ry. (1880), 6 Q. B. D. 287; Kent v. Courage, Croft v. Same (1890), 55 J. P. 264; Cornford v. Carlton Bank, [1899] 1 Q. B. 392. **Mentd.** Whitfield v. S. E. Ry. (1858), 27 L. J. Q. B. 229; Pratt v. British Medical Assocn., [1919] 1 K. B. 244.

**243.** —.]—**SHUFFLEBOTTOM v. ALLDAY**, No. 268, *post*.

**244.** —.]—**MELIA v. NEATE**, No. 293, *post*.

**245.** —.]—**ABRATH v. NORTH EASTERN RY. CO.**, No. 418, *post*.

**246.** —.]—Malice, in its widest & vaguest sense, has been said to mean any wrong or indirect motive; & malice can be proved, either by showing what the motive was & that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor. . . . There may be such plain want of reasonable & probable cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made, & in that case want of reasonable & probable cause is evidence of malice. But I am not prepared to assent to the proposition that, where there is want of reasonable & probable cause, the jury may always find malice, no matter what the circumstances may be (CAVE, J.).—**BROWN v. HAWKES**, [1891] 2 Q. B. 718; 60 L. J. Q. B. 332, D. C.; *affd.*, [1891] 2 Q. B. 725, C. A.

*Annotations* :—**Refd.** Carder v. Peninsular & Oriental Steam Navigation Co. (1892), 8 T. L. R. 335; Cornford v. Carlton Bank (1899), 81 L. T. 415; Bradshaw v. Waterlow, [1915] 3 K. B. 527.

**247.** —.]—**MEERING v. GRAHAME-WHITE AVIATION CO., LTD.**, No. 317, *post*.

**Presumption of malice.**—See Sub-sect. 4, *post*.

#### B. Particular Instances.

**248. Unreasonable delay in laying charge.**—**TAILOR & TOWLIN'S CASE** (1628), Godb. 444; 78 E. R. 261.

*Annotation* :—**Refd.** R. v. Turner (1810), 13 East, 228.

**249. Advertising indictment.**—In action for a malicious prosecution, an advertisement put in the papers by deft., pending the indictment, is evidence, though an information had been granted for it.—**CHAMBERS v. ROBINSON** (1726), 2 Stra. 691; 93 E. R. 787.

*Annotations* :—**Foldd.** Wicks v. Fentham (1791), 4 Term Rep. 247. **Mentd.** Beardmore v. Carrington (1764), 2 Wils. 244.

**250. Attempting justification of charge—In gross ignorance of law.**—A. takes a bank note in the course of his business, which he pays to B., the note is afterwards stopped at the bank as a forged note, & is brought by an inspector to A. who immediately pays to B. the amount of the note, & refuses to give it up to the inspector, insisting on his right to retain it, in order to recover the amount from the person from whom he received it. The inspector, in the absence of all circumstances of suspicion, is not justified in charging A. before a magistrate with feloniously having the note in his possession, knowing it to be forged for the purpose of compelling him to give up the note. By

possession, under Bank Notes Forgery Act, 1805 (c. 99), is meant the original possession of a note acquired in an illegal mode, & not a subsequent possession like the above, where the original possession was legal.

The possession which is made felonious by the statute, is to be understood of an original possession of a note obtained by unlawful means. This I consider to be so clear that to press a commitment, under circumstances like the present, is such a *crassa ignorantia* that it amounts to malice (LORD ELLENBOROUGH, J.).—**BROOKS v. WARWICK** (1818), 2 Stark, 389, N. P.

**251. Refusal to sign authority of discharge—After debt settled—Defendant in custody under ca. sa.**—Pltf. is bound to accept from deft. in custody under a *ca. sa.* the debt & costs, when tendered in satisfaction of his debt, & to sign an authority to the sheriff to discharge deft. out of custody. An action on the case will lie against pltf. for having maliciously refused so to do; & the refusal to sign the discharge is sufficient *prima facie* evidence of malice in the absence of circumstances, to rebut the presumption.—**CROZER v. PILLING** (1825), 4 B. & C. 26; 6 Dow. & Ry. K. B. 129; 107 E. R. 969; *sub nom.* CROYER v. PILLING, 3 L. J. O. S. K. B. 131.

*Annotations* :—**Consd.** Drury v. Hounsfield (1840), 11 Ad. & El. 100. **Apld.** Phillips v. General Omnibus Co. (1880), 50 L. J. Q. B. 112. **Refd.** Lewis v. Morris (1834), 2 Cr. & M. 712; Saxon v. Castle (1837), 6 Ad. & El. 652; Hounsfield v. Drury (1839), 11 Ad. & El. 98; De Medina v. Grove (1846), 10 Q. B. 152; Moore v. Gardner (1847), 16 M. & W. 595; Hemming v. Hale (1859), 7 C. B. N. S. 487; Cubitt v. Gamble (1919), 35 T. L. R. 223. **Mentd.** Savory v. Chapman (1840), 11 Ad. & El. 829; Lee v. Dangar, Grant, [1892], 1 Q. B. 231.

**252. Holding to bail—Inferior court.**—**SMITH v. CATTLE** (1768), 2 Wils. 376; 95 E. R. 870.

**253.** — **Ballable sum not due.**—**JACKSON v. BURLIGH** (1799), 3 Esp. 34, N. P.

**254.** — **Person liable in representative capacity only.**—**FLETCHER v. WEBB** (1822), 11 Price, 381; 147 E. R. 506.

**255. Admitted set-off not taken into account.**—Where there are mutual dealings between two parties, & items known to be due on each side of the account, an arrest for the amount of one side of the account, without deducting what is due on the other is malicious, & without probable cause.—**AUSTIN v. DEBNAM** (1824), 3 B. & C. 139; 4 Dow. & Ry. K. B. 653; 2 L. J. O. S. K. B. 207; 107 E. R. 686.

*Annotation* :—**Refd.** Churchill v. Siggers (1854), 18 Jur. 773.

**256. Improper conduct towards accused—After apprehension.**—In an action by A. for the malicious prosecution by C. of an indictment against A. & B., evidence of the misconduct of C. towards B. after his apprehension, tending to show the bad motives of C. is admissible.—**CADDY v. BARLOW** (1827), 1 Man. & Ry. K. B. 275; 1 Man. & Ry. M. C. 84; *sub nom.* TADDY v. BARLOW, 6 L. J. O. S. M. C. 19.

**257. Arrest for amount in excess of sum due.**—**MITCHELL v. JENKINS**, No. 235, *ante*.

**258. Knowingly causing arrest of privileged person.**—(1) If A. wilfully & maliciously cause B., an attorney in practice, to be arrested on mesne process, A. knowing him to be an attorney, an action on the case lies against A. for causing this arrest; & the fact of A. having a good cause of action against B. for a large sum, will be no ground of defence, & the attorney of A. may be joined in the action if, besides acting as attorney, he co-operated with A. in causing the arrest.

(2) In an action for a malicious arrest, the

#### PART IV. SECT. 2, SUB-SECT. 2.—B.

**257 l. Arrest for amount in excess of**

*sum due.*—**Held**: the jury might with propriety infer malice from the fact of deft. having recovered a sum less than

attached for, unless satisfactorily accounted for.—**PALK v. K** (1853), 11 U. C. R. 350.—**CAN.**



**Sect. 2.—Malice: Sub-sect. 2, B.; sub-sect. 3.]**

question is, whether the original pltf. had a probable cause of action for the amount for which he held the party to bail; & not whether he had probable cause of action in the particular form of action brought; thus where A. had a good cause of action on a covenant for a sum of £1,150 against B. & C. separately, but not jointly, & he sued B. & C. jointly, & arrested B. in that action, for that amount, it was held that an action for a malicious arrest would not lie by B. against A.

(3) In considering whether there was probable cause for an arrest, the judge will not take expressions of general malice into his consideration, as tending to show a want of probable cause.

(4) If in a declaration for a malicious arrest it be averred that pltf. was arrested, that allegation is satisfied by proof of a detainer.

(5) It is admitted that pltf. was an attorney & as such he is privileged from arrest; & if defts. caused him to be arrested, knowing him to be a privileged person, that knowledge is a circumstance from which you may infer that they did it maliciously (*LITTLEDALE, J.*).—*WHALLEY v. PEPPER* (1836), 7 C. & P. 506.

*Annotation:—As to (1) Reid. The Walter D. Wallet, [1893] P. 202.*

**259. Refusal to accept tender of debt & costs.]—**In an action for maliciously & without reasonable cause refusing to accept a tender of debt & costs, for which pltf. was in execution at deft.'s suit, deft. may give evidence of probable cause, under the plea of not guilty.—*HOUNSFIELD v. DRURY* (1839), 11 Ad. & El. 98; 3 Per. & Dav. 127; 9 L. J. Q. B. 33; 4 Jur. 24; 113 E. R. 351.

*Annotations:—Reid. De Medina v. Grove* (1847), 11 Jur. 145; *Moore v. Gardner* (1847), 16 M. & W. 595.

**260. Satisfaction of judgment debt—Failure to notify sheriff.]—***TEBBUTT v. HOLT* (1844), 1 Car. & Kir. 280, N. P.

*Annotation:—Reid. Clissold v. Cratchley, [1910] 2 K. B. 244.*

**261. Attempt to set up colourable chargeability.]—**In an action for maliciously, & without reasonable or probable cause, charging pltf. with & causing him to be apprehended on a warrant for unlawfully running away & leaving his wife & children chargeable to a parish, it appeared that pltf. had left his wife & children with her father, & went, as he alleged, in search of work. Deft., the brother of pltf.'s wife, at her request & with the consent of the father, who was unable to support his daughter, applied to the magistrate's clerk, & by his advice a warrant was issued, & pltf. apprehended, by deft.'s instructions. Before the hearing deft. took pltf.'s wife to the overseer & obtained some relief, & she was taken to the workhouse; but there was some evidence that this was a colourable chargeability, & was done with a view to support the information. The justices dismissed the case, & thereupon the action was brought:—*Held*: the judge was right in telling the jury that there was no reasonable or probable cause for the arrest, & although deft. acted under a mistake, the jury might infer malice from his subsequently endeavouring to set up a colourable chargeability.—*HEATH v. HEAPE* (1856), 1 H. & N. 478; 26

L. J. M. C. 49; 20 J. P. 760; 5 W. R. 23; 156 E. R. 1289.

*Annotation:—Mentd. Sweeney v. Spooner* (1863), 3 B. & S. 329.

**262. Prosecution not for punishment—Plaintiff to be held up as example.]—***STEVENS v. MIDLAND COUNTIES RY. CO.*, No. 242, *ante*.

**263. Arrest for debt—After bill for debt accepted.]—**It will be evidence of malice in an arrest on mesne process that pltf. has taken a bill for the debt, & it will also negative reasonable & probable cause; & though the party has been discharged on the condition of bringing no action for trespass, that does not preclude an action on the case.—*MACFARLANE v. ELLIS* (1858), 1 F. & F. 288.

**264. Proceedings merely coercive—To secure speedier payment.]—***MELIA v. NEATE*, No. 293, *post*.

**265. Laying charge recklessly.]—***STEWART v. BEAUMONT*, No. 34, *ante*.

**266. —.]—***JOHNSON v. EMERSON*, No. 196, *ante*.

**267. Perseverance in prosecution—After representation as to probable innocence of accused.]—**A. having reasonable & probable cause for supposing that B. made an assault on him with intent to rob him, went for a constable, who, on coming to the place, recognised B., & assured A. that he was a respectable man, & that he would be answerable for his coming forward to meet the charge. A., nevertheless, persisted in giving B. into custody, & on the following day preferred the same charge against him before a justice, who dismissed it. In an action by B. against A. for maliciously & without probable cause making such charge before the justice, the judge stated to the jury, that pltf. had reasonable & probable cause for suspicion in the first instance, but that he thought that, on the explanation given by the constable, that reasonable & probable cause ceased; & that if the jury were of opinion that deft. was satisfied with such explanation, but persevered in the charge from obstinacy or wounded pride, they should find for the pltf.:—*Held*: that this direction was wrong; for as the facts remained unaltered, the representation of the constable could not take away the reasonable & probable cause afforded by those facts.

To support an action of this kind, there must be both malice in deft., & a want of reasonable & probable cause. It is admitted that even if there be excessive malice, if it is combined with probable cause, the action cannot be supported. So also, it is admitted that a total want of probable cause is sufficient evidence from which the jury may infer malice, inasmuch as in such case the party could have no ground for proceeding in the charge but a malicious one. But, on the other hand, from any degree of malice you cannot infer a want of probable cause; that stands upon a class of facts to be looked at by themselves (*LORD ABINGER, C.B.*).

With respect to the question of malice, if deft. went on, though believing that there was no reasonable or probable cause, I should doubt whether it might not properly go to the jury whether his conduct was not malicious. If he was

**2621. Prosecution not for punishment—Plaintiff to be held up as example.]—**A desire on the part of a co. to make an example of one of their agents by having him arrested is an improper motive for such arrest, & when coupled with an utter want of reasonable & proper cause, justifies an inference of malice.—*FYNE v. AFRICAN REALTY TRUST, LTD.*, [1906] E. D. C. 248.—S. AF.

**g. — To establish civil right.]—**The instituting of criminal proceedings for the purpose of establishing a civil right amounts to the malice which must be proven in an action for malicious prosecution.—*IBBOTSON v. BERKLEY (B.C.)*, [1918] 3 W. W. R. 1018.—CAN.

**h. —.]—***HURST v. ELLIOTT (Alta.)*, [1919] 2 W. W. R. 849.—CAN.

**k. — As means of collecting debt.]**

—In an action for malicious prosecution proof that deft. endeavoured to use the criminal cts. as a means for collecting a debt, establishes such malice as the law requires pltf. to prove.—*OLDS v. PARIS (B.C.)*, [1918] 2 W. W. R. 682.—CAN.

**l. —.]—***MARKEL v. HINCK, BOKOVSKY v. HINCK, BOKOVSKY v. HINCK*, [1920] 3 W. W. R. 191.—CAN.

**m. —.]—***FRIEDMAN v.*

in fact satisfied with the representation, the jury perhaps might fairly infer that he could only be actuated in going on by malice (ALDERSON, B.).—MUSGROVE v. NEWELL (1836), 1 M. & W. 582; 2 Gale, 91; Tyr. & Gr. 957; 5 L. J. Ex. 227; 150 E. R. 567.

*Annotations*.—*Reid*. Panton v. Williams (1841), 2 Q. B. 169; Michell v. Williams (1843), 12 L. J. Ex. 193; Hadrick v. Heslop & Raine (1848), 17 L. J. Q. B. 313.

**268.** ———.]—Deft. having been robbed gave information to a policeman, & on the following morning pltf. was arrested, when a large sum of money was found on him, & deft. said, on being shown the man, That is the man with a coat on his arm, although told that a person who had seen the parties who committed the robbery said pltf. was not the man. Pltf. was taken & kept in the lock-up; when brought before the magistrate, the magistrate not being able to attend to the matter till the evening, it was postponed, when the deft. said he could not wait, & got the matter remanded till the following Monday, when no prosecutor appearing he was discharged. Subsequently deft. went before another magistrate & took out a warrant, & some correspondence took place between pltf.'s solr., who always declared himself ready to produce pltf. & meet the charge, deft. & the officer who held the warrant, the latter cautioning deft. not to arrest pltf., as he would make himself responsible. Pltf. surrendered, but no prosecutor appeared, & he was discharged. There was also evidence that deft. had urged pltf. to stop the action, each party paying his own costs, & stated that he deft. would then withdraw from the prosecution:—*Held*: the remand till Monday was a judicial act of the magistrate, & therefore there was no false imprisonment. The mere statement identifying a person in custody was a confidential communication & not slander; but on the above facts there was an absence of reasonable & probable cause for taking out the warrant, & ample evidence of malice.—SHUFFLEBOTTOM v. ALLDAY (1857), 28 L. T. O. S. 292; 21 J. P. 263; 5 W. R. 315.

**269.** ——— After positive knowledge of innocence of accused.]—FITZJOHN v. MACKINDER, No. 58, ante.

**270.** Detective deputed to charge accused with felony—Acting only on hearsay.]—The evidence of a want of reasonable & probable cause, is, of itself, if believed by the jury, evidence of malice to maintain the action; & the deputing by defts., the power to charge a person with a felony, to a detective officer, who, without any knowledge of his own, but acting on information, swears positively that such person has been guilty of a felony, is, in the absence of evidence by defts., of reasonable & probable cause for instituting the proceedings, evidence of malice entitling pltf. to maintain the action (KELLY, C.B.).

Pltf. must give some evidence of the want of reasonable & probable cause, & the mere discontinuance of the proceedings is not sufficient evidence of that. But pltf. here, having negatived, as far as he could, the evidence of reasonable & probable cause, it was for defts. to make it out, if there was any (CLEASLY, B.).—HENDERSON v. MIDLAND RY. CO. (1871), 24 L. T. 881; 20 W. R. 23.

*Annotation*.—*Mentd*. Cornford v. Carlton Bank, [1899] 1 Q. B. 392.

KRYSAK (Sask.) (1921), 36 Can. Crim. Cas. 253.—CAN.

*n.* ——— To enforce claim for services.]—Where a person causes the arrest of another to enforce a supposed claim to his services, it is no excuse in an action for damages for malicious

prosecution & wrongful arrest to state that he thought he had a claim to such services.—STUART v. NKALUNO (1919), 40 N. L. R. 55.—S. AF.

*o.* Obtaining judgment by default—After payment of sum due.]—Deft. co. sued pltf. for a small sum. He

**271.** Failure to withdraw prosecution—On proof of mistaken identity—Until accused twice remanded.]—HARRISON v. NATIONAL PROVINCIAL BANK OF ENGLAND, No. 395, post.

**272.** Evidence of identity of accused—Favourable evidence produced—Unfavourable evidence ignored.]—HARRISON v. NATIONAL PROVINCIAL BANK OF ENGLAND, No. 395, post.

**273.** Prosecution to prevent action for wrongful dismissal.]—S., a bank clerk, had initialed the paying-in book of Y., a customer of defts., for the receipt of a sum of money, as to which no entry was made in the bank books either by S. or any other clerk. This was discovered owing to S.'s having called the attention of the bank manager to the fact that Y.'s account was overdrawn. S. admitted having received the money, & said that he recollected having put it with a slip relating to it on the desk of a fellow clerk. The directors of the bank having considered the facts, ordered that the managing directors should arrange the matter. S. offered to pay the money on condition that he was removed to another branch of defts.' bank, & that a proper inquiry be instituted as to the conduct of business at that at which he had been employed. Finding that he was dismissed & accused of dishonesty, S. brought an action of wrongful dismissal against defts., who then immediately instituted criminal proceedings against him. They withdrew from such prosecution on seeing a written confession made by S.'s fellow clerk that he had stolen the money. In an action of malicious prosecution brought by S. the judge held that the bankers, not having taken any proper steps to ascertain how far the fact of one of their clerks having initialed a customer's paying-in book was proof of his having had the money, so paid in, in his possession & as to the allegation made by S. that he had placed the amount in question on the desk of his fellow clerk, showed an absence of reasonable & probable cause for their prosecuting S., & the jury found that they had been actuated by an indirect motive. On a motion for a new trial:—*Held*: the ruling as to the absence of reasonable & probable cause was right, & the jury were justified in finding malice in defts., as there was evidence from which it might reasonably be inferred that the criminal prosecution had been instituted by them with a view to stop pltf.'s action against them for wrongful dismissal.—SPRINGETT v. LONDON & SOUTH WESTERN BANK (1885), 1 T. L. R. 611, D. C.

**274.** Application for separate search warrants—Against two persons for same offence.]—In an action for malicious prosecution, it is no evidence of malice on the part of deft. that, in applying for a search warrant to issue against pltf., deft. asked that a warrant at the same time might issue against another person for the same offence.—UTTING v. BERNEY (1888), 52 J. P. 806; 5 T. L. R. 39, D. C.

#### SUB-SECT. 3.—SUFFICIENCY OF MALICE PER SE.

**275.** Malice & absence of reasonable & probable cause—Both must be proved.]—INCLEDON v. BERRY (1805), 1 Camp. 203, n., N. P.

*Annotation*.—*Reid*. Willans v. Taylor (1829), 3 Moo. & P. 350.

paid the amount to the co. before the date fixed for the hearing, but the co. applied for & obtained judgment by default, & the fact was published in the newspapers:—*Held*: no action lay.—CROSS v. COMMERCIAL AGENCY, LTD. (1899), 18 N. Z. L. R. 153.—N.Z.



*Sect. 2.—Malice: Sub-sects. 3 & 4, A. & B.; sub-sect. 5.]*

276. ———.] — WILLANS *v.* TAYLOR, No. 535, *post.*

277. ———.] — GOLDING *v.* CROWLE (1751), Say. 1; 96 E. R. 782.

*Annotation:—Refd. Nicholson v. Coghill (1825), 4 B. & C. 21.*

278. ———.] — FARMER *v.* DARLING (1766), 4 Burr. 1971; 98 E. R. 27.

279. ———.] — MITCHELL *v.* JENKINS, No. 235, *ante.*

280. ———.] — MUSGROVE *v.* NEWELL, No. 267, *ante.*

281. ———.] — TURNER *v.* AMBLER, No. 444, *post.*

282. ———.] — HICKS *v.* FAULKNER, No. 18, *ante.*

283. ———.] — Not sufficient without proof of special damage.] — QUARTZ HILL GOLD MINING CO. *v.* EYRE, No. 21, *ante.*

#### SUB-SECT. 4.—PRESUMPTION OF MALICE.

##### A. Absence of Reasonable and Probable Cause.

284. Whether malice presumed.] — PARROTT *v.* FISHWICK (1772), 9 East, 362, n.; 103 E. R. 611. *Annotation:—Refd. Willans v. Taylor (1829), 3 Moo. & P. 350.*

285. ———.] — JOHNSTONE *v.* SUTTON, No. 2, *ante.*

286. ———.] — It lies on pltf. in an action for malicious prosecution to give evidence of malice in deft., either express, or to be collected from circumstances showing plainly the want of probable cause; & the malice is not to be implied from the mere proof of pltf.'s acquittal for want of prosecutor's appearing when called.

An action for a malicious prosecution cannot from the very nature of it be maintained without proof of malice, either express or implied; & malice may be implied from the want of probable cause: but that must be shown by pltf. (LE BLANC, J.). — PURCELL *v.* MACNAMARA (1808), 9 East, 361; 103 E. R. 610; *previous proceedings*, 1 Camp. 199, N. P.

*Annotations:—Refd. Taylor v. Willans (1831), 1 L. J. K. B. 17; Henderson v. Mid. Ry. (1871), 24 L. T. 881.*

287. ———.] — BURLEY *v.* BETHUNE, No. 373, *post.*

288. ———.] — TURNER *v.* TURNER, No. 401, *post.*

289. ———.] — MITCHELL *v.* JENKINS, No. 235, *ante.*

290. ———.] — MUSGROVE *v.* NEWELL, No. 267, *ante.*

#### PART IV. SECT. 2, SUB-SECT. 4.—A.

284 i. Whether malice presumed.] — Malice may be inferred from the want of probable cause. — BURGOYNE *v.* MOFFATT (1861), 5 All. 13.—CAN.

284 ii. ———.] — In an action for malicious prosecution the want of reasonable & probable cause does not necessarily establish that malice which is requisite to maintain the action. — KEAN (1882), 1 O. R. 193.—CAN.

i. ———.] — WOOD *v.* NEWBY, 21 W. L. R. 438; 5 D. L. R. 486; 4 Alta. L. R. 333.—CAN.

284 iv. ———.] — Where deft. lays a charge which he believes to be without foundation, he must be deemed to be

MAN (1812), 20 W. L. R. 212; 1 D. L. R. 312; 5 Sask. L. R. 85; 1

W. W. R. 861.—CAN.

284 v. ———.] — COLLINS *v.* GOULD (1913), 23 W. L. R. 288; 3 W. W. R. 811; 6 Alta. L. R. 132; 9 D. L. R. 665.—CAN.

284 vi. ———.] — While the absence of reasonable & probable cause is some evidence from which the malice necessary to support an action for malicious prosecution may be inferred, yet the two conditions are distinct & different. — SCOTT *v.* HARRIS, [1918] 3 W. W. R. 1028; 44 D. L. R. 737; 14 Alta. L. R. 143.—CAN.

284 vii. ———.] — The ct. found a want of reasonable & probable cause & that the institution of the prosecution was so unreasonable as to lead to the inference of malice. — FOSTY *v.* PELAZOK, [1920] 1 W. W. R. 501; 30 Man. L. R. 377.—CAN.

284 viii. ———.] — Where a prosecution

291. ———.] — TURNER *v.* AMBLER, No. 444, *post.*

292. ———.] — There is a material distinction, as to liability for malicious prosecution, between the institution of the prosecution & its continuance, after it has been already instituted, without authority, by an agent; & the absence of reasonable & probable cause, which might be evidence of malice in the one case, will not be so in the other.

Where the party put in possession under a bill of sale had issued a summons against the assignor for feloniously stealing some of the chattels assigned, & the assignees attended the hearing & allowed the case to be opened on their behalf as prosecutors:—*Held*: the absence of reasonable & probable cause would not be evidence of malice as against them. *Qu.*: whether there was such an entire absence of reasonable & probable cause as would in any case be evidence of malice.— WESTON *v.* BEEMAN (1857), 27 L. J. Ex. 57; 22 J. P. 115.

*Annotation:—Refd. Harris v. Dignum (1859), 29 L. J. Ex. 23.*

293. ———.] — In an action against a builder, his attorney, & his attorney's clerk, for maliciously & without reasonable or probable cause procuring an order for the arrest of the now pltf. in an action of debt, it appeared that pltf., a Roman Catholic priest, had entered into a contract with the builder for the erection of a church, the contract containing the usual condition for payment only on architect's certificates; & all the money originally due upon it having been paid, & a further claim made by the builder for extras, which the architect had refused to allow, thereupon the builder consulted his attorney, co-deft., who sent his clerk, the other co-deft., to serve the now pltf., & see what he would say; & on the clerk's statement as to what he said, the attorney, viz. that pltf. had said he was going abroad at some time, the precise words being in dispute, caused his clerk to make an affidavit thereof, & his client to make an affidavit of debt, & of belief that pltf. was going abroad; upon which a judge made the order; the affidavit not making mention of the contract, & its condition, or of the architect's refusal to certify, or of pltf.'s permanent office:—*Held*: (1) there was no reasonable or probable cause for the proceeding, as there was no reason to suppose that pltf. was going abroad for any lengthened time, or to avoid the action; (2) if the proceeding was for any improper purpose, as to coerce pltf. into more speedy payment, it would be malicious; (3) in such case the attorney would be liable; (4) its merely being an improper proceeding, & without reasonable cause, was not *per se* evidence of malice, assuming *bona fides*.

is obviously false & not instituted in good faith, the cts. will infer malice.— MAUNG SET KHAING *v.* MAUNG TUN NYEIN (1925), 1 L. R. 3 Ran. 82.—IND

284 ix. ———.] — STEWART *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES (1890), 8 N. Z. L. R. 647.—N.Z.

284 x. ———.] — WILSON *v.* MACKIE (1875), 3 R. (Ct. of Sess.) 18; 13 Sc. L. R. 8.—SCOT.

284 xi. ———.] — MASEROWITZ *v.* RICHMOND (1905), T. S. 342.—S. AF.

284 xii. ———.] — *Semble*: there may be cases in which there is such an utter absence of reasonable & probable cause as to justify an inference of malice.— RIGG *v.* ROPER & JACKSON (1885), S. C. 114.—S. AF.

284 xiii. ———.] — LEFSDAHL *v.* DREDGE [1910] C. P. D. 452.—S. AF.

Malice in law means not merely personal ill will, but any undue or indirect object, that is, any intention to gain an undue advantage (WELL, B.).

The only legal right a person has to arrest his debtor is to secure his presence when the time shall arrive for payment of the debt; & if the debtor is arrested not with that view, or with the belief that he will not be here, but to coerce him into paying what is not due, or to pay earlier than he otherwise would, that would be a malicious proceeding (BRAMWELL, B.).—MELIA v. NEATE (1863), 3 F. & F. 757, N. P.

294. —.]—HENDERSON v. MIDLAND RY. CO., No. 270, *ante*.

295. —.]—HICKS v. FAULKNER, No. 18, *ante*.

296. —.]—QUARTZ HILL GOLD MINING CO. v. EYRE, No. 21, *ante*.

297. —.]—BROWN v. HAWKES, No. 246, *ante*.

298. —.]—QUINN v. LEATHEM, No. 365, *post*.

299. —.]—MEERING v. GRAHAME-WHITE AVIATION CO., LTD., No. 317, *post*.

#### B. Failure or Abandonment of Prosecution.

300. Whether malice presumed—From mere failure of prosecution.]—If an indictment be preferred for a trespass, & the party be acquitted, it shall be intended to have been malicious; & therefore an action on the case will lie against the prosecutor.—ANON. (1678), 2 Mod. Rep. 306; 86 E. R. 1088.

Annotation:—*Reid*. Jones v. Givin (1713), Gilb. 185.

301. —.]—SAVILLE v. ROBERTS, No. 510, *post*.

302. —.]—SYKES v. DUNBAR (1799), 1 Camp. 202, n., N. P.

Annotations:—*Consd.* Willans v. Taylor (1829), 3 Moo. & P. 350. *Reid*. Purcell v. Macnamara (1808), 9 East, 361.

303. —.]—WALLIS v. ALPINE (1805), 1 Camp. 204, n., N. P.

Annotation:—*Reid*. Willans v. Taylor (1829), 6 Bing. 183.

304. —.]—PURCELL v. MACNAMARA, No. 286, *ante*.

305. —.]—Under Roman-Dutch as well as English law a prosecution instituted without malice & with reasonable & probable cause does not amount to an act of aggression; that an *animus injuriæ*, malice, cannot be inferred from the mere fact that the prosecution has failed; & that the *onus* of proving malice rests on pltf.

In an action for malicious prosecution against respt. in that he had charged applt. with theft, criminal trespass, & the forcible removal of his goods, it appeared that the real charge was that of criminal trespass, that the conversion of the charge of removal of goods into that of theft was not done recklessly, that respt. took action under legal advice in defence of his title to his property in the *bonâ fide* belief that applt. had trespassed & forcibly removed his goods, & that there was no proof of indirect motive or malice of any kind on respt.'s part:—*Held*: the Appellate Ct. was right in reversing the district judge's decree for damages, & the appeal therefrom must be dismissed.—COREA v. PEIRIS, [1909] A. C. 549; 79 L. J. P. C. 25; 100 L. T. 790; 25 T. L. R. 631, P. C.

306. —.]—When proceedings abandoned.]—In an action for a malicious arrest pltf. can recover no

damages for extra costs, nor any damages unless malice be proved of which the first action, being non-prossed, is not of itself evidence.—SINCLAIR v. ELDRED (1811), 4 Taunt. 7; 128 E. R. 229.

Annotations:—*Folld.* Webber v. Nicholas (1826), Ry. & M. 419. *Reid*. Nicholson v. Coghill (1825), 4 B. & C. 21; Webb v. Hill (1828), 3 C. & P. 485; Saxon v. Castle (1837), 6 Ad. & El. 652. *Mentd.* Jenkins v. Biddulph (1827), 12 Moore, C. P. 390; Nowel v. Roake (1827), 6 L. J. O. S. K. B. 26; Hodges v. Litchfield (1835), 1 Scott, 443; Doe d. Drax v. Filliter (1843), 11 M. & W. 80; Howard v. Lovegrove (1870), 23 L. T. 396.

307. —.]—(1) Averment in an action for a malicious arrest, that deft. detained pltf. until he found bail. If some detention be proved, it is sufficient to support the action, although no bail was put in.

(2) An averment that the suit is wholly ended & determined, is evidenced by proof of the rule to discontinue upon payment of costs, & that the costs were taxed & paid.

(3) A. having by his laches lost all right of action on a note indorsed by B., arrests B., & afterwards discontinues the action, these circumstances do not of themselves so exclude all probable cause as to afford a presumption of malice.—BRISTOW v. HEYWOOD (1815), 4 Camp. 213; 1 Stark, 48, N. P.

Annotations:—*As to* (2) *Reid*. Webb v. Hill (1828), 3 C. & P. 485; Drummond v. Pigou (1835), 2 Scott, 228.

308. —.]—NICHOLSON v. COGHILL, No. 422, *post*.

#### SUB-SECT. 5.—QUESTION FOR JURY.

309. General rule.]—In an action for a malicious arrest, the question of malice or no malice may properly be left to the jury.—LLOYD v. THOMAS (1823), 1 L. J. O. S. C. P. 51.

310. —.]—DAVIS v. HARDY, No. 459, *post*.

311. —.]—MITCHELL v. JENKINS, No. 235, *ante*.

312. —.]—Two concurrent writs of *ca. sa.* were issued into the counties of L. & M., by A., the attorney of C., pltf. in a former action, against E. Both writs were returnable on Nov. 2. E. was arrested on Nov. 1 on the writ issued into the county of M.; but the sheriff of that county, on being paid the debt & costs, discharged E. out of custody, without the knowledge or sanction of pltf. in the original action or her attorney, & without any authority from either. After his discharge from that arrest, E. went into the county of L., & was again arrested on the following day, upon the *ca. sa.* issued into the latter county, & was detained in custody for about twelve days. A notice was sent to A.'s office on Nov. 3, that E. had been arrested & paid the debt & costs to the sheriff of M., but A. was then from home. On Nov. 9, A. was again applied to by the undersheriff of L., but refused to authorise E.'s discharge unless the debt & costs were paid into his hands. Some days after, the amount of debt & costs, having been obtained from the sheriff of M., was paid to A.; & he thereupon gave an order for the discharge of E. In an action brought by E. against A. & C. for wilfully & maliciously neglecting to inform & give notice to the sheriff of L. that E. had been before arrested in the county of M., & the judgment satisfied:—*Held*: malice was essential to the action, & the existence of malice was a question for the jury, & they having

#### PART IV. SECT. 2, SUB-SECT. 5.

309 i. General rule.]—Malice is not a question for the judge to determine.—WASSON v. TAYLOR (1867), 1 Han.

#### 102.—CAN.

309 ii. —.]—Malice is a question for the jury, to be inferred or repelled from the facts proved, & not by defts.' own declarations with regard to his motives or intentions.—GLESEN v. DOMVILLE (1879), 19 N. B. R. 77.—CAN.



*Sect. 2.—Malice: Sub-sects. 5 & 6. Sect. 3: sect. 1, A. & B.]*

negatived malice & found thereupon for defts., their finding was right.—*LEWIS v. MORRIS* (1834), 2 Cr. & M. 713; 4 Tyr. 907; 4 L. J. Ex. 264; 149 E. R. 947.

313. —. —.]—*FRASER v. HILL*, No. 446, *post*.

314. —. —.]—In an action for malicious prosecution the question of malice was never in terms left to the jury. The ct. made a rule absolute for a new trial, although the rule *nisi* was not obtained on the ground of misdirection.—*PAYNE v. REVANS* (1861), 9 W. R. 693; *previous proceedings*, 2 F. & F. 367, N. P.

315. —. —.]—*HICKS v. FAULKNER*, No. 18, *ante*.

316. —. —.]—*WATSON v. SMITH*, No. 119, *ante*.

317. —. —.]—Absence of reasonable & probable cause for instituting a prosecution against a person affords evidence from which it may be inferred that there was a want of honest belief on the part of the prosecutor in the guilt of the person accused. But absence of reasonable & probable cause alone will not suffice. There must be evidence of some further indirect motive.

For the purpose of establishing his case of malicious prosecution pltf. had to prove two things, material I mean to the present case. He had to prove that the prosecution had been instituted by defts. with malice. That was entirely a question for the jury. He had to prove that the prosecution had been started & carried on without reasonable & probable cause. That was a question partly for the jury & partly for the judge, for the jury so far as there were any facts in dispute, & for the judge whether, when those facts were found, they constituted in law an absence of reasonable & probable cause. Now, with reference to malice. The jury are, in my opinion, I think this is now quite settled by authority, entitled to take into account circumstances on which the judge may properly arrive at the conclusion that there is in law an absence of reasonable & probable cause (*WARRINGTON, L.J.*).—*MEERING v. GRAHAME-WHITE AVIATION CO., LTD.* (1919), 122 L. T. 44, C. A.

318. All circumstances to be left to jury.]—In case for a malicious prosecution, the declaration stated, that deft. falsely & maliciously, & without any reasonable or probable cause, indicted, &

318 i. All circumstances to be left to jury.]—Retaining the clerk of the peace to prosecute an indictment against pltf., before the sessions, together with the conduct of the prosecutor before & after, are proper matters to be left to the jury on the question of malice.—*ALWARD v. SHARP* (1868), 1 Han. 286.—CAN.

318 ii. —.]—*Held*: the taking of legal advice before laying a charge is matter for the jury, & with some limitations, tends to repel the idea of malice.—*SEARY v. SAXTON* (1895), 28 N. S. R. 278.—CAN.

318 iii. —.]—*BOLSTER v. CLELAND* (Alta.), [1919] 1 W. W. R. 1020; 14 Alta. L. R. 341; 45 D. L. R. 574.—CAN.

#### PART IV. SECT. 3, SUB-SECT. 1.—A.

319 i. General rule.]—In an action for malicious prosecution it is not sufficient for pltf. to show the prosecution & its abandonment; he must also show want of probable cause.—*LAPOINTE v. STENNETT* (1839), 2 Ont. Dig. 4096.—CAN.

319 ii. —.]—*WANLESS v. MATHE-SON* (1857), 15 U. C. R. 278.—CAN.

319 iii. —.]—In an action for mali-

cious prosecution, both the want of reasonable & probable cause & malice must be shown.—*WAINWRIGHT v. VILLETARD (N.W.T.)* (1905), 2 W. L. R. 242.—CAN.

319 iv. —.]—To succeed in an action for malicious prosecution, pltf. must prove that there was an absence of reasonable & probable cause for such proceedings.—*MORTIMER v. FISHER* (1913), 23 W. L. R. 905; 11 D. L. R. 77; 4 W. W. R. 454; 6 Sask. L. R. 200.—CAN.

319 v. —.]—*SVAMI NAYUDU v. SUBRAMANIA MUDALI* (1864), 2 Mad. 158.—IND.

319 vi. —.]—*HEALY v. HEENAN*, 1 J. R. 189.—N.Z.

#### PART IV. SECT. 3, SUB-SECT. 1.—B.

321 i. General rule.]—*WILSON v. LEE* (1853), 11 U. C. R. 91.—CAN.

321 ii. —.]—*MITCHELL v. MCMURRICH* (1892), 22 O. R. 712.—CAN.

321 iii. —.]—*FORD v. CANADIAN EXPRESS CO.* (1910), 16 O. W. R. 797; 1 O. W. N. 1117; 21 O. L. R. 585.—CAN.

321 iv. —.]—Reasonable & probable cause being an answer to an action for malicious prosecution it is

caused & procured to be indicted, the said pltf., etc., & falsely & maliciously prosecuted the said indictment, etc.:—*Held*: (1) the fact of deft. having been bound by recognisance to prefer the indictment, was no answer to this declaration, but the jury might consider all the circumstances attending the original charge, the apprehension, & the taking the party before a magistrate as tending to show whether the prosecutor was actuated by malice or not, although none of those earlier proceedings were stated upon the record as part of the complaint; (2) it was right for the judge to leave all the circumstances to the consideration of the jury, & not to confine them to the question of whether in the single fact of preferring the indictment, the prosecutor had acted from malicious motives.—*DUBOIS v. KEATS* (1840), 11 Ad. & El. 329; 3 Per. & Dav. 306; 9 L. J. Q. B. 66; 4 Jur. 148; 113 E. R. 440.

*Annotations*:—As to (1) *Distd. Huggins v. Bailey* (1847), 9 L. T. O. S. 453. *Apld. Fitzjohn v. Mackinder* (1861), 9 C. B. N. S. 505.

#### SUB-SECT. 6.—EVIDENCE.

See Part V., Sect. 4, *post*.

### SECT. 3.—ABSENCE OF REASONABLE AND PROBABLE CAUSE.

#### SUB-SECT. 1.—NECESSITY FOR.

##### A. In General.

319. General rule.]—*HICKS v. FAULKNER*, No. 18, *ante*.

320. Procedure abuse of process of court—Absence of probable cause need not be shown.]—*GRAINGER v. HILL*, No. 149.

##### B. Criminal Proceedings.

321. General rule.]—An action will not lie for indicting a man for felony unless it be done maliciously & without probable cause.—*KNIGHT v. JERMIN* (1589), Cro. Eliz. 134; 78 E. R. 391.

*Annotations*:—*Reid. Marham v. Pescod* (1606), Cro. Jac. 130; *Jones v. Givin* (1714), Gilb. 185. *Mentd. Lovet v. Faulkner* (1614), 2 Bulst. 270.

not necessary to consider the question of malice.—*DARLING v. FLATER* (1913), 24 W. L. R. 666; 4 W. W. R. 1002; 12 D. L. R. 294; 6 Alta. L. R. 276.—CAN.

321 v. —.]—*BIGHAM v. BOYD* (1913), 24 O. W. R. 499; 4 O. W. N. 1193.—CAN.

321 vi. —.]—In an action for damages for malicious prosecution, it is not sufficient to prove merely the dismissal of the charge. It must be proved that the prosecution was without reasonable & probable cause.—*BABOO GUNNESH DUTT SINGH v. MUGNEERAM CHOWDHRY* (1872), 11 B. L. R. P. C. 321; 17 W. R. 283.—IND.

321 vii. —.]—A person who, influenced by actual malice, lays a criminal charge against another, is not liable in an action for damages for malicious prosecution, if he had reasonable & probable cause for laying such charge.—*DE KOCK v. UYS* (1878), Buch. 184.—S. AF.

321 viii. —.]—*GREYLING v. TUNCE*, [1920] E. D. L. 8.—S. AF.

p. Prosecution instituted in good faith—Subsequent knowledge—Reasonable & probable cause removed.]—In an action for malicious prosecution, though

**322.** —.]—(1) In an action on the case for a malicious prosecution, pltf. must show special damages.

(2) Probable cause is a good plea to an action for malicious prosecution.—*NEWTON v. CRESWICK* (1688), 3 Mod. Rep. 165; 87 E. R. 107.

**323.** —.]—No action for malicious prosecution will lie if there was probable cause.—*ANON.* (1703), 6 Mod. Rep. 73; 87 E. R. 831.

**324.** —.]—An action for malicious prosecution will not lie if there were probable cause for it.—*JOHNSON v. BROWNING* (1704), 6 Mod. Rep. 216; Holt, K. B. 4; 87 E. R. 969, N. P.

*Annotation* :—*Reid*. *Brooke v. Carpenter* (1825), 11 Moore, C. P. 59.

**325.** —.]—*JONES v. GIVIN*, No. 25, *ante*.

**326.** —.]—*GOLDING v. CROWLE* (1751), Say. 1; 96 E. R. 782.

*Annotation* :—*Reid*. *Nicholson v. Coghill* (1825), 4 B. & C. 21.

**327.** —.]—Malice (either express or implied) & the want of probable cause must both concur (*per CUR.*).—*FARMER v. DARLING* (1766), 4 Burr. 1971; 98 E. R. 27.

**328.** —.]—*BURLEY v. BETHUNE*, No. 373, *post*.

**329.** —.]—(1) It seems that where a partner of a firm prosecutes for an alleged theft of property belonging to the partnership, & an action is brought for a malicious prosecution, & wrongous imprisonment, neither the co. nor the other individual partners can be dealt with as prosecutors merely because the property belonged to the firm.

(2) It seems that an action for a malicious prosecution cannot be sustained, though the accusation be false, if the prosecutor can show probable cause for the charge.—*ARBUCKLE v. TAYLOR* (1815), 3 Dow. 160; 3 E. R. 1023, H. L.

**330.** —.]—*DAVIS v. HARDY*, No. 459, *post*.

**331.** —.]—*WILLANS v. TAYLOR*, No. 535, *post*.

**332.** —.]—*MUSGROVE v. NEWELL*, No. 267, *ante*.

**333.** —.]—*DELEGAL v. HIGHLEY*, No. 376, *post*.

**334.** —.]—A count in case, charging that deft., contriving & intending maliciously to injure pltf., etc., unlawfully & maliciously did advise, procure, instigate, & stir up J., to commence & prosecute an action of trespass, etc.; that by and through such advice, etc., J. did, in fact, commence & prosecute the action; that pltf. was acquitted of the premises, whereby pltf. was put to great trouble, & also obliged to pay a large sum of money, etc.:—*Held*: bad, for not averring that the action was commenced & prosecuted without reasonable or probable cause; this not being a count for maintenance in the proper sense of maintaining an existing suit, but for procuring one to be commenced.—*FLIGHT v. LEMAN* (1843), 4 Q. B. 883; Dav. & Mer. 67; 12 L. J. Q. B. 353; 1 L. T. O. S. 287; 7 Jur. 557; 114 E. R. 1130.

*Annotations* :—*Reid*. *Cotterell v. Jones* (1851), 11 C. B. 713; *Bradlaugh v. Newdegate* (1883), 11 Q. B. D. 1; *Oram v. Hutt*, [1914] 1 Ch. 98; *Neville v. London Express Newspaper*, [1919] A. C. 368.

**335.** —.]—Deft., a miller, saw a number of sacks partly covered with a tarpaulin lying on a quay alongside a vessel. Seeing his mark on one of the sacks, he cut it open & found it contained pieces of sacks, some new & some old. He removed the tarpaulin, & saw some sacks on which was his mark, & on others it was cut away. Being in-

formed that the sacks were about to be shipped by pltf. for the manufacture of paper, he laid an information before a magistrate that he had reason to suspect, & did suspect, that some sacks, his property, had been stolen, & were then in the possession of pltf. Thereupon the magistrate issued a warrant to search for the goods, & if they should be found, to bring them & pltf. before him, to be dealt with according to law. Pltf. was accordingly apprehended & taken before the magistrate who dismissed the charge. In an action for maliciously causing the search warrant to be issued & pltf. apprehended:—*Held*: (1) the magistrate was justified in issuing a warrant in that form, since the application for a search warrant involved an application to arrest; (2) there was no absence of reasonable & probable cause for the information, & consequently deft. was not liable either in respect of the search warrant or arrest.—*WYATT v. WHITE* (1860), 5 H. & N. 371; 29 L. J. Ex. 193; 1 L. T. 517; 24 J. P. 197; 8 W. R. 307; 157 E. R. 1226.

*Annotation* :—*As to* (1) *Reid*. *Jones v. German* (1897), 66 L. J. Q. B. 281.

**336.** —.]—L., being entitled to the possession of certain premises, entered upon them, but was afterwards ejected by T. & W. He then indicted them for a forcible entry, but they were acquitted. They then brought an action against him for malicious prosecution, & obtained a verdict, which was afterwards set aside:—*Held*: the action could not be maintained, as the facts showed that L. had a right to the possession, & had actually obtained possession & there was therefore reasonable & probable cause for the indictment.—*LOWS v. TELFORD* (1876), 1 App. Cas. 414; 45 L. J. Q. B. 613; 35 L. T. 69; 40 J. P. 741; 13 Cox, C. C. 226, H. L.; *reversing* S. C. *sub nom.* *TELFORD v. LOWS* (1874), 31 L. T. 90, Ex. Ch.

*Annotations* :—*Mentd.* *Beddall v. Maitland* (1881), 17 Ch. D. 174; *Jones v. Foley* (1891), 60 L. J. Q. B. 464; *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K. B. 720.

**337.** —.]—*HICKS v. FAULKNER*, No. 18, *ante*.

**338.** —.]—*ABRATH v. NORTH EASTERN RY. CO.*, No. 418, *post*.

**339.** —.]—Pltf. was asked by one of deft.'s men to buy some potatoes, which the man stated deft.'s son had told him to sell. Pltf., who had had previous dealings with deft., went to a field where deft. had placed a clamp of potatoes, & purchased half a ton for 25s., paying deft.'s man for the same. Whilst pltf. was removing the potatoes in his cart a policeman accused him of stealing them, & took him to the station. Pltf. was formally charged with theft by one of deft.'s sons & committed for trial, & after fourteen days in prison, was tried at the Surrey Sessions & acquitted. Deft.'s case was that he had missed potatoes from the clamp in question for some time; that the man had no authority to sell the potatoes; that the potatoes taken out of the clamp would be worth 80s. a ton; that he had acted without malice, & honestly believed in the guilt of pltf., & that he acted with reasonable & probable cause:—*Held*: deft. had acted with reasonable & probable cause, & judgment for deft. accordingly.—*GOODGE v. SIMS* (1884), 1 T. L. R. 35.

**340.** —.]—*THARBY v. BAYFIELD & DARLING* (1887), 4 T. L. R. 62, N. P.

**341.** —.]—*VAGG v. KEMP* (1887), 4 T. L. R. 52, N. P.

pltf. fails to prove want of reasonable & probable cause previous to laying the information, deft., having subsequently acquired information such as would

leave him without reasonable & probable cause, is liable for the further prosecution of the charge, unless, at least, he brings the facts to the notice

of the tribunal seized of the charge.—*CARRUTHERS v. BEISIEGEL* (1908), 8 W. L. R. 255; 1 Alta. L. R. 390.—*CAN.*



**Sect. 4.—Mandamus: Sub-sect. 1, C. (a) & (b).]**

**1491. — Decision not warranted by evidence.]**—A *mandamus* will not lie to justices in quarter sessions to compel them to review their decision on an appeal, upon the ground that the adjudication was not warranted by the evidence.—*R. v. WORCESTERSHIRE JJ.* (1819), 1 Chit. 649.

**1492. — Wrong decision of sessions.]—Mandamus** to dismiss an appeal to quarter sessions refused.

There are many cases in which there is no other remedy against the sessions, where we should not interfere. There was a case here some time ago where we had reason to think the sessions were wrong, but we refused to interfere (BAYLEY, J.).—*R. v. WILTS JJ.* (1818), 2 Chit. 257.

**1493. — —.]—Mandamus** will not lie to the justices to rehear an application for an ale license at any other period of the year than within the first twenty days of Sept., though the justices may have refused a license under a mistake of the law.—*R. v. SURREY JJ.* (1824), 5 Dow. & Ry. K. B. 308 ; 2 Dow. & Ry. M. C. 435.

*Annotation:—Mentd.* Leicester Corpn. v. Burgess (1833), 2 Nev. & M. K. B. 131.

**1494. — —.]—On appeal against a conviction** for a trespass under Game Act, 1831 (c. 32), s. 30, applt. admitted the trespass, & offered only evidence that the property in the land was not as laid in the conviction. The sessions having rejected the evidence, & confirmed the conviction, without stating a case, this ct. refused to call upon them by *mandamus* to hear the case, since the mistake, if any, was one of law, which this ct. could not enter into, the appeal having in fact been heard, & no case sent up.—*Re PRATT* (1837), 7 Ad. & El. 27 ; 2 Nev. & P. K. B. 102 ; 1 Nev. & P. M. C. 311 ; Will. Woll. & Dav. 455 ; 1 J. P. 186, 278 ; 112 E. R. 381.

*Annotation:—Mentd.* Thompson v. Ingham (1850), 15 L. T. O. S. 23.

— —.]—*See, also*, HIGHWAYS, Vol. XXVI., pp. 482, 484. Nos. 1940, 1955.

**1495. — Mandamus to compel sessions to give reasons.]—The ct.** has no authority to compel quarter sessions by *mandamus* to give their reasons for their judgments, or make any special entries upon their records. Rule for a *mandamus* commanding the justices to alter the judgment of the quarter sessions as recorded by making a special entry upon the record of the reasons of their judgment discharged with costs.—*R. v. DEVON JJ.* (1819), 1 Chit. 34.

*Annotation:—Consd.* *R. v. West Riding JJ.*, *Sheffield v. Crich* (1843), 5 Q. B. 1.

**1496. — Judgment not warranted by evidence.]—(1)** Where the ct. of quarter sessions, after a case has been fully heard, both upon the law & upon the merits, have given their decision, but have afterwards, on the solicitation of counsel, been induced to permit a special case to be submitted to the ct. above, but it is discovered that the writ of *certiorari* has been taken away, the Ct. of K. B. will not issue a *mandamus* to hear & determine upon the merits. *Qu.*: such a *mandamus* would not be granted, should the case appear to have been but partially heard, & decided under an arrangement that it should be put into the form of a special case.

(2) Three several appeals involving the same facts, & the same questions of law, having been entered for hearing at sessions, & applts. having agreed that the decision of the ct. on one should bind the other cases, & sessions having by a majority of justices decided with resp. in the first :—*Held*: the ct. would not compel sessions to hear

the other cases, although the justices had granted a case, but not upon any doubt of their own as to the propriety of the decision.—*R. v. WORCESTERSHIRE JJ.* (1827), 9 Dow. & Ry. K. B. 210 ; 4 Dow. & Ry. M. C. 299 ; 5 L. J. O. S. M. C. 64.

**1497. — Case partly heard.]—R. v. WORCESTERSHIRE JJ.**, No. 1496, *ante*.

**1498. — Sessions clearly wrong.]—It is a question,** therefore, whether the appeal having been thus entered under these circumstances, the ct. ought to interfere, that being the right mode in which the appeal was entered. I think it ought not, for I cannot say the sessions were so clearly wrong as to warrant me in interfering by directing a *mandamus* to issue. The rule must, therefore be discharged, but without costs (WIGHTMAN, J.).—*R. v. LEICESTERSHIRE JJ.* (1847), 3 New Sess. Cas. 1 ; 9 L. T. O. S. 249 ; 11 Jur. 848 ; 11 J. P. Jo. 439.

*Annotation:—Reid.* *R. v. Buckinghamshire JJ.* (1848), 10 L. T. O. S. 390.

**(b) Decision on Preliminary Objection.**

**1499. Mandamus the proper remedy.]—An objection,** that the sessions erroneously annulled the certificate on a preliminary technical objection appearing on its face, cannot be taken advantage of on a rule to quash the order of sessions for insufficiency, although the certificate as well as the order annulling it, be returned on *certiorari*. The proper mode of proceeding is by *mandamus* to the sessions to hear the appeal on the merits.—*R. v. STACEY* (1850), as reported in 19 L. J. M. C. 177 ; 14 J. P. 415 ; 14 Jur. 549.

*Annotation:—Dtd.* *R. v. Worcestershire JJ.* (1854), 3 E. & B. 477.

**1500. What is a preliminary objection.]—Where** quarter sessions have improperly decided against an appeal on a preliminary objection, the Ct. of K. B. will grant a *mandamus* to them to enter continuances & hear the appeal: but where an objection has been made, during the trial of an appeal, to the reception of a particular piece of evidence, & the sessions have held such objection valid, in consequence of which the appeal has been dismissed, this ct. will not interfere, unless the sessions send up a case.

The cases where this ct. has interfered have turned upon matters of preliminary practice & have arisen when the ct. thought the practice not, in its own nature, legal, or not consistent with the rules by which the sessions themselves professed to be guided (LORD DENMAN, C.J.).—*R. v. FRIESTON (INHABITANTS)* (1833), 5 B. & Ad. 597 ; 110 E. R. 911.

*Annotations:—Appld.* *R. v. Cheshire JJ.*, *Ex p. Heaver* (1912), 108 L. T. 374. *Reid.* *R. v. Sussex JJ.* (1840), 9 Dowl. 125 ; *R. v. Customs & Excise Comrs.*, [1913] 3 K. B. 483.

**1501. Refusal to amend order—Mistake in description.]—An order of removal on the complaint of the parish officers of A., was made for a removal to B. By mistake the order was filled up as made on the complaint of the parish officers of B. Upon an appeal against the order, the mistake was discovered. The sessions refused to amend under Quarter Sessions Act, 1732 (c. 19), & allowed the appeal:—*Held*: they ought to have amended ; & a *mandamus* ordered that they should.—*R. v. DURHAM JJ.* (1830), 8 L. J. O. S. M. C. 103.**

**1502. Dismissal of appeal—On grounds of insufficient notice.]—By statute,** parties were enabled in certain cases to appeal to quarter sessions for a particular district, giving ten days' notice. The Act said nothing as to further notice in the event of such appeal being respited, nor did

*Sect. 3.—Absence of reasonable and probable cause :  
Sub-sect. 1, B. & C.; sub-sect. 2, A.]*

342. —.] — *YOUNG v. GREAT EASTERN RY. Co.* (1888), 5 T. L. R. 112.

343. —.] — *LOOG v. NAHMASCHINEN FABRIK ACT. & RIESE* (1888), 4 T. L. R. 268.

344. —.] — *LEA v. CHARRINGTON*, No. 453, *post*.

345. —.] — *CARDER v. PENINSULAR & ORIENTAL STEAM NAVIGATION Co.* (1892), 8 T. L. R. 335.

346. —.] — *BRADSHAW v. GOODWIN & Co.*, No. 541, *post*.

347. —.] — *WATSON v. SMITH*, No. 119, *ante*.

348. —.] — *QUINN v. LEATHAM*, No. 365, *post*.

349. —.] — Two ingredients essential to support an action for malicious prosecution are malice & an absence of reasonable & probable cause, & the jury must find that deft. acted maliciously.

It was decided by the Ct. of Appeal in *Bradshaw v. Waterlow & Sons, Ltd.*, No. 493, *post*, that the question whether deft. honestly believed in the charge which he made ought not to be left to the jury unless there was some evidence of the absence of that belief. In this case there was not any such evidence. Again, the judge is to determine whether there is reasonable & probable cause or not. In this case there is no evidence whatever of the want of reasonable & probable cause (*SWINFEN EADY, L.J.*).—*TREBECK v. CROUDACE* (1917), as reported in 118 L. T. 141; 34 T. L. R. 57; 62 Sol. Jo. 85, C. A.  
*Annotation* :—*Mentd.* *Isaacs v. Keech*, [1925] 2 K. R. 354.

*C. Civil Proceedings.*

350. **General rule.**—If the condemnation of goods for not entering & paying duty, by sub-comrs., be reversed by the Comrs. of Appeal in Ireland, an action for a malicious prosecution does not lie against the informer, for the judgment of the sub-comrs. shows there was a foundation for the information & prosecution. — *REYNOLDS v. KENNEDY* (1748), 1 Wils. 232; 95 E. R. 591.

*Annotations* :—*Consd.* *Sutton v. Johnstone* (1786), 1 Term Rep. 493. *Refd.* *Warden v. Bailey* (1811), 4 Taunt. 67; *Musgrove v. Newell* (1836), 1 M. & W. 582; *Craig v. Hasell* (1843), 4 Q. B. 481.

351. —.] — *TURNER v. TURNER*, No. 401, *post*.

352. —.] — No action lies against an execution creditor or his attorney for issuing a *fi. fa.* indorsed to levy the whole sum recovered by a judgment which, to the knowledge of both, has been partly satisfied by payments, unless malice & want of probable cause be alleged in the declaration, & proved. *Qu.* : whether, even if such allegation & proof were made, an action is the proper remedy.

The law allows every person to employ its process for the purpose of trying his rights, without subjecting him to any liability, unless he acts maliciously & without probable cause (*WILDE, C.J.*).—*DE MEDINA v. GROVE* (1847), 10 Q. B. 172; 17 L. J. Q. B. 321; 11 Jur. 145; 116 E. R. 67, Ex. Ch.

*Annotations* :—*Appld.* *Holdway v. Ray* (1863), 1 New Rep. 273. *Refd.* *Moore v. Gardner* (1847), 16 M. & W. 595; *Churchill v. Siggers* (1854), 3 E. & B. 929. *Mentd.* *Horsley v. Style* (1893), 69 L. T. 222.

353. —.] — The declaration in an action on the case alleged that pltf. being indebted to L. in £30, he, by deft. as his attorney, sued pltf.; & that after declaration, pltf. petitioned the Ct. of Bkpcy., under Execution Act, 1844 (c. 96), & obtained a protection from process, of which deft. had notice. Yet deft., well knowing the premises,

but wilfully & maliciously intending, etc., procured judgment to be signed against pltf., & sued out a *ca. sa.*, under which the sheriff arrested pltf.:—*Held*: the declaration was not sufficient, & it ought to have alleged that the arrest was without reasonable & probable cause.—*ROBERT v. LEWIS* (1848), 5 Dow. & L. 371; 17 L. J. Ex. 99; 10 L. T. O. S. 331.

354. —.] — A declaration for a malicious arrest by *capias* under Judgments Act, 1838 (c. 110), stated that deft. not having any reasonable or probable cause of action against pltf. to the amount for which he maliciously caused pltf. to be arrested, falsely, maliciously, & unjustly procured from a judge an order for a *capias*, by falsely & maliciously representing to the judge that pltf. was justly & truly indebted to deft. in a certain sum, by means of a certain false affidavit then shown & uttered by deft. before the judge; & thereupon maliciously caused a *capias* to be issued, & without any reasonable or probable cause of action, caused pltf. to be arrested:—*Held*: on special demurrer, the declaration was sufficient, & it need not more particularly set out the false statement by which the judge was induced to make the order, nor show that the facts were false within deft.'s knowledge, or that he had not reasonable or probable cause for believing them true.—*ROSS v. NORMAN* (1850), 5 Exch. 359; 1 L. M. & P. 409; 19 L. J. Ex. 329; 15 L. T. O. S. 208; 155 E. R. 157.

355. —.] — *CHURCHILL v. SIGGERS*, No. 527, *post*.

356. —.] — *DIMMACK v. BOWLEY*, No. 396, *post*.

357. —.] — *PHILLIPS v. NAYLOR*, No. 224, *ante*.

358. —.] — Creditor, receiving information from one person that his debtor is going abroad, & obtaining an order to arrest him on affidavit, afterwards held insufficient & to some extent untrue, is not therefore liable to an action for maliciously obtaining the arrest without reasonable cause, there being enough to justify the belief that the debtor was going abroad; & the payment into ct. of a sum over £20 is a sufficient admission of a debt to justify the application. *Semble*: the action should not be brought while the former action [in which creditor is suing his alleged debtor] is pending.—*NEVILL v. LOADMAN* (1860), 2 F. & F. 313.

359. —.] — Declaration against justices of the peace alleged that pltf. was rated to a church rate, which was demanded on Sept. 8, 1857; that pltf. was summoned for non-payment thereof on May 5, 1859; that at the hearing on May 12, 1859, pltf. gave evidence that the rate had been demanded of him & the matter of complaint had arisen more than six months before the complaint, & contended that, by Summary Jurisdiction Act, 1848 (c. 43), s. 11, defts. had no jurisdiction; yet defts. made an order for payment of the rate, which order had been quashed. Plea, that upon the hearing of the complaint it was proved that, besides the demand of the rate in the declaration mentioned, the same was again demanded on Mar. 25, 1859, & the complaint was laid within six calendar months from the time of that demand. Upon demurrer:—*Held*: it was within the duty of defts., as justices, to determine the question whether a complaint was made within the time limited; & therefore, by Justices Protection Act, 1848 (c. 44), s. 1, the action was not maintainable without proof of malice & want of reasonable & probable cause.—*SOMMERVILLE v. MIREHOUSE* (1860), 1 B. & S. 652; 121 E. R. 857; *sub nom.*



SOMERVILLE v. MIREHOUSE, 3 L. T. 294; 25 J. P. 21; 9 W. R. 53.

Annotation:—*Reid*. Pease v. Chaytor (1861), 1 B. & S. 658.

360. —.]—The judge directed the jury that if defts. did not at the time of the arrest believe that their debt would be otherwise lost, & acted with a view to protect the interests of the indorsers of the notes rather than their own, that would be evidence of want of reasonable & probable cause for arresting, & entitle pltf. to damages; & the ct. subsequently, in discharging a rule nisi for a new trial, held that the general verdict, including damages in respect of the first three counts, was justified on the ground that the pleas of defts. to those counts did not deny the material allegations of publication, falsity, & malice:—*Held*: there was misdirection, which justified a new trial; there was reasonable & probable cause for the arrest if defts. believed that pltf. was about to leave the province, & that their remedy against him would be lost if he were not arrested; notwithstanding they might have believed that they could recover the debt from the indorsers, & were endeavouring to protect the interests of the indorsers.—BANK OF BRITISH NORTH AMERICA v. STRONG (1876), 1 App. Cas. 307; 34 L. T. 627, P. C.

361. —.]—HORSLEY v. STYLE, No. 228, ante.

#### SUB-SECT. 2.—WHAT AMOUNTS TO REASONABLE AND PROBABLE CAUSE.

##### A. In General.

362. General rule.]—The disbelief of the party making a charge before a magistrate is some evidence of want of probable cause, notwithstanding other evidence has shown that there was *prima facie* probable cause for making the charge.

In order to justify deft., there must be a reasonable cause, such as would operate on the mind of a discreet man; there must also be a probable cause, such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him (TINDAL, C.J.).

Reasonable & probable cause is a mixed question of law & fact; the facts being found or undisputed, the judge determines whether they amount to reasonable & probable cause; but if the facts are doubtful, the jury must come to the conclusion of fact before the judge determines the effect of it in law. The principle is sufficiently clear; the difficulty is in the application (BOSANQUET, J.).

#### PART IV. SECT. 3, SUB-SECT. 2.—A.

362 i. General rule.]—In an action for malicious prosecution reasonable & probable cause is an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which assuming them to be true, would reasonably lead any ordinary prudent & cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.—COLWILL v. JOHNSON (N.W.T.) (1905), 1 W. L. R. 218.—CAN.

362 ii. —.]—LANDRY v. BATHURST LUMBER Co. (1917), 44 N. B. R. 374; 35 D. L. R. 701.—CAN.

362 iii. —.]—In an action for malicious prosecution there is want of reasonable & probable cause for a charge of felony if there is a want of belief on the part of the person making

the charge that the person charged has committed the felony.—MCLEOD v. REEVES (1882), 1 N. Z. L. R. 50 (S. C.).—N.Z.

362 iv. —.]—If deft. in an action for malicious prosecution did not honestly believe in the full charge which he made against pltf., he had not reasonable & probable cause for the prosecution.—HARCOURT v. AIKEN (1902), 22 N. Z. L. R. 389.—N.Z.

q. Reliance on legal opinion.—Counsel.]—In an action for malicious prosecution where deft. has laid a *bond fide* statement of the material facts of the case before counsel, & has acted *bond fide* on the opinion obtained, there is reasonable & probable cause.—FELLOWES v. HUTCHINSON (1855), 12 U. C. R. 633.—CAN.

r. —.]—A sutor taking legal advice upon a question of law, & acting thereon apparently *bond fide*, is

Where the facts or inferences are doubtful, it must be determined by the jury (COLTMAN, J.).

It would be a monstrous proposition, that a party who did not believe the guilt of accused should be said to have reasonable & probable cause for making the charge (ERSKINE, J.).—BROAD v. HAM (1839), 5 Bing. N. C. 722; 8 Scott, 40; 8 L. J. C. P. 357, 132 E. R. 1278.

Annotations:—*Consd.* Haddrick v. Heslop (1848), 12 Q. B. 267; Hailes v. Marks (1861), 7 Jur. N. S. 851; Lister v. Perryman (1870), L. R. 4 H. L. 521. *Reid*. Turner v. Ambler (1847), 10 Q. B. 252; Johnson v. Emerson & Sparrow (1871), 40 L. J. Ex. 201; Shrosbery v. Osmaston (1877), 37 L. T. 792.

363. —.]—In an action for a malicious prosecution of pltf. for obtaining goods from deft. by false pretences, there having been considerable delay on the part of deft. before he made any charge:—*Held*: although the goods had been obtained from deft. by false pretences, still, if the jury were of opinion that deft., when he went before the magistrate & made his complaint, did not *bond fide* believe that pltf. intended to defraud him, there was an absence of reasonable & probable cause.—WILLIAMS v. BANKS (1859), 1 F. & F. 557, N. P.

Annotation:—*Consd.* Shrosbery v. Osmaston (1877), 37 L. T. 792.

364. —.]—HICKS v. FAULKNER, No. 18, ante.

365. —.]—Take the familiar instance of an action for malicious prosecution. It is not a wrongful act for any person who honestly believes that he has reasonable & probable cause, though he has it not in fact, to put the criminal law in motion against another; but if to the absence of such reasonable & probable cause a malicious motive operating upon the mind of such prosecutor is added, that which would have been a rightful, in the sense of a justifiable, act if done without malice becomes with malice wrongful & actionable. What would constitute such malice it is not material for the purposes of this case to define. Of course, if when he instituted criminal proceedings the prosecutor knew he had no reasonable ground for the steps he was taking, the definition of malice given by BAYLEY, J., in *Bromage v. Prosser*, No. 232, ante, would distinctly apply, & no further proof of malice would be required; but if he really believed he had such reasonable cause, although in fact he had it not, & was actuated not by such belief alone, but also by personal spite or a desire to bring about the imprisonment of or other harm to the accused, or to accomplish some other sinister object of his own, that personal enmity or sinister motive would be quite sufficient to establish the malice required by law to complete a cause of action—

not responsible; nor can an action for maliciously taking such proceeding be successfully prosecuted against him.—CRAWFORD v. McLAREN (1859), 9 C. P. 215.—CAN.

t. —.]—Opinion of counsel will not protect from an action for malicious prosecution unless the party uses reasonable care to ascertain the facts & lays them before counsel.—WILSON v. WINNIPEG CITY (1887), 4 Man. L. R. 193.—CAN.

a. —.]—If a party lays all the facts of his case fairly before counsel, & acts *bond fide* upon the opinion given by that counsel, he is not liable to an action for malicious prosecution.—R. v. STEWART (1889), 6 Man. L. R. 257.—CAN.

b. —.]—DUNDAS v. WILSON (1911), 19 O. W. R. 17; 2 O. W. N. 995.—CAN.

c. —.]—HARRIS v. HICKEY

**Sect. 3.—Absence of reasonable and probable cause :  
Sub-sect. 2, A. & B.]**

that is, if such malice was found as a fact by the jury (LORD BRAMPTON).—QUINN v. LEATHEM, [1901] A. C. 495 ; 70 L. J. P. C. 76 ; 85 L. T. 289 ; 65 J. P. 708 ; 50 W. R. 139 ; 17 T. L. R. 749, H. L.

**Annotations :—Mentd.** Bulcock v. St. Anne's Master Builders' Federation (1902), 19 T. L. R. 27 ; Read v. Friendly Soc. of Operative Stonemasons of England, Ireland & Wales, [1902] 2 K. B. 732 ; West Ham Union v. L. C. C. (1902), 71 L. J. K. B. 299 ; Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600 ; R. v. Brailsford, [1905] 2 K. B. 730 ; South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239 ; Denaby & Cadeby Main Collieries v. Yorkshire Miners' Assocn., [1906] A. C. 384 ; Conway v. Wade, [1908] 2 K. B. 844 ; National Phonograph Co. v. Edison Bell Consolidated Phonograph Co., [1908] 1 Ch. 335 ; Gaskell v. Lancashire & Cheshire Miners' Federation (No. 2) (1912), 56 Sol. Jo. 719 ; *In the Goods of Hall*, Hall v. Knight & Baxter (1913), 109 L. T. 587 ; Santon v. Busnach (1913), 29 T. L. R. 214 ; Vacher v. London Soc. of Compositors, [1913] A. C. 107 ; *Re Ainsworth*, Finch v. Smith, [1915] 2 Ch. 96 ; Larkin v. Long, [1915] A. C. 814 ; Long v. Smithson (1918), 88 L. J. K. B. 223 ; Croft v. Blay, [1919] 1 Ch. 277 ; Pratt v. British Medical Assocn., [1919] 1 K. B. 244 ; Valentine v. Hyde, [1919] 2 Ch. 129 ; Davies v. Thomas, [1920] 2 Ch. 189 ; Hodges v. Webb, [1920] 2 Ch. 70 ; Said v. Butt, [1920] 3 K. B. 497 ; Welldon v. Butterley Co., [1920] 1 Ch. 130 ; Tinline v. White Cross Insce., [1921] 3 K. B. 327 ; Ware & De Freville v. Motor Trades Assocn., [1921] 3 K. B. 40 ; White v. Riley, [1921] 1 Ch. 1 ; Jasperson v. Dominion Tobacco Co., [1923] A. C. 709 ; Brimelow v. Casson, [1924] 1 Ch. 302 ; Reynolds v. Shipping Federation, [1924] 1 Ch. 28 ; Sorrell v. Smith, [1925] A. C. 700 ; G. W. K. v. Dunlop Rubber Co. (1926), 42 T. L. R. 376.

**366. —.**—COX v. ENGLISH, SCOTTISH & AUSTRALIAN BANK, No. 455, *post*.

**367. Suspicion.]—**PAIN v. ROCHESTER & WHITFIELD, No. 391, *post*.

**368. — Of third persons.]—**WALE v. HILL (1611), 1 Bulst. 149 ; 80 E. R. 842.

**Annotation :—Mentd.** Jarmain v. Hooper (1843), 7 Scott, N. R. 663.

**369. —.**—(1) Deft. in an action for maliciously & without reasonable or probable cause procuring pltf. to be apprehended on a charge of felony, cannot rely on circumstances of mere suspicion as evidence of reasonable or probable cause for a defence to the action.

A robbery had been committed by S., who immediately absconded. Pltf., his fellow-workman, had said that he had heard, a few hours after the robbery, that S. had absconded ; & that S. had previously told him that he intended to go to Australia. S. had also been seen, early in the morning after the robbery, coming from a public entry leading to the back door of pltf.'s house. Deft., pltf.'s master, having been informed of these circumstances, caused him to be apprehended, & charged before magistrates with the robbery :—*Held* : no evidence of reasonable or probable cause justifying deft. in making the charge.

(2) The existence of reasonable or probable cause is to be decided by the judge.—BUSST v. GIBBONS (1861), 30 L. J. Ex. 75.

& GARDINER (1912), 19 W. L. R. 948 ; 17 B. C. R. 21 ; 2 D. L. R. 356.—CAN.

**d. —.**—In an action for malicious prosecution a person who institutes criminal proceedings, honestly believing in his case, is entitled to act on the advice of his counsel, but the duty is placed upon him to put before counsel everything, including all circumstances in mitigation of the accused's action.—MOMSEN v. RUDOLPH (1913), 18 B. C. R. 631.—CAN.

**e. —.**—The fact that deft. to an action for malicious prosecution acted upon the advice of counsel in instituting the prosecution

is not necessarily a complete answer to the allegation of lack of reasonable & probable cause.—OLDS v. PARIS (B.C.), [1918] 2 W. W. R. 682.—CAN.

**f. —.**—The plea in defence to such an action that deft. laid the information on the advice of counsel is not a good answer to the allegation of lack of reasonable & probable cause for the prosecution where he did not inform counsel of all the facts.—GABLER v. CYMBALISKI, [1922] 2 W. W. R. 716 ; 15 Sask. L. R. 457.—CAN.

**g. — Magistrate.]—**COLBERT v. HICKS (1880), 5 A. R. 571.—CAN.

**h. — Solicitor.]—**LONGDEN v.

**370. Commitment by magistrate.]—**Complaint of a felony, the commitment of the magistrate is sufficient probable cause in an action for malicious prosecution, although no felony was in fact committed.—COX v. WIRRAL (1607), Cro. Jac. 193 ; Yelv. 105 ; 79 E. R. 169.

**Annotations :—Reid.** Panton v. Williams (1841), 2 Q. B. 169. **Mentd.** Jones v. Givin (1712), Gilb. 185.

**371. Deliberation of jury before acquittal.]—**If a party is indicted for a felony, though he is acquitted without calling any witnesses, he cannot maintain an action for a malicious prosecution, if his acquittal was the result of deliberation, & the evidence sufficient to cause the jury to pause.—SMITH v. MACDONALD (1799), 3 Esp. 7, N. P.

**Annotation :—Consd.** Willans v. Taylor (1829), 3 Moo. & P. 350.

**372. —.]—**WILLANS v. TAYLOR, No. 535, *post*.

**373. No ground for instituting proceedings.]—**In an action against a magistrate for a malicious conviction, it is not sufficient for pltf. to prove his innocence, & to call on deft. to show probable cause for the conviction ; pltf. must give such evidence of what passed on the hearing, by calling the witnesses for the prosecution or otherwise, that it may appear there was no probable cause for the conviction.

In the case of malicious prosecution proof that there was in reality no ground for imputing the crime to pltf. shows that the prosecution was instituted without probable cause, & malice may be inferred from thence (GIBBS, C.J.).—BURLEY v. BETHUNE (1814), 5 Taunt. 580 ; 1 Marsh. 220 ; 128 E. R. 816.

**374. Reliance on legal opinion.]—**It is a good defence to an action for a malicious arrest, that deft., when he caused pltf. to be arrested, acted *bonâ fide* upon the opinion of a legal adviser of competent skill & ability, & believed that he had a good cause of action against pltf. But where it appeared that the party was influenced by an indirect motive in making the arrest, it was held to be properly left to the jury to consider whether he acted *bonâ fide* upon the opinion of his legal adviser, believing that he had a good cause of action.

As it must be taken after the finding of the jury that he did not believe that he had any cause of action it is quite clear that there was no probable cause (HOLROYD, J.).—RAVENGA v. MACKINTOSH (1824), 2 B. & C. 693 ; 4 Dow. & Ry. K. B. 187 ; 2 L. J. O. S. K. B. 137 ; 107 E. R. 541 ; *previous proceedings*, *sub nom.* REVENGA v. MACINTOSH, 1 C. & P. 204, N. P.

**Annotations :—Consd.** Blachford v. Dod (1831), 2 B. & Ad. 179 ; Broad v. Ham (1839), 8 L. J. C. P. 357 ; Johnson v. Emerson & Sparrow (1871), L. R. 6 Exch. 329. **Reid.** Granger v. Hill (1838), 1 Arn. 42. **Mentd.** Bradshaw v. Waterlow, [1915] 3 K. B. 527.

**375. —.]—**ABRATH v. NORTH EASTERN RY. Co., No. 418, *post*.

**376. Source of defendant's information—Personal knowledge.]—**A plea to an action for a

BILSKY (1910), 16 O. W. R. 877 ; 2 O. W. N. 18 ; 22 O. L. R. 4.—CAN.

**k. —.**—IBBOTSON v. BERKLEY (B. C.), [1918] 3 W. W. R. 1018.—CAN.

**l. —.**—The fact that deft. consulted a solr. before laying the charge must be considered ; & its efficacy as a defence depends upon whether deft. laid all the facts before his solr. & acted *bonâ fide* upon his opinion.—SMITH v. RURAL MUNICIPALITY OF LAODENA No. 228 & McTAGGART, [1924] 1 W. W. R. 36 ; 18 Sask. L. R. 23.—CAN.

**m. — Clerk of the peace.]—**The fact that deft. acted *bonâ fide* & under



malicious charge before a magistrate, justifying the charge on the ground, that pltf. had committed the offence imputed to him, is not sufficient unless it allege, that at the time of the charge deft. had been informed of, or knew the facts on which the charge was made.—*DELEGAL v. HIGHLEY* (1837), 3 Bing. N. C. 950, 3 Hodg. 158; 5 Scott, 154; 6 L. J. C. P. 337; 132 E. R. 677; *subsequent proceedings*, 4 Bing. N. C. 114; 8 C. & P. 444, N. P.

*Annotations*:—*Refd.* James v. Phelps (1840), 11 Ad. & El. 483; Turner v. Ambler (1847), 11 Jur. 346. *Mentd.* Pearson v. Le Maitre (1843), 7 J. P. 336.

**377.** ——— *Information from third parties.* — *DELEGAL v. HIGHLEY*, No. 376, *ante*.

**378.** ——— *Bonâ fide belief in.* — *Information* received from persons apparently respectable & believed to be credible:—*Held*: sufficient evidence of reasonable & probable cause for a prosecution.

If those persons made such statements to deft., & he honestly believed them, & honestly instituted this prosecution, then he had reasonable & probable cause. If a man acts *bonâ fide* on honest belief of truth of statements made to him by others whom he believes to be credible persons, he is justified in so acting upon such statements, if he believes there is reasonable & probable cause for his so doing. The question is not whether they were right or wrong. It is what they told deft. (*COCKBURN, C.J.*).—*CHATFIELD v. COMERFORD* (1866), 4 F. & F. 1008, N. P.

**379.** ——— ———.]—G., pltf., advertised his farming stock & effects for sale, was arrested at the suit of B., on a judge's order to hold to bail, made upon the affidavit of C. that G. had stated his intention to go to Jersey to avoid his creditors, but he was at once discharged upon paying the amount to the officer. On the following day he was arrested at the suit of defts., upon a like order made upon the affidavit of their London agent, that he had read, & believed the statement in the affidavit of C. to be true. It eventually appeared that C.'s statement was untrue, & pltf. was discharged by judge's order. At the trial of the action against defts. for arresting pltf. maliciously, & without reasonable & probable cause, the agent was called on the part of defts., & he swore that he believed, without further inquiry, the statement in C.'s affidavit to be true at the time that he applied for & obtained the order to hold pltf. to bail, & thereupon the judge directed the verdict to be entered for defts. on the ground that there was reasonable & probable cause for the arrest, & the action could only be maintained on proof, (a) of malice on the part of defts., & (b) of want of reasonable & probable cause:—*Held*: there was reasonable & probable cause for the arrest, & there was no duty on defts.,

the advice of the clerk of the peace & of counsel is not of itself enough to afford a good defence of reasonable & probable cause.—*CROCKER v. STOREY* (1914), 43 N. B. R. 69.—*CAN.*

**377 i.** *Source of defendant's information*—*Information from third parties.*—In an action for malicious prosecution if a person has hearsay evidence, from which he may reasonably believe that another has committed perjury, he is justified in prosecuting though he may not have the evidence of two witnesses, or such other testimony as will be sufficient to obtain a conviction.—*CASTAGUETTI v. SANTI* (1878), 12 S. A. L. R. 1.—*AUS.*

**378 i.** ——— *Bonâ fide belief in.* — *OSWALD v. MEWBURN* (1843), 6 O. S. 471.—*CAN.*

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or their agent to make inquiry into the truth of the facts stated in C.'s affidavit before making an application based thereon for an order to hold pltf. to bail.—*GIBSON v. VEASEY* (1867), 15 L. T. 586; 31 J. P. 167; *previous proceedings* (1866), 15 L. T. 450, N. P.

**380.** ——— ———.] — *LISTER v. PERRYMAN*, No. 449, *ante*.

**381.** ——— ———.] — *HICKS v. FAULKNER*, No. 18, *ante*.

**382.** *Primâ facie case against plaintiff.*—In an action for malicious prosecution, reasonable & probable cause may be shown by evidence which would make a *primâ facie* case such as would justify a criminal charge, although it might be insufficient to convict; & although it might require confirmation by further evidence not disclosed or discovered by prosecutor until after he had given pltf. into custody.

The evidence of an accomplice, that he had been tampered with by the attorney for the defence, coupled with a letter found on the person of the attorney, after his arrest, on the criminal charge:—*Held*: evidence of reasonable cause for its prosecution.—*DAWSON v. VANSANDAU* (1863), 11 W. R. 516.

*Annotation*:—*Refd.* Bradshaw v. Waterlow, [1915] 3 K. B. 527.

**383.** *Flat of Attorney-General—Prior to commencement of prosecution.*—*BRADSHAW v. WATERLOW & SONS, LTD.*, No. 493, *post*.

#### B. Particular Proceedings.

**384.** *Theft—Possession of stolen goods—No explanation of possession.*—Finding stolen goods in a man's house who refuses to account for the possession of them, & who is committed in consequence thereof by a magistrate, on suspicion of being the thief, is a good probable cause to justify against an action for malicious prosecution; & deft. need not traverse the malice.—*CHAMBERS v. TAYLOR* (1602), Cro. Eliz. 900; 78 E. R. 1123.

**385.** ——— ———.]—The possession of stolen goods, without being able to give a probable account of coming honestly by them, is good cause of arrest by the officer, of commitment by the magistrate, & of prosecution by the owner; but on the replication *de son tort*, etc., to an action for such a prosecution, if the jury find it was *sans tiel cause*, pltf. shall have judgment.—*DOGATTE v. LAWRY* (1607), Cro. Jac. 190; 79 E. R. 166.

*Annotation*:—*Refd.* Jones v. Givin (1712), Gilb. 185.

**386.** ——— ——— & commitment by magistrate.]—Possession of stolen goods, & commitment by a magistrate is such probable cause as will justify an indictment for the theft.—*MARHAM v. PESCOD* (1606), Cro. Jac. 130; 79 E. R. 113.

*Annotations*:—*Refd.* Jones v. Givin (1712), Gilb. 185. *Mentd.* Rafael v. Verelst (1776), 2 Wm. Bl. 1055.

*Paid to procure evidence.*—*ANDERSON v. BELL* (1892), 24 N. S. R. 100.—*CAN.*

*o. Primâ facie case against plaintiff—Bonâ fide belief in.*—A reasonable *bonâ fide* belief in such facts as would have, if true, warranted a prosecution for theft, will constitute reasonable & probable cause.—*DUGUAY v. MYLES* (1913), 14 E. L. R. 410.—*CAN.*

*p. Continuation of prosecution—Where mistake might have been discovered.*—*PRUSSE v. DOCKERY* (1891), 17 V. L. R. 420.—*AUS.*

*q. — After discovery of mistake.*—There is an absence of reasonable & probable cause if deft. does not withdraw from prosecution of charge when he finds same not well founded.—*FANCOURT v. HEAVEN* (1909), 14

O. W. R. 230; 18 O. L. R. 492.—*CAN.*

*r. Acting on instructions of police.*—Where deft. first swore out a search warrant & afterwards, upon instructions by Royal North-West Mounted Police, swore to the information upon which the proceedings against pltf. were commenced:—*Held*: a reasonable & probable cause.—*LONGMUIR v. FORREST* (1914), 28 W. L. R. 821; 7 Sask. L. R. 162.—*CAN.*

#### PART IV. SECT. 3, SUB-SECT. 2.—B.

*t. Theft—Possession of stolen goods.*—*HIRTLE v. KNOX* (1913), 47 N. S. R. 219; 13 D. L. R. 21; 13 E. L. R. 149.—*CAN.*

*a. — Explanation of possession—Duty of prosecutor to verify.*—

K K

**Sect. 3.—Absence of reasonable and probable cause:**  
*Sub-sect. 2, B.; sub-sect. 3, A., B. & C.]*

**387. — Refusal to show them.]**—In an action for malicious prosecution for stealing deft.'s cattle it is a good cause of suspicion that pltf., in whose possession the cattle were, refused to show them.—*WEAL v. WELLS* (1617), J. Bridg. 60; 3 Bulst. 284; 81 E. R. 239.

**388. — Possession of goods—Bonâ fide belief in ownership.]**—In an action for a malicious prosecution for sheep stealing, it appeared at the trial that pltf. was possessed of a sheep which deft. claimed as one of a lot stolen from him. Pltf. gave an account of the way he became possessed of it, which, if the sheep was deft.'s, must have been wilfully false. Deft. took away the sheep. Pltf. sued him for so doing in the county ct. To stop the action deft. indicted pltf., who was acquitted. There was evidence both ways; but it appeared that the sheep really never was deft.'s, though deft. *bonâ fide* believed it was. The judge, assuming these facts to be true, asked the jury if deft. had reasonable grounds for his belief. On their finding that he had, he ruled that there was reasonable & probable cause for the indictment:—*Held*: under the circumstances, the finding of the jury on that one point, in addition to the facts beyond dispute, made out a complete case of reasonable & probable cause.

The duty of the judge was to decide whether there was reasonable & probable cause, taking into account all the undisputed facts & leaving the disputed material facts to the jury (*CROMPTON, J.*).—*DOUGLAS v. CORBETT* (1856), 6 E. & B. 511; 27 L. T. O. S. 134; 2 Jur. N. S. 1247; 119 E. R. 955.

**389. — Of like kind & condition.]**—A farmer having lost two trusses of straw, & finding pltf.s soon afterwards at a place some two or three miles distant with some loose straw in a cart, gave them into custody, with some expression of irritation, & prosecuted them for stealing it:—*Held*: if the straw were of the same kind as that lost, & in particular if it were clean & new, there was probable cause for suspicion; but if otherwise, there was not probable cause; & if the jury thought that he had acted under irritation, rashly, & rather under the influence of angry feeling than with reasonable care or due inquiry, there was evidence of malice on a count for malicious prosecution.—*DARLING v. COOPER, BEAUCHAMP v. COOPER* (1869), 21 L. T. 442; 11 Cox, C. C. 533, N. P.

**390. — Denial of receipt of money—Money in fact received.]**—*EAGAR v. DYOTT*, No. 59, *ante*.

**391. Accused absenting himself—After notice of issue of warrant.]**—The probable cause may be specially pleaded to an action for a malicious prosecution, though in effect it amounts to the general issue.

Causes of suspicion of deft. & absenting of pltf. after notice of the warrant [against him] are causes sufficient (*per CUR.*).—*PAIN v. ROCHESTER & WHITFIELD* (1602), Cro. Eliz. 871; 78 E. R. 1096.

*Annotations*:—*Consd.* *Panton v. Williams* (1841), 2 Q. B. 169. *Reid.* *Chambers v. Taylor* (1602), Cro. Eliz. 900. *Mentd.* *Hussey v. Jacob* (1696), 1 Salk. 344; *Bridge v. Grand Junction Ry.* (1838), 1 Horn & H. 26.

**392. Conviction by lower court—Subsequently quashed.]**—*REYNOLDS v. KENNEDY*, No. 350, *ante*.

**393. Assault—Made in self-defence.]**—If A. strike B. & B. return the blow, on which A. indicts B. for an assault, the bare fact of A. having struck the first blow is not sufficient to support an action for a malicious prosecution.

Though pltf. was justified in defending himself from deft.'s assault, it was still an assault & there was probable cause for the prosecution (*LORD KENYON*).—*FISH v. SCOTT* (1792), Peake, 184, N. P.

*Annotation*:—*Consd.* *Hinton v. Heather* (1845), 14 M. & W. 131.

**394. Forgery—Similarity of handwriting.]**—*CLEMENTS v. OHRLY*, No. 38, *ante*.

**395. — Identity.]**—A forged cheque having been uttered at defts.' bank, they had reason to believe that it was forged by C. Pltf. having been arrested by the police on the supposition that he was C., was identified by defts.' cashier as the person who, in his belief, had uttered the forged cheque. The cashier signed the charge-sheet, & pltf. was remanded from time to time at the instance of defts. While he was so under remand defts. received information as to the alibi which was to be set up in the case, but acting on counsel's opinion they went on with the prosecution. Having been subsequently advised that pltf., even if committed for trial, would probably be ultimately acquitted of the charge, defts. at once gave notice of their intention of withdrawing from the prosecution. Pltf. subsequently brought an action against them to recover damages from them for false imprisonment & malicious prosecution, & obtained a verdict:—*Held*: pltf. having been identified by defts.' cashier as the man who had uttered the cheque, they were not bound to make any inquiries as to the alibi, they had acted reasonably, & therefore there was no want of reasonable & probable cause.—*HARRISON v. NATIONAL PROVINCIAL BANK OF ENGLAND* (1885), 2 T. L. R. 70, C. A.; *affg.*, 49 J. P. 390, D. C.

**396. Defendant acting in self protection.]**—The declaration stated that pltf.s, being traders, gave defts. a judge's order for debt & costs in an action then pending between them, & paid the amount next day, but that nevertheless defts. wrongfully & maliciously caused the order to be filed with the clerk of the dockets under Bankrupt Law Consolidation Act, 1849 (c. 106), s. 137, whereby pltf.'s credit was injured:—*Held*: (1)

*JENNER v. HARBISON* (1879), 5 V. L. R. 111.—*AUS.*

**388 i. — Possession of goods—Bonâ fide belief in ownership.]**—*SCUGALL v. STAPLETON* (1886), 12 O. R. 206.—*CAN.*

**b. — Hearsay evidence—Explanation by accused refused—Prosecutor not under duty to verify.]**—*TURNER v. WRIGHT* (1880), 6 V. L. R. 273.—*AUS.*

**c. Assault.]**—In an action for malicious prosecution for assault, the finding that there was in fact an assault is not decisive of the question whether there was reasonable & probable cause for the prosecution; pltf. is entitled to have the circumstances relied on as

justification for the assault submitted to the jury.—*ROUTHIER v. MCLAURIN* (1889), 18 O. R. 112.—*CAN.*

**d. Forgery.]**—*CHARLEBOIS v. SURVEYOR* (1897), 27 S. C. R. 556.—*CAN.*

**e. —.]**—While mere similarity of hand writing may in many cases be a reasonable cause for charging a person with forgery, the opinion of experts, that the handwriting in a formal document is not only similar to but identical with that in a controverted document, is or may be of great value, & furnish reasonable & probable cause.—*McMERLEN v. WETLANFER* (1915), 33 O. L. R. 177.—*CAN.*

**f. Defamation.]**—In an action for malicious prosecution for defama-

tion pltf. in order to establish the absence of reasonable & probable cause, must prove that the facts known to deft. at the time when he initiated the prosecution were inconsistent with an honest belief upon reasonable grounds that deft. could not establish a defence to the charge.—*CROWLEY v. GLISSAN* (1905), 2 C. L. R. 744.—*AUS.*

**g. Execution.]**—*SMITH v. CHEP* (1842), 6 O. S. 213.—*CAN.*

**h. —.]**—*HOOD v. CRONKITE* (1869), 29 U. C. R. 98.—*CAN.*

**k. Seduction.]**—*RIDDELL v. BROWN* (1864), 24 U. C. R. 90.—*CAN.*

**l. Ill-treating a bull—Prima facie**



the declaration was bad for not averring the want of reasonable & probable cause; (2) defts. had reasonable & probable cause for filing the order, being entitled to do so under the statute for their own protection.

*Qu.*: whether defts. were not bound by the statute to file the order.—**DIMMACK v. BOWLEY** (1857), 2 C. B. N. S. 542; 26 L. J. C. P. 231; 3 Jur. N. S. 1059; 140 E. R. 528.

**397. Fraud—Issue of erroneous balance sheet—No fraudulent intent.**—The mere fact that a report & balance sheet prepared & published by the secretary of a public co., contains errors or mis-statements, does not afford "reasonable & probable cause" for charging him criminally under Larceny Act, 1861 (c. 96), s. 84, & will be no defence to an action for malicious prosecution brought by him if he has been so charged, unless some proof be given that he made & circulated the report & balance sheet as a wilful falsehood & with a fraudulent intent.—**AYRES v. ELBOROUGH** (1870), 22 L. T. 106, N. P.; *subsequent proceedings, sub nom. ELBOROUGH v. AYRES*, L. R. 10 Eq. 367.

#### SUB-SECT. 3.—WHEN ABSENCE WILL OR WILL NOT BE PRESUMED.

##### A. In General.

**398. From amount of damage.**—It has been always held, that the amount of damages is a *prima facie* ground from which to presume the presence or absence of reasonable & probable cause for the arrest.—**BALLANTYNE v. TAYLOR** (1836), 5 Ad. & El. 792; 1 Nev. & P. K. B. 219; 2 Har. & W. 453; 111 E. R. 1366.

*Annotation*:—**Refd.** *White v. Prickett* (1838), 4 Bing. N. C. 237.

##### B. Proof of Express Malice.

**399. Want of probable cause not implied.**—**JOHNSTONE v. SUTTON**, No. 2, *ante*.

**400.** —.]—**INCLEDON v. BERRY** (1805), 1 Camp. 203, n., N. P.

*Annotations*:—**Refd.** *Turner v. Turner* (1818), Gow, 20; *Willans v. Taylor* (1829), 3 Moo. & P. 350.

**401.** —.]—To support an action for a conspiracy in issuing a commission of lunacy, malice & a want of probable cause must be proved. On proof of a total want of probable cause malice may be implied; but, although express malice be proved, some slight evidence of a want of probable cause must be given.—**TURNER v. TURNER** (1818), Gow, 20, N. P.

**402.** —.]—**WHALLEY v. PEPPER**, No. 258, *ante*.

**403.** —.]—**MUSGROVE v. NEWELL**, No. 267, *ante*.

**404.** —.]—Although want of reasonable & probable cause cannot be inferred from proof of malice, where a person making a charge before a magistrate acted on the information of another, & the charge was highly improbable:—**Held**: the

jury might infer from the proof of malice that he did not believe the statement to be true.—**WRIGHT v. GREENWOOD** (1853), 1 W. R. 393.

##### C. Disbelief in Guilt or Liability of Plaintiff.

**405. Implies absence of probable cause.**—**RAVENGA v. MACKINTOSH**, No. 374, *ante*.

**406.** —.]—**BROAD v. HAM**, No. 362, *ante*.

**407.** —.]—In an action for maliciously indicting pltf. for an assault on deft., the following facts were proved: deft. came to pltf.'s house, which was let out as chambers, to inquire for a Mr. S., & on being informed that no such person lived there, uttered abusive language, & on pltf. requesting him to go away, laid hands on him, whereupon pltf. forced him out. There was conflicting testimony as to the degree of violence used by pltf. Pltf. was indicted by deft. for the assault, & acquitted. On the trial of the action the learned judge directed the jury, that if deft. preferred the indictment with a consciousness that he was in the wrong, there was no reasonable or probable cause for the indictment:—**Held**: the mere fact of pltf. having assaulted deft. did not of itself constitute reasonable & probable cause without reference to the other circumstances of the case, & the direction of the judge was substantially correct.—**HINTON v. HEATHER** (1845), 14 M. & W. 15 L. J. Ex. 39; 153 E. R. 419.

**408.** —.]—**TURNER v. AMBLER**, No. 444, *post*.

**409.** —.]—Case for maliciously, & without probable cause, indicting pltf. for perjury. Averment: that pltf. was tried & acquitted, & judgment given that he should depart without day, as by the record appeared. Plea: not guilty. The evidence on which perjury was assigned was given against deft. in an action in which he was deft., & in which the evidence for him contradicted that of the then pltf. Deft., on being told of the now pltf.'s evidence, said he would indict him for perjury. Deft.'s informant said he thought there was no ground for such indictment; but deft. replied that he should move for a new trial in the then action, & the indictment would stop the mouths of the now pltf. & the opposite party for a time:—**Held**: (1) the jury were properly asked whether deft. believed there was reasonable & probable cause for the prosecution, & they having found that he did not, the judge was right in ruling that there was no such cause; (2) the jury were rightly told that, if, upon the above evidence, they believed that deft. acted from an improper motive, they might infer malice; (3) the acquittal was admitted on the record.

(4) I think that belief is essential to the existence of reasonable & probable cause. I do not mean abstract belief, but a belief upon which a party acts. Proof of the absence of belief is almost always involved in the proof of malice (**LORD DENMAN, C.J.**).—**HADDRICK v. HESLOP** (1848), 12 Q. B. 267; 17 L. J. Q. B. 313; 11 L. T. O. S.

*case—Explanation by accused refused—Prosecutor not under duty to v. ...*  
**DESLAURIERS v. JASMIN** (1908), 5 E. L. R. 243.—**CAN.**

*m. Distress.*—**STREIMER v. NAGEL** (1909), 11 W. L. R. 325.—**CAN.**

*n. Arson.*—**LYONE v. LONG** (Sask.), [1917] 3 W. W. R. 139; 36 D. L. R. 76; 10 Sask. L. R. 343.—**CAN.**

*o. Neglecting a child.*—**RAE v. SCOTTISH SOCIETY FOR PREVENTION OF CRUELTY TO CHILDREN**, [1924] S. C. 102.—**SCOT.**

#### PART IV. SECT. 3, SUB-SECT. 3.—A.

##### p. Prosecution for offence unknown

*to law.*—Where the offence charged is non-existent deft. cannot have had reasonable & probable cause for the prosecution, notwithstanding that he had been advised by his solr.—**MACKENZIE v. HYAM** (1908), 8 S. R. N. S. W. 587.—**AUS.**

*q. Want of reasonable care by prosecutor to inform himself of the facts.*—In an action for malicious prosecution, where there is a want of reasonable care on the part of deft. to inform himself of the true state of the case there is sufficient justification for holding that there was a want of reasonable & probable cause.—**WEBBER v. MCLEOD** (1888), 16 O. R. 609.—**CAN.**

#### PART IV. SECT. 3, SUB-SECT. 3.—B.

*r. Honest belief—Improper motive—Reasonable & probable cause implied.*—**CURRIE v. CALOFF** (1911), 19 W. L. R. 767; 1 W. W. R. 233.—**CAN.**

#### PART IV. SECT. 3, SUB-SECT. 3.—C.

**405 i. Implies absence of probable cause.**—**BAKER v. KILPATRICK** (1900), 7 B. C. R. 150.—**CAN.**

**405 ii.** —.]—**GEERS v. NESTMAN** (1912), 20 W. L. R. 212; 1 D. L. R. 312; 5 Sask. L. R. 85; 1 W. W. R. 861.—**CAN.**

**405 iii.** —.]—**FOLEY v. HARRISON** (1915), 49 N. S. R. 135.—**CAN.**

**Sect. 3.—Absence of reasonable and probable cause :  
Sub-sect. 3, C., D., E., F. & G.]**

414; 12 Jur. 600; 116 E. R. 869; *subsequent proceedings, sub nom.* CHAPMAN v. HESLOP, 12 Q. B. 928.

*Annotations:—As to (1), (2) & (4) Consd.* Shrosbery v. Osmaston (1877), 37 L. T. 792. *Generally, Mentd.* Heslop v. Chapman (1853), 23 L. J. Q. B. 49; Gilding v. Eyre (1861), 10 C. B. N. S. 592.

410. ———.]—GREGORY v. CORNER (1848), 10 L. T. O. S. 418.

411. ———.]—CHAPMAN v. HESLOP, No. 488, *post.*

412. ———.]—WILLIAMS v. BANKS, No. 363, *ante.*

413. ———.]—SHROSBERY v. OSMASTON, No. 490, *post.*

**D. Knowledge of Good Faith of Plaintiff.**

414. **Implies absence of probable cause—Knowledge that act done under bonâ fide claim of right.]—**

(1) The mere fact of obstructing the airway of a mine is not sufficient to constitute reasonable & probable cause for prosecuting the party who has done the act under 7 & 8 Geo. 4, c. 30, s. 6, so as to warrant the judge in an action for a malicious prosecution in withdrawing the question as to reasonable & probable cause from the jury, where the act has been done under a claim of right, & after notice given.

If deft. was aware at the time of making the charge of all the circumstances under which the act was done & that pltf. acted *bonâ fide* in the assertion of a right it could not be said that deft. had reasonable & probable cause (DENMAN, C.J.).

(2) Whether, in an action for a malicious prosecution, the question of reasonable & probable cause is to be submitted to the jury, or decided by the judge, depends upon the circumstances of the particular case & not upon any general rule.—JAMES v. PHELPS (1840), 11 Ad. & El. 483; 3 Per. & Dav. 231; 9 L. J. Q. B. 106; 4 J. P. 74; 113 E. R. 499.

*Annotation:—Generally, Mentd.* Fletcher v. Calthrop (1845), 6 Q. B. 880.

415. ———.]—In an action for maliciously causing pltf. to be arrested, it appeared that pltf. was employed to work up some timber into spars, under a contract with H., by which he was to be paid £48 by weekly instalments during the progress of the work, & the balance on the completion of it. Before the work was completed H. assigned all his goods to deft. & others for the benefit of his creditors generally. At this time about £19 remained due to pltf. as the value of the work done up to that time. Pltf. went to deft.'s yard where the spars were & asked for them, & on deft.'s foreman refusing to give them up, he took them away the next morning at 4 o'clock a.m. His attorney then wrote to deft.'s attorney to say that he claimed a lien on the spars. Deft. demanded them back, but pltf. refused to give them up. Pltf. was then taken into custody for stealing the spars on the information & complaint of deft. He asked deft. why he gave him into custody, to which deft. replied: "You had no right to take the spars away, I think you merely fetched them away to get what was your due"—*Held*: there was evidence of the absence of reasonable & probable cause for the charge.

The expression alleged by pltf. to have been used by deft., showing that he did not think that pltf. meant to steal the goods, was not denied or

explained. It is therefore impossible to say that there was no evidence of the absence of reasonable & probable cause for the charge (POLLOCK, C.B.).—HUNTLEY v. SIMSON (1857), 2 H. & N. 600; 27 L. J. Ex. 134; 30 L. T. O. S. 157; 22 J. P. 86; 6 W. R. 106; 157 E. R. 247.

416. ———.]—COLSON v. RADCLYFFE (1887), 4 T. L. R. 59.

**E. Termination of Proceedings in Favour of Plaintiff.**

**Necessity for proving termination of proceedings.]**

—See Sect. 1, *ante.*

417. **Absence of probable cause not implied—Bill ignored by grand jury.]—**The fact of a bill being thrown out [by grand jury] was no proof of a want of probable cause (PARK, J.).—FREEMAN v. ARKELL (1824), 1 C. & P. 326.

418. ———.]—(1) In an action for malicious prosecution the burden of proof as to all the issues arising therein lies upon pltf.; & although pltf. proves that he was innocent of the charge laid against him, & although the judge in order to enable himself to determine the issue of reasonable & probable cause, leaves subsidiary questions of fact to the jury, nevertheless the *onus* of proving the existence of such facts as tend to establish the want of reasonable & probable cause on the part of deft., rests upon pltf.

(2) Pltf., a surgeon, had attended M. for bodily injuries alleged to have been sustained in a collision upon defts.' railway. M. brought an action against defts., which was compromised by defts. paying a large sum for damages & costs. Subsequently the directors of defts.' co., having received certain information, caused the statements of certain persons to be taken by a solr.; these statements tended to show that the injuries of which M. complained were not caused at the collision, but were produced wilfully by pltf., with the consent of M., for the purpose of defrauding defts. These statements were laid before counsel, who advised that there was good ground for prosecuting pltf. & M. for conspiracy. Defts. accordingly prosecuted pltf., but he was acquitted. In an action for malicious prosecution, the judge directed the jury to find whether defts. had taken reasonable care to inform themselves of the true state of the case, & whether they honestly believed the case which they laid before the magistrates; the jury having answered these questions in the affirmative, the judge entered the judgment for defts.:—*Held*: the direction to the jury was correct, upon the facts & the findings of the jury, defts. had reasonable & probable cause for prosecuting pltf., & the judge had rightly entered the judgment for defts.

(3) The question, whether reasonable care has or has not been taken by a prosecutor to inform himself of the real state of the case, is not merely a piece of evidence to prove some fact, but it is a question which is itself to be decided by evidence, & upon which evidence to prove & disprove it may be given. It is a necessary part of the question whether there was reasonable & probable cause, because if there has been a want of reasonable care on the part of the prosecutor to inform himself of the true state of the case, then there must be a want of reasonable & probable cause. It is one of those facts for which I have tried to find a proper designation, but I have not succeeded in finding one satisfactory to my mind; it may be described as a fundamental fact, in order to try

**PART IV. SECT. 3, SUB-SECT. 3.—D.**

t. **Implies absence of probable cause.]—**TORRANCE v. JARVIS (1852), 13 U. C. R. 120.—CAN.



to distinguish it from a fact which is merely evidence of something else. It is a fact which it would be necessary to allege & prove, & it is not merely a fact which is evidence of something which is to be alleged & proved (BRETT, M.R.).

(4) In an action for malicious prosecution pltf. has to prove (a) that he was innocent & that his innocence was pronounced by the tribunal before which the accusation was made; (b) that there was a want of reasonable & probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable & probable cause; & (c) that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect & improper motive, & not in furtherance of justice. All those three propositions pltf. has to make out, & if any step is necessary, to make out any one of those three propositions, the burden of making good that step rests upon pltf. (BOWEN, L.J.).

(5) Something has been said about innocence being proof, *prima facie*, of want of reasonable & probable cause. I do not think it is. When mere innocence wears that aspect, it is because the fact of innocence involves with it other circumstances which show that there was the want of reasonable & probable cause; as, for example, when prosecutor must know whether the story which he is telling against the man whom he is prosecuting, is false or true. In such a case, if accused is innocent, it follows that prosecutor must be telling a falsehood, & there must be want of reasonable & probable cause. Or if the circumstances proved are such that prosecutor must know whether accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if accused is innocent there must be a want of reasonable & proper care. Except in cases of that kind, it never is true that mere innocence is proof of want of reasonable & probable cause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable & probable cause (BOWEN, L.J.).—**ABRATH v. NORTH EASTERN RY. CO.** (1883), 11 Q. B. D. 440; 52 L. J. Q. B. 620; 49 L. T. 618; 47 J. P. 692; 32 W. R. 50; 15 Cox, C. C. 354, C. A.; *affd.* (1886), 11 App. Cas. 247, H. L.

*Annotations*:—As to (1) **Folld.** *Bradshaw v. Goodwin* (1894), 10 T. L. R. 491. As to (2) **Apld.** *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1884), 50 L. T. 274. **Refd.** *Harrison v. National Provincial Bank of England* (1885), 2 T. L. R. 70; *Penfold v. Grosvenor Bank* (1886), 2 T. L. R. 759; *Brown v. Hawkes*, [1891] 2 Q. B. 718; *Bradshaw v. Waterlow*, [1915] 3 K. B. 527. As to (3) **Apld.** *Lea v. Charrington* (1889), 61 L. T. 222. As to (4) **Folld.** *Edwards v. Annett* (1887), 3 T. L. R. 671. **Apld.** *Cox v. English, Scottish & Australian Bank*, [1905] A. C. 168. *Generally, Refd.* *Wakelin v. L. & S. W. Ry.* (1884), [1896] 1 Q. B. 189, n.; *Cornford v. Carlton Bank*, [1899] 1 Q. B. 392; *Wiffen v. Bailey & Romford U. D. C.* (1914) 78 J. P. 187. **Mentd.** *Flood v. Jackson*, [1895] 2 Q. B. 21; *Nevill v. Fine Arts & General Insce.*, [1895] 2 Q. B. 156; *Citizens' Life Assee. v. Brown*, [1904] A. C. 423; *Jones v. Hulton*, [1909] 2 K. B. 444; *R. v. Stoddart* (1909), 73 J. P. 348; *R. v. Bradshaw, Edwards & Jones* (1910), 4 Cr. App. Rep. 280; *R. v. Horn* (1912), 76 J. P. 270; *R. v. Immer, R. v. Davis* (1917), 118 L. T. 416; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

#### F. Abandonment of Proceedings.

**419. How far want of probable cause implied.]—****WALLIS v. ALPINE** (1805), 1 Camp. 204, n., N. P.  
*Annotation*:—**Refd.** *Willans v. Taylor* (1829), 6 Bing. 183.

**PART IV. SECT. 3, SUB-SECT. 3.—F.**  
*Implies want of probable cause.]*  
—In an action for malicious prosecution & false imprisonment, where

the circumstances connected with the offence with which pltf. was charged in no way pointed to him as the guilty person, & deft. interfered at

**420. —.]—INCLEDON v. BERRY** (1805), 1 Camp. 203, n., N. P.

*Annotations*:—**Folld.** *Turner v. Turner* (1818), Gow, 20. **Refd.** *Willans v. Taylor* (1829), 3 Moo. & P. 350.

**421. —.]—PURCELL v. MACNAMARA**, No. 286, *ante*.

**422. —.]—A. arrested B. on an affidavit of debt for money paid to his use, but did not declare until ruled to do so, & soon afterwards discontinued the action, & paid the costs:—Held: this was sufficient *prima facie* evidence of malice & the absence of probable cause to support an action for a malicious arrest.—NICHOLSON v. COGHILL** (1825), 4 B. & C. 21; 6 Dow. & Ry. K. B. 12; 107 E. R. 967.

*Annotations*:—**Refd.** *Webb v. Hill* (1828), 3 C. & P. 485; *Panton v. Williams* (1841), 2 Q. B. 169; *Malley v. Pumfrey* (1846), 7 L. T. O. S. 63.

**423. —.]—WILLANS v. TAYLOR**, No. 535, *post*.

**424. —.]—HENDERSON v. MIDLAND RY. CO.**, No. 270, *ante*.

**425. —.]—HILLIAR v. DADE** (1898), 14 T. L. R. 534, C. A.

#### G. Failure to take Set-Off into Account.

**426. Whether absence of reasonable cause implied.]—**If in an action for a malicious arrest, the declaration averred that B., deft., had no cause of action against A., pltf., to the amount of £10 & it appeared that A. was indebted to him above that sum, although not nearly to the amount sworn to in the affidavit to hold to bail:—**Held**: the action could not be supported; as A. should have declared against B. for maliciously holding him to bail for a greater sum than was really due; but if, in fact, B. was largely indebted to A., on a balance of accounts & had only a cross demand upon him for a different cause from that mentioned in the affidavit to hold to bail, then the above averment was not falsified as in that case A. did not owe B. £10 & B. had no cause of action for which he could lawfully hold A. to bail.—**WETHERDEN v. EMBDEN** (1808), 1 Camp. 295, N. P.

**427. —.]—**An action cannot be maintained for a malicious arrest by A. against B. if A. owed B. the sum for which he was held to bail, although B. was indebted to A. to a larger amount.

Deft.'s conduct in this transaction was highly vexatious & reprehensible; but this action cannot be maintained. He had not only a probable, but a real, cause of action against pltf. at the time of the arrest. The cross demands were separate & distinct. The statute of set-off is not compulsory, deft. was not obliged to set off the debt due to him from pltf. (**LORD ELLENBOROUGH**).—**BROWN v. PIGEON** (1811), 2 Camp. 594, N. P.

*Annotations*:—**Dbtd.** *Austin v. Debnam* (1824), 3 B. & C. 139. **Distd.** *Forster v. Weston* (1830), 4 Moo. & P. 276.

**428. —.]—**Where, in the account between pltf. & deft., there are items clearly due on both sides, it is an arrest without reasonable & probable cause within 43 Geo. 3, c. 46, s. 3, if pltf. arrests & holds deft. to bail for the amount due to him without, at the same time, giving him credit for the items clearly due on the other side of the account. He ought only to hold deft. to bail for the admitted balance.—**DRONEFIELD v. ARCHER** (1822), 5 B. & Ald. 513; 106 E. R. 1278; *sub nom.* **DROMFIELD v. ARCHER**, 1 Dow. & Ry. K. B. 67.

*Annotations*:—**Folld.** *Austin v. Debnam* (1824), 3 B. & C. 139; *Ashton v. Naull* (1833), 3 Moo. & S. 184.

the time of the arrest & failed to prosecute, want of probable cause may be inferred.—**SAVAGE v. BRETON** (1905), 37 N. B. R. 240.—**CAN**,

*Sect. 3.—Absence of reasonable and probable cause :  
Sub-sect. 3, G.; sub-sect. 4, A. & B. (a).]*

429. ———.]—AUSTIN v. DEBNAM, No. 255, *ante*.

430. ———.]—Pltfs. having arrested deft., & held him to bail for £1,123 & consented at the trial to take a verdict for £710 they having, at the time of the arrest, a sum of £407 belonging to deft. in their hands:—*Held*: he was entitled to his costs under 43 Geo. 3, c. 46, s. 3, as the balance was the sum ultimately due to pltfs., after deducting the latter sum, although the account on which the balance was due was a joint account between deft. & a third person.—FORSTER v. WESTON (1830), 6 Bing. 527; 4 Moo. & P. 276; 130 E. R. 1384; *sub nom.* FOSTER v. WESTON, 8 L. J. O. S. C. P. 210.

*Annotation*:—*Refd.* Reynolds v. Flower (1833), 3 Moo. & S. 801.

431. ———.]—If there be mutual dealings & mutual debts between two parties, & if one arrest the other without striking a balance, & deducting that sum in which he himself is indebted, such arrest is without reasonable or probable cause; & the party by whom it is made is liable to costs under 43 Geo. 3, c. 46.—ASHTON v. NAULL (1833), 2 Dowl. P. C. 727; 3 Moo. & S. 184; 2 L. J. C. P. 137.

*Annotation*:—*Refd.* White v. Prickett (1838), 4 Bing. N. C. 237.

#### SUB-SECT. 4.—QUESTION FOR JUDGE AND JURY.

##### A. In General.

432. Mixed question of law & fact.]—JOHNSTONE v. SUTTON, No. 2, *ante*.

433. ———.]—The question of probable cause is a mixed question of law & fact: if you believe such & such facts, then I tell you there is probable cause; & if you think the motives of the prosecutor were such, then there is no probable cause: so that the question is rightly left to the jury, to judge of the motive which actuated deft. in instituting the prosecution (LORD TENTERDEN, C.J.).

I have always understood the rule as laid down in *Johnstone v. Sutton*, No. 2, *ante*, is correct. That rule is this, that the evidence given is for the consideration of the jury, for them to say, whether they give credit to the witnesses, & whether the particular facts induce a particular inference or not. They are to judge of the weight & bearing of evidence; but, if it is believed by them, it is for the judge to say whether the

evidence amounts to proof of want of probable cause. If it had been wished to put the objection in the way in which it is now put, pltf. should have assigned as error, that the facts proved did not amount to a want of probable cause. That would have taken issue in law on the whole of the case (TAUNTON, J.).—TAYLOR v. WILLANS (1831), 2 B. & Ad. 845; 1 L. J. K. B. 17; 109 E. R. 1357.

*Annotations*:—*Consd.* Broad v. Ham (1839), 5 Bing. N. C. 722. *Refd.* Shufflebottom v. Allday (1857), 21 J. P. 263. *Abrath v. N. E. Ry.* (1883), 11 Q. B. D. 440.

434. ———.]—M'DONALD v. ROOKE, No. 480, *post*.

435. ———.]—BROAD v. HAM, No. 362, *ante*.

##### B. Duty of Judge.

###### (a) In General.

436. General rule—Judge to decide what amounts to reasonable & probable cause.]—GOLDING v. CROWLE (1751), Say. 1; 96 E. R. 782.

*Annotations*:—*Refd.* Byne v. Moore (1813), 1 Marsh. 12; *Nicholson v. Coghill* (1825), 4 B. & C. 21.

437. ———.]—JOHNSTONE v. SUTTON, No. 2, *ante*.

438. ———.]—TAYLOR v. WILLANS, No. 433, *ante*.

439. ———.]—(1) In an action against deft. for having without reasonable or probable cause preferred a complaint against pltf. before a magistrate, & caused him to be imprisoned & held to bail, on a charge of having threatened to do deft. some bodily harm, the question whether or not there was reasonable or probable cause for the complaint, is one of law; but the facts, where they are conflicting, must be first ascertained by the jury.

(2) Where, in such action, the judge non-suited pltf. without referring the belief of deft., in holding to bail, to the jury:—*Held*: such non-suit was wrong, inasmuch as the belief of deft. was a fact, & should be determined like any other fact by the jury.—VENAFRA v. JOHNSON (1833), 10 Bing. 301; 6 C. & P. 50; 3 Moo. & S. 847; 3 L. J. C. P. 51; 131 E. R. 920; *subsequent proceedings* (1834), 1 Mood. & R. 316, N. P.

*Annotations*:—*As to* (1) *Appld.* Musgrove v. Newell (1836), 1 M. & W. 582. *As to* (2) *Appld.* Steward v. Gromett (1859), 7 C. B. N. S. 191.

440. ———.]—BROAD v. HAM, No. 362, *ante*.

441. ———.]—In an action for indicting maliciously & without probable cause, if deft. set up facts as showing probable cause, the judge must determine whether the facts, if proved, or any of them, constitute such cause. The jury is

#### PART IV. SECT. 3, SUB-SECT. 4.—A.

432 i. Mixed question of law & fact.]—VAGG v. BRIGHT (1887), 13 V. L. R. 614.—AUS.

432 ii. ———.]—VINCENT v. WEST (1868), 1 Han. 290.—CAN.

432 iii. ———.]—Where the facts upon which the existence of reasonable & probable cause depends are in dispute, the judge is not in a position to decide that question until the jury have found upon the facts.—ERICKSON v. BRAND (1888), 14 A. R. 614.—CAN.

432 iv. ———.]—In an action for malicious prosecution the jury is to find the facts on which the question of reasonable & probable cause depends, but the judge must determine whether the facts found do constitute reasonable & probable cause.—STILL v. HASTINGS (1907), 9 O. W. R. 121; 13 O. L. R. 322; *affd.*, 10 O. W. R. 10; 14 O. L. R. 638.—CAN.

432 v. ———.]—It is for the judge & not for the jury to determine what is reasonable & probable cause in action for malicious prosecution. The jury

finds the facts. The judge draws the proper inference from the findings of the jury & in that sense the question is a question of law.—PESTONJI MUNCHERJI MODY v. QUEEN INSURANCE CO. (1900), 1 L. R. 25 Bom. 332.—IND.

#### PART IV. SECT. 3, SUB-SECT. 4.—B. (a).

436 i. General rule—Judge to decide what amounts to reasonable & probable cause.]—SMITH v. MCKAY (1853), 10 U. C. R. 412.—CAN.

436 ii. ———.]—HUGHSON v. KEITH (1863), 5 All. 559.—CAN.

436 iii. ———.]—BAKER v. JONES (1869), 19 C. P. 365.—CAN.

436 iv. ———.]—In an action for malicious prosecution, the jury having found the facts in dispute, the question of reasonable & probable cause is for the judge.—MARTIN v. HUTCHINSON (1891), 21 O. R. 388.—CAN.

436 v. ———.]—ARCHIBALD v. MCLAREN (1892), 21 S. C. R. 588.—CAN.

436 vi. ———.]—GRANT v. BOOTH (1893), 25 N. S. R. 266.—CAN.

436 vii. ———.]—In an action for malicious prosecution the question of reasonable & probable cause is one for the judge, & is not disposed of by the finding of the jury that deft. had just cause for action against pltf.—HAWKINS v. SNOW (1895), 27 N. S. R. 408.—CAN.

436 viii. ———.]—PECK v. PECK (1901), 35 N. B. R. 484.—CAN.

436 ix. ———.]—MEANEY v. REID NEWFOUNDLAND CO. (1906), 39 N. S. R. 407.—CAN.

436 x. ———.]—JEWHRST v. UNITED CIGAR STORES, LTD. (1919) 46 O. L. R. 180; 17 O. W. N. 80.—CAN.

436 xi. ———.]—HARISH CHANDER NEOGY v. NISHI KANT BANERJEE (1901), 1 L. R. 28 Calc. 591; 6 C. W. N. 159.—IND.

b. Discretion of judge.]—COUVES v. KIRKCALDIE (1900), 18 N. Z. L. R. 626.—N.Z.

c. Direction to jury—Explanation of



to decide only whether the facts, or facts inferred from them, exist; & this, however complicated or numerous the facts may be.—**PANTON v. WILLIAMS** (1841), 2 Q. B. 169; 1 Gal. & Dav. 504; 10 L. J. Ex. 545; 114 E. R. 66, Ex. Ch.

*Annotations*:—**Folld.** **Watson v. Whitmore** (1844), 1 New Pract. Cas. 108. **Consd.** **Rowlands v. Samuel** (1847), 11 Q. B. 40, n. **Apld.** **Douglas v. Corbett** (1856), 6 E. & B. 511. **Consd.** **Busst v. Gibbons** (1861), 30 L. J. Ex. 75. **Apprvd.** **Lister v. Perryman** (1870), L. R. 4 H. L. 521. **Consd.** **Abrath v. N. E. Ry.** (1883), 11 Q. B. D. 79; **Bradshaw v. Goodwin** (1894), 10 T. L. R. 491. **Refd.** **Turner v. Ambler** (1847), 10 Q. B. 252; **Gosden v. Elphick**, **Vass v. Same**, **Maynard v. Same** (1849), 14 L. T. O. S. 157; **Ross v. Norman** (1850), 5 Exch. 359; **West v. Baxendale** (1850), 9 C. B. 141; **Hailes v. Marks** (1861), 7 H. & N. 56; **Johnson v. Emerson** (1871), L. R. 6 Exch. 329; **Bradshaw v. Waterlow**, [1915] 3 K. B. 527. **Mentd.** **Kine v. Evershed** (1847), 11 Jur. 673; **Cox v. Reid** (1849), 18 L. J. Q. B. 216.

**442.** ———.]—In an action for maliciously & without reasonable or probable cause causing a summons & warrant to be issued against pltf. under which he was brought before a comr. of bkpcy. Upon the facts proved the judge was of opinion & directed the jury that there was reasonable & probable cause for the arrest:—**Held**: the question whether the facts proved or admitted amounted to reasonable & probable cause was for the judge & not for the jury.—**WATSON v. WHITMORE** (1844), 1 New Pract. Cas. 108; 14 L. J. Ex. 41; 4 L. T. O. S. 99; 8 Jur. 964.

**443.** ———.]—In case for maliciously, & without reasonable or probable cause, causing pltf. to be arrested on a *capias* under 1 & 2 Vict. c. 110, s. 3, the order for which had been obtained upon an affidavit not fairly disclosing the nature of the contract, for the alleged breach of which defts. were suing, the judge having stated, that, in his opinion, pltf. had failed to make out a want of reasonable & probable cause, told the jury, that, to entitle pltf. to a verdict, they must be satisfied that there was a total want of reasonable & probable cause, & that defts. had acted with malice:—**Held**: a misdirection.—**GIBBONS v. ALISON** (1846), 3 C. B. 181; 7 L. T. O. S. 209; 136 E. R. 73.

**444.** ———.]—In an action for malicious prosecution, the facts material to the question of probable cause must be found by the jury; & the judge is then to decide, as a point of law, whether the facts so found establish probable cause or want of it: among these facts are deft.'s knowledge of the alleged ground of accusation at the time when he prosecuted; & his belief, at that time, that the conduct forming such ground of accusation amounted to the offence charged. If deft. did not so believe, the want of reasonable & probable cause is established, though the imputed offence appear *prima facie* to have been committed by pltf., & the fact to have been known to deft., before the charge was made. The absence of belief must be proved by pltf., & if it be not proved, the defect is not supplied, for the purpose of showing want of probable cause, by evidence that deft. made use of the charge as a means of obtaining an unfair advantage over pltf.

The prevailing law of reasonable & probable cause is this, that the jury are to ascertain certain facts, & that the judge is to decide whether those facts amount to such cause. But among the facts to be ascertained is the knowledge of deft. of the existence of those which tend to show reasonable & probable cause, because without knowing them he could not act on them, & also deft.'s belief that

the facts amounted to the offence which he charged, because otherwise he would have made that a pretext for prosecution without even entertaining an opinion that he had a right to do so; in other words, the reasonable & probable cause must appear not only to be deducible in point of law from the facts, but to have existed in deft.'s mind at the time of the proceedings; & perhaps, whether they did so or not, is rather an independent question for the jury, to be decided on their view of all the particulars of deft.'s conduct, than for the judge, to whom the legal effects of the facts only is more properly referred (**LORD DENMAN, C.J.**).

The most express malice would not be sufficient if there were probable cause (**PATTESON, J.**).—**TURNER v. AMBLER** (1847), 10 Q. B. 252; 16 L. J. Q. B. 158; 9 L. T. O. S. 36; 11 J. P. 631; 11 Jur. 346; 116 E. R. 98.

*Annotations*:—**Consd.** **Haddrick v. Heslop** (1848), 12 Q. B. 267; **Johnson v. Emerson** (1871), L. R. 6 Exch. 329. **Apld.** **Shrosbery v. Osmaston** (1877), 37 L. T. 792. **Refd.** **Hicks v. Faulkner** (1881), 8 Q. B. D. 167.

**445.** ———.]—**CHAPMAN v. HESLOP**, No. 488, *post*.

**446.** ———.]—It has been, from the very earliest period of time, the established doctrine that the judge is bound to state, & it is for that purpose made matter of law, whether there was or was not probable cause for that proceeding which is complained of as having been malicious. In order to sustain such an action against a party for having prosecuted maliciously & without probable cause, two things must be made out, that the prosecution was malicious, & that it was without probable cause. Whether it is malicious or not is purely a question for the jury. Whether there was or was not probable cause is a question of law for the judge. To enable the judge to arrive at a decision upon that question of law, he may, if the circumstances of the case call for it, ask the jury any fact leading or not to a particular conclusion. Did the party do so & so? because upon your answer "aye" or "no," I come to the conclusion whether there was or was not probable cause (**LORD CRANWORTH, C.**).—**FRASER v. HILL** (1853), 1 C. L. R. 7; 21 L. T. O. S. 69; 1 W. R. 538, H. L.

**447.** ———.]—**DOUGLAS v. CORBETT**, No. 388, *ante*.

**448.** ———.]—**BUSST v. GIBBONS**, No. 369, *ante*.

**449.** ———.]—It is a rule of law that the jury must find the facts on which the question of reasonable & probable cause depends, but that the judge must then determine whether the facts found do constitute reasonable & probable cause. No definite rule can be laid down for the exercise of the judge's judgment.

L. was the owner of a rifle, which was left in the care of his coachman, H. The rifle had been seen & admired by P., who said he wished he had one like it. It was stolen. H. told that fact to L., his master, & at the same time informed him that R., the coachman of a near neighbour, said he had seen it in a barn belonging to P.'s father, that P. hearing of this statement denied it, & offered to take H. & R. to the barn & show them the gun he had there, that he did take them to the barn & showed them a gun, which was not L.'s gun, & that R. said that was not the gun he had previously seen in the barn. L. caused P. to be

*law & application of facts.*]—In an action for malicious prosecution, it is not enough for the judge to tell the jury merely what the law is on the

subject, he must explain its application to the facts of the particular case.—**LYON v. BROWNE** (1882), 8 V. L. R. 247.—**AUS.**

—.]—**CONNORS v. REID** (1911), 20 O. W. R. 291; 3 O. W. N. 209, 1137; 25 O. L. R. 44; 3 D. L. R. 636.—**CAN.**

it appear that there was any rule of practice on the subject at those sessions. An appeal under the statute, of which due notice had been given, was respited, & came on at a subsequent session, pursuant to the respite. Applt. was called upon to prove that he had given notice of trial of the respited appeal, & on his failing to do so the appeal was dismissed:—*Held*: the sessions were wrong in requiring such notice, & the case was one in which this ct. might overrule their decision. *Mandamus* granted to hear the appeal.

The province of this ct. in such a case as the present is clear. We have no right to interfere with the discretionary power of the sessions; where they have that power, their discretion is to be confided in. But the question, what is such reasonable notice as gives them jurisdiction to entertain an appeal, is a legal question, of which they are not the exclusive judges; & this ct. will see that in determining such a point they act legally, & according to the jurisdiction which they possess (PARKE, J.).—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1833), 5 B. & Ad. 667; 2 Nev. & M. K. B. 390; 1 Nev. & M. M. C. 433; 3 L. J. M. C. 21; 110 E. R. 937.

*Annotations*:—*Distd.* *R. v. Monmouthshire JJ.* (1835), 3 Dowl. 306. *Consd.* *R. v. Sussex JJ.* (1840), 9 Dowl. 125. *Distd.* *R. v. Middlesex JJ.* (1843), 2 Dowl. N. S. 719; *R. v. Montgomeryshire JJ.* (1845), 3 Dowl. & L. 119; *R. v. Derbyshire JJ.* (1852), Bail Ct. Cas. 113. *Appld.* *R. v. Pawlett* (1873), L. R. 8 Q. B. 491. *Refd.* *R. v. Hewes* (1835), 5 L. J. M. C. 45; *Ex p. Hopwood* (1850), 14 Jur. 812; *R. v. Buckinghamshire JJ.* (1854), 18 Jur. 1079; *R. v. Eyre* (1857), 22 J. P. 37.

**1503.** — — —.]—*R. v. GLAMORGANSHIRE JJ.*, No. 1043, *ante*.

**1504.** — — — *Tender of case at same time.*]—Where the sessions dismiss an appeal on a preliminary point, at the same time tendering appls. a case, which they decline to accept, appls. are not thereby precluded from applying for a *mandamus* to enter continuances & hear it.—*R. v. WEST RIDING JJ., Re CHORLTON TOWNSHIP* (1842), 11 L. J. M. C. 84; 6 J. P. 585.

**1505.** — — — *Error in notice of appeal—Misdescription of conviction.*]—Three persons were jointly summoned to answer a complaint, under 7 & 8 Geo. 4, c. 29, s. 34, for unlawful fishing: they were heard jointly, & convicted in penalties of separate sums for each deft. They gave a joint notice of appeal under sect. 72, as against a conviction of us, etc., naming the three, & entered severally into recognisances by separate instruments. Three several convictions, one of each deft. were afterwards returned to the sessions. The sessions affirmed the convictions, without hearing the merits, on the ground that the notice misdescribed the convictions. This ct. issued a *mandamus* commanding the sessions to hear, on the ground that, if there was any variance, it was one which could not mislead.—*R. v. OXFORDSHIRE JJ.* (1843), 4 Q. B. 177; 3 Gal. & Dav. 348; 7 J. P. 50; 7 Jur. 195; 114 E. R. 865; *sub nom.* *R. v. OXFORDSHIRE JJ., Re JEMMETT*, 12 L. J. M. C. 40.

*Annotation*:—*Appld.* *R. v. Leeds Recorder* (1852), 21 L. J. M. C. 171.

**1506.** — — — *Misnomer of justices.*]—*R. v. LEICESTERSHIRE JJ.*, No. 1054, *ante*.

**1507.** — — —.]—Where the name of one of the justices signing an order of removal was so illegibly written in the copy of the order sent to applt. parish, although legible enough in the copy of the examinations, that the parties gave their notice of appeal as against the order of A. B. & Jonah Walter instead of A. B. & Josiah Wilson, the real name of the justice, & the appeal was entered at the sessions, as against the order of

A. B. & John Walter; & the sessions refused to entertain the appeal, on the ground of misdescription, this ct. granted a *mandamus* compelling them to enter continuances & hear the appeal.—*R. v. MIDDLESEX JJ.* (1846), 3 Dowl. & L. 745; 1 New Mag. Cas. 588; 2 New Sess. Cas. 341; 15 L. J. M. C. 100; 7 L. J. O. S. 117; 10 Jur. 495; 10 J. P. Jo. 309.

**1508.** — — — *Notice for wrong sessions.*]—Notice of appeal against an order of removal was given within twenty-one days, & it was therein stated that the appeal would be made to the next quarter sessions for the borough of C. Appls., however, discovered that there was not a separate ct. of quarter sessions for the borough of C., & entered & respited the appeal at the next quarter sessions for the county. They served on resps. notice of the entry & respite, of the intention to try at the sessions next after the entry & respite, & a statement of the grounds of appeal some time before the sessions last mentioned. The appeal came on for trial pursuant to the last-mentioned notice; the sufficiency of the original notice was impeached & the appeal was dismissed. On showing cause against a rule *nisi* for a *mandamus* to the sessions to enter continuances on & hear the appeal:—*Held*: the erroneous statement in the notice of the appeal of the ct. to which the appeal was to be made might be rejected as surplusage, the sessions did not appear to have dismissed the appeal on the ground that the notice was not a reasonable one & therefore that the rule must be absolute.—*R. v. BUCKINGHAMSHIRE JJ.* (1854), 4 E. & B. 259, n.; 3 C. L. R. 32; 24 L. J. M. C. 15, n.; 24 L. T. O. S. 110; 19 J. P. 148; 18 Jur. 1079; 3 W. R. 63; 119 E. R. 100.

*Annotations*:—*Distd.* *R. v. Salop JJ.* (1854), 4 E. & B. 257. *Refd.* *Kendall v. Wilkinson* (1855), 24 L. T. O. S. 309; *R. v. Leeds Recorder* (1861), 3 L. T. 699.

**1509.** — — — *On question of fact.*]—Where sessions, on appeal, decide on a point preliminary to the whole case, or to the reception of a particular piece of evidence that they will not hear the case further, their decision is conclusive if the point involve matter of fact only.

Otherwise if it raise a point of practice which this ct. can perceive to be a matter of law. In the latter case this ct. will grant a *mandamus* to enter continuances & hear; in the former not.—*R. v. KESTIVEN JJ.* (1844), 3 Q. B. 810; 1 Dav. & Mer. 113; 1 New Mag. Cas. 8; 1 New Sess. Cas. 151; 13 L. J. M. C. 78; 3 L. T. O. S. 55; 8 J. P. 629; 8 Jur. 445; 114 E. R. 718.

*Annotations*:—*Folld.* *R. v. Macclosfield* (1844), 1 New Mag. Cas. 59; *R. v. West Riding JJ.* (1844), 1 New Sess. Cas. 247; *R. v. Flintshire JJ.* (1847), 2 New Mag. Cas. 160; *R. v. Somerset JJ.* (1847), 11 Jur. 351. *Appld.* *R. v. Cambridgeshire JJ.* (1850), 1 L. M. & P. 47. *Consd.* *R. v. Sutton Coldfield Overseers* (1874), L. R. 9 Q. B. 153; *Walsall Overseers v. L. & N. W. Ry.* (1878), 4 App. Cas. 30. *Refd.* *R. v. Marton-cum-Grafton* (1847), 16 L. J. M. C. 159; *R. v. Dayman* (1857), 5 W. R. 578. *Mentd.* *R. v. Canterbury (Archbp.)* (1848), 11 Q. B. 483.

*On question of law.*]—*R. v. KESTIVEN JJ.*, No. 1509, *ante*.

**1511.** — — — *On consideration of matters outside concern of court.*]—*R. v. LANCASTER JJ.* (1891), 55 J. P. 580; 7 T. L. R. 428, C. A.; *revg.* S. C. *sub nom.* *Re O'BRIEN*, *R. v. LANCASHIRE JJ.*, 64 L. T. 562, D. C.

*Annotation*:—*Expld.* *Whiffen v. Bligh, etc. Malling Licensing JJ.* (1891), 61 L. J. M. C. 82.

**1512.** *Refusal to hear appeal.*]—If the ct. of quarter sessions have improperly refused to hear an appeal against an order of removal on a preliminary point, this ct. will grant a *mandamus*, & will not enter into the question whether the notice of appeal contains any good statement of grounds of appeal.—*R. v. DENBIGHSHIRE JJ.* (1841), 9



**Sect. 3.—Absence of reasonable and probable cause :**  
**Sub-sect. 4, B. (a) & (b), & C. (a) & (b) i.]**

apprehended for felony. P. was tried & acquitted, & brought an action for a malicious prosecution. Whether L. saw R. before, or only after, the apprehension, was a matter of contradictory evidence at the trial. The jury found that he had not seen R. before ordering P.'s apprehension. The judge directed the jury that that being so, he considered L. to have acted on hearsay evidence alone, & therefore without reasonable & probable cause, & consequently that P. was entitled to the verdict:—*Held*: this was a misdirection, & there must be a new trial.

There can be no doubt since the case of *Panton v. Williams*, No. 441, *ante*, in which the question was solemnly decided in the Exch. Chamber, that what is reasonable & probable cause in an action for malicious prosecution, or for false imprisonment, is to be determined by the judge. In what other sense it is properly called a question of law I am at a loss to understand. No definite rule can be laid down for the exercise of the judge's judgment. Each case must depend upon its own circumstances, & the result is a conclusion drawn by each judge for himself, whether the facts found by the jury, in his opinion, constitute a defence to the action. The verdict in cases of this description, therefore, is only nominally the verdict of a jury (LORD CHELMSFORD).

The existence of "reasonable & probable cause" is an inference of fact. It must be derived from all the circumstances of the case. I regret, therefore, to find the law to be, that it is an inference to be drawn by the judge, & not by the jury. I think it ought to be the other way (LORD WESTBURY).—*LISTER v. PERRYMAN* (1870), L. R. 4 H. L. 521; 39 L. J. Ex. 177; 23 L. T. 269; 35 J. P. 4; 19 W. R. 9, H. L.; *reversing* S. C. *sub nom.* *PERRYMAN v. LISTER* (1868), L. R. 3 Exch. 197, Ex. Ch.

*Annotations*:—*Consd.* *Hicks v. Faulkner* (1881), 8 Q. B. D. 167; *Abrath v. N. E. Ry.* (1883), 11 Q. B. D. 79. *Appld.* *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1884), 50 L. T. 274. *Consd.* *Loog v. Nahmaschinen Fabrik Act, & Riese* (1888), 4 T. L. R. 268; *Bradshaw v. Goodwin* (1894), 10 T. L. R. 491; *King v. Henderson*, [1898] A. C. 720. *Refd.* *Brooks v. Blain* (1869), 39 L. J. C. P. 1; *Walker v. S. E. Ry.*, *Smith v. Same* (1870), L. R. 5 C. P. 640; *Shrosbery v. Osmaston* (1877), 37 L. T. 792; *Lea v. Charrington* (1889), 61 L. T. 222; *Brown v. Hawkes*, [1891] 2 Q. B. 718. *Mentd.* *King v. Chamberlain* (1871), 40 L. J. C. P. 273.

**450.** ———.] — *HICKS v. FAULKNER*, No. 18, *ante*.

**451.** ———.] — *QUARTZ HILL GOLD MINING CO. v. EYRE*, No. 21, *ante*.

**452.** ———.] — *THARBY v. BAYFIELD & DARLING* (1887), 4 T. L. R. 62, N. P.

**453.** ———.] — It is necessary for pltf. to prove, in order to succeed in the action, that there had been a want of reasonable & probable cause on the part of deft. That question has to be determined by the judge at the trial, & cannot be left to the jury. If there is a dispute on the facts as to the cause, those facts may be left to the jury, & on their finding the judge will have to say whether there was reasonable & probable cause or

not (LORD ESHER, M.R.).—*LEA v. CHARRINGTON* (1889), as reported in 5 T. L. R. at p. 678, C. A.

**454.** ———.] — The question whether there is an absence of reasonable & probable cause is for the judge & not for the jury, & if the facts on which that depends are not in dispute, there is nothing for him to ask the jury & he should decide the matter himself. If there are facts in dispute upon which it is necessary he should be informed in order to arrive at a conclusion on this point, those facts must be left specifically to the jury, & when they have been determined in that way the judge must decide as to the absence of reasonable & probable cause (LORD ESHER, M.R.).—*BROWN v. HAWKES*, [1891] 2 Q. B. 718; 61 L. J. Q. B. 151; 65 L. T. 108; 55 J. P. 823; 7 T. L. R. 607, C. A.

*Annotations*:—*Refd.* *Carder v. Peninsular & Oriental Steam Navigation Co.* (1892), 8 T. L. R. 335; *Cornford v. Carlton Bank* (1899), 81 L. T. 415; *Bradshaw v. Waterlow*, [1915] 3 K. B. 527.

**455.** ———.] — (1) A verdict for damages for having been adjudged insolvent maliciously & without reasonable & probable cause was rightly set aside when it appeared that, assuming pltf. was not keeping out of the way of his creditors with a view to delay them, there was evidence which might lead a reasonable man to believe that he was.

(2) The question of reasonable & probable cause should not be left to the jury, but determined by the judge on facts found by the jury.

(3) The *onus*, in an action of this kind, is on pltf. to prove that there was no reasonable & probable cause (LORD DAVEY).—*COX v. ENGLISH, SCOTTISH & AUSTRALIAN BANK*, [1905] A. C. 168; 74 L. J. P. C. 62; 92 L. T. 483, P. C.

*Annotation*:—*Generally*, *Mentd.* *Neville v. London Express Newspaper* (1917), 33 T. L. R. 409.

**456. Discretion of judge — When mala fides found by jury.**—*JAMES v. PHELPS*, No. 414, *ante*.

**457.** ———.] — *SHROSBERY v. OSMASTON*, No. 490, *post*.

**458. Right to interpose question to jury — At conclusion of plaintiff's case.**—*SHROSBERY v. OSMASTON*, No. 490, *post*.

**(b) When Facts Undisputed.**

**459. General rule — Judge to decide on undisputed facts.**—Upon the trial of an action for maliciously indicting pltf., without reasonable or probable cause, pltf. proved a case, which, in the opinion of the learned judge, showed that there was no reasonable or probable cause for preferring the indictment. Deft. then called a witness to prove an additional fact, & that being proved, the learned judge was of opinion, that there was reasonable & probable cause for preferring the indictment:—*Held*: there being no contradictory testimony as to that fact, & there being nothing in the demeanour of the witness who proved it to impeach his credit, the learned judge was not bound to leave it to the jury to find the fact, but that he might act upon it as a fact proved, & nonsuit pltf.—*DAVIS v. HARDY* (1827), 6 B. & C.

**PART IV. SECT. 3, SUB-SECT. 4.—**  
**B. (b).**

**459 i. General rule—Judge to decide on undisputed facts.**—In an action for malicious prosecution, reasonable & probable cause is a pure question of law for the ct., only where the facts present to deft.'s mind at the time of instituting the prosecution are undisputed, & the inferences are clear.—*WILLIAMSON v. M'RAVEY* (1880), 6 V. L. R. (L.) 487.—*AUS.*

**459 ii.** ———.] — When the material facts of a case in which pltf. claims damages for malicious prosecution are not in dispute, the question as to whether deft. had reasonable & probable cause for the prosecution is for the judge to determine.—*WILSON v. MITCHELL* (1915), 17 W. A. L. R. 169.—*AUS.*

**459 iii.** ———.] — *WILSON v. WINNIPEG CITY* (1887), 4 Man. L. R. 193.—*CAN.*

**459 iv.** ———.] — In an action for malicious prosecution the question of reasonable & probable cause is for the judge, where there is no conflict of testimony.—*SEARY v. SEXTON* (1895), 28 N. S. R. 278.—*CAN.*

**459 v.** ———.] — *RENTON v. GALLAGHER* (1910), 19 Man. L. R. 478; 14 W. L. R. 60.—*CAN.*

**459 vi.** ———.] — *WHITAKER v. HAMILTON (MAYOR ETC.)* (1908), 27 N. Z. L. R. 321.—*N.Z.*

225 ; 9 Dow. & Ry. K. B. 380 ; 5 L. J. O. S. K. B. 91 ; 108 E. R. 436.

*Annotations* :—*Refd.* Venafrá v. Johnson (1833), 3 L. J. C. P. 51. *Mentd.* Giblin v. McMullen (1868), L. R. 2 P. C. 317.

**460.** ———.]—On the trial in this action, the judge, without leaving any question to the jury, decided that there was reasonable & probable cause for preferring the indictment:—*Held*: that decision was correct, & the evidence did not raise a question of fact for the jury, whether defts. *bonâ fide* believed that they had a reasonable cause for indicting, but a pure question of law for the judge, whether defts. had such reasonable cause.—*BLACHFORD v. DOD* (1831), 2 B. & Ad. 179 ; 9 L. J. O. S. K. B. 196 ; 109 E. R. 1110.

*Annotations* :—*Distd.* Broad v. Ham (1839), 5 Bing. N. C. 722 ; James v. Phelps (1840), 11 Ad. & El. 483. *Apld.* Bradshaw v. Waterlow (1915), 85 L. J. K. B. 318.

**461.** ———.]—*BROAD v. HAM*, No. 362, *ante*.

**462.** ———.]—*MICHELL v. WILLIAMS*, No. 63, *ante*.

**463.** ———.]—If the facts are undisputed the judge may decide the question of reasonable & probable cause without taking the finding of the jury upon them.—*WILKINSON v. FOOTE* (1856), 20 J. P. 807 ; 5 W. R. 22.

**464.** ———.]—*BROWN v. HAWKES*, No. 454, *ante*.

**465.** ———.]—Where there is no evidence of absence of reasonable & probable cause, the judge ought to act consistently on his own view & not leave any questions to the jury (*LORD ESHER, M.R.*).—*ALLMOND v. MUIRHEAD* (1896), 13 T. L. R. 12, C. A.

**466.** ———.]—*BRADSHAW v. WATERLOW & SONS, LTD.*, No. 493, *post*.

### C. Duty of Jury.

#### (a) In General.

**467. General rule—Jury to find facts.**—*JOHNSTONE v. SUTTON*, No. 2, *ante*.

**468.** ———.]—*TAYLOR v. WILLANS*, No. 433, *ante*.

**469.** ———.]—*VENAFRA v. JOHNSON*, No. 439, *ante*.

**470.** ———.]—*BROAD v. HAM*, No. 362, *ante*.

**471.** ———.]—*PANTON v. WILLIAMS*, No. 441, *ante*.

**472.** ———.]—*TURNER v. AMBLER*, No. 444, *ante*.

**473.** ———.]—*CHAPMAN v. HESLOP*, No. 488, *post*.

**474.** ———.]—*DOUGLAS v. CORBETT*, No. 388, *ante*.

### PART IV. SECT. 3, SUB-SECT. 4.— C. (a).

**467 i. General rule—Jury to find facts.**—In an action for malicious prosecution where the facts are in dispute, the jury must pass upon those facts before the ct. can say whether reasonable & probable cause is, or is not, absent.—*WILLINSKY v. ANDERSON* (1909), 14 O. W. R. 595 ; 1 O. W. N. 13 ; 19 O. L. R. 437.—*CAN.*

**467 ii.** ———.]—If, in an action for malicious prosecution, there is any conflict of evidence as to the facts upon which reasonable & probable cause depends, the jury must be allowed to find the facts.—*HAMILTON v. COUSINEAU* (1892), 19 A. R. 203.—*CAN.*

**467 iii.** ———.]—*JEWHURST v. UNITED CIGAR STORES, LTD.* (1919), 48 O. L. R. 180 ; 17 O. W. N. 80.—*CAN.*

**480 i. When jury may decide existence of reasonable & probable cause—**

*Question combined with facts—Discretion of judge.*—*GAZE v. JOHN HUNTER CO.* (1902), 4 W. A. L. R. 70.—*AUS.*

**480 ii.** ———.]—*BLAKELEY v. ROLLAND*, 1 J. R. N. S. 20.—*N.Z.*

### PART IV. SECT. 3, SUB-SECT. 4.— C. (b) i.

**483 i. General rule—Belief in reasonable & probable cause question for jury.**—In an action of malicious prosecution the judge left it to the jury to say, first whether deft. when he preferred the charge honestly believed that he could substantiate it ; & secondly, whether he had reasonable grounds for such belief:—*Held*: the direction was right.—*MACHATTIE v. LEE* (1861), 10 N. S. W. L. R. (L.) 182 ; 6 N. S. W. W. N. 13.—*AUS.*

**483 ii.** ———.]—*ABELL v. LIGHT* (1868), 1 Han. 240.—*CAN.*

**483 iii.** ———.]—*YOUNG v. NICHOL* (1885), 9 O. R. 347.—*CAN.*

**483 iv.** ———.]—*PRING v. WYATT* (1903), 23 C. L. T. 191 ; 5 O. L. R.

**475.** ———.]—*LISTER v. PERRYMAN*, No. 449, *ante*.

**476.** ———.]—*QUARTZ HILL GOLD MINING CO. v. EYRE*, No. 21, *ante*.

**477.** ———.]—*BROWN v. HAWKES*, No. 454, *ante*.

**478.** ———.]—*HOLLINGS v. CURTEIS* (1894), 10 T. L. R. 503, C. A.

**479.** ———.]—*HILLIAR v. DADE* (1898), 14 T. L. R. 534, C. A.

**480. When jury may decide existence of reasonable & probable cause—Question combined with facts—Discretion of judge.**—In an action for a malicious prosecution, though reasonable & probable cause, or the want of it, is a question of law for the opinion of the judge ; yet, when such question is combined with, & depending upon, a long chain of facts, as given in evidence, the whole may be left to the jury for their decision ; & the judge, by leaving the matter thus, does not surrender the authority with which he is vested.—*M'DONALD v. ROOKE* (1835), 2 Bing. N. C. 217 ; 2 Scott, 359 ; 132 E. R. 85 ; *sub nom.* M'DONNELL v. BROOKE, 1 Hodg. 314 ; 5 L. J. C. P. 9.

*Annotations* :—*Refd.* Musgrave v. Newell (1836), 5 L. J. Ex. 227 ; Panton v. Williams (1841), 2 Q. B. 169.

**481.** ———.]—*FRASER v. HILL*, No. 446, *ante*.

**482.** ———.]—*JAMES v. PHELPS*, No. 414, *ante*.

### (b) Facts for Determination by Jury.

#### i. Belief of Defendant.

**483. General rule—Belief in reasonable & probable cause question for jury.**—*RAVENGA v. MACKINTOSH*, No. 374, *ante*.

**484.** ———.]—*TAYLOR v. WILLANS*, No. 433, *ante*.

**485.** ———.]—*VENAFRA v. JOHNSON*, No. 439, *ante*.

**486.** ———.]—*TURNER v. AMBLER*, No. 444, *ante*.

**487.** ———.]—*HADDRICK v. HESLOP*, No. 409, *ante*.

**488.** ———.]—In an action for a malicious prosecution it is a question for the jury, whether deft. believed or had reasonable & probable cause for believing that the charge on account of which he had prosecuted pltf. was true ; & when they have given their answer, it is a question for the judge whether deft. had reasonable & probable cause for instituting the prosecution.—*CHAPMAN v. HESLOP* (1853), 2 C. L. R. 139 ; 2 W. R. 74 ;

505 ; 2 O. W. R. 22, 321.—*CAN.*

**483 v.** ———.]—In an action for malicious prosecution where the act in respect of which criminal proceedings were launched was done in the light of day, in open view of deft., & in pursuance of a statutory right, the judge was right in leaving it to the jury to say whether, in the circumstances, deft. really thought pltf. was a thief.—*TANGHE v. MORGAN* (1905), 11 B. C. R. 455 ; 3 W. L. R. 146.—*CAN.*

**483 vi.** ———.]—In an action for malicious prosecution a reasonable *bonâ fide* belief in such facts as would have, if true, warranted a prosecution for theft, will constitute reasonable & probable cause, & the jury should be asked to find if deft. did actually believe such facts at the time of commencing the prosecution.—*DUGUAY v. MYLES* (1913), 14 E. L. R. 410.—*CAN.*

**483 vii.** ———.]—*BLAKELEY v. ROLLAND*, 1 J. R. N. S. 20.—*N.Z.*



*Sect. 3.—Absence of reasonable and probable cause : Sub-sect. 4, C. (b) i. & ii. ; sub-sect. 5. Sect. 4 : Sub-sect. 1, A. & B. ; sub-sect. 2, A.]*

*sub nom.* HESLOP *v.* CHAPMAN, 23 L. J. Q. B. 49 ; 18 Jur. 348, Ex. Ch.

*Annotations :—Consd.* Shrosbery *v.* Osmaston (1877), 37 L. T. 792. *Refd.* Johnson *v.* Emerson (1871), L. R. 6 Exch. 329.

489. ———.] — JOHNSON *v.* EMERSON, No. 196, *ante*.

490. ———.] — In an action for malicious prosecution the judge, at the close of pltf.'s case, & against the protest of deft.'s counsel, asked the jury whether they thought deft. had acted with malice. The jury returned an answer in the affirmative, contrary to the expectation of the judge, & the case proceeded, the judge refusing to rule expressly that there was reasonable & probable cause. On the conclusion of deft.'s case the jury found that deft. had acted with malice, & had not himself believed in the existence of any circumstances justifying the charge he had made, & judgment was thereupon given for pltf., the damages having been assessed at £250 :—*Held* : (1) though, if the jury found that deft. had acted *bonâ fide*, the question of reasonable & probable cause was for the judge, yet, where deft. was found by them not to have believed in circumstances justifying his action, the question of reasonable & probable cause could not be ruled in his favour. Reasonable & probable cause in the mind of the judge was not sufficient ; there must have been reasonable & probable cause moving deft.

No doubt a deft. may believe there is reasonable & probable cause, if he is a hasty man or a very suspicious man ; but if he believe there is reasonable & probable cause, the judge is not therefore bound to say that there was reasonable & probable cause. The judge must form his own judgment ; & if the question as to the deft.'s belief had been answered in the affirmative, that would not have entitled the judge to say that upon the facts disclosed or admitted there was reasonable & probable cause (DENMAN, J.).

These actions are only maintainable on acquittal, because a man may prosecute successfully, & he may have reasonable & probable cause, whether he believed it or not ; but if a man believes that another is not guilty of a criminal charge, & prosecutes unsuccessfully, I confess I have the greatest difficulty in seeing that such a man can be held to have had reasonable & probable cause for prosecuting (LINDLEY, J.).

(2) The judge in interposing a question to the jury at the conclusion of pltf.'s case had acted within his discretion & no substantial wrong had been done to deft.—SHROSBERY *v.* OSMASTON (1877), 37 L. T. 792.

491. ———.] — HICKS *v.* FAULKNER, No. 18, *ante*.

492. ———.] — In an action against a railway co. for malicious prosecution the judge directed the jury that it was for pltf. to establish a want of reasonable & probable cause, & malice, & that it lay on him to show that defts. had not taken reasonable care to inform themselves of the true facts of the case, & asked the jury whether they were satisfied that defts. did take reasonable care to inform themselves of the true facts, & that

they honestly believed in the case which they laid before the magistrates. The jury answered both questions in the affirmative, & the judge entered judgment for defts. :—*Held* : the direction was right, & the judgment rightly entered.—ABRATH *v.* NORTH EASTERN RY. CO. (1886), 11 App. Cas. 247 ; 55 L. J. Q. B. 457 ; 55 L. T. 63 ; 50 J. P. 657 ; 2 T. L. R. 416, H. L.

*Annotations :—Apld.* Quartz Hill Consolidated Gold Mining Co. *v.* Eyre (1884), 50 L. T. 274. *Distd.* Harrison *v.* National Provincial Bank of England (1885), 2 T. L. R. 70. *Refd.* Penfold *v.* Grosvenor Bank (1886), 2 T. L. R. 759 ; Edwards *v.* Annett (1887), 3 T. L. R. 671 ; Lea *v.* Charrington (1889), 61 L. T. 222 ; Brown *v.* Hawkes, [1891] 2 Q. B. 718 ; Cornford *v.* Carlton Bank, [1899] 1 Q. B. 392 ; Citizen's Life Assco. *v.* Brown, [1904] A. C. 423 ; Cox *v.* English, Scottish & Australian Bank, [1905] A. C. 168 ; Wiffen *v.* Bailey & Romford U. D. C. (1914), 78 J. P. 187 ; Bradshaw *v.* Waterlow, [1915] 3 K. B. 527. *Mentd.* Wakelin *v.* L. & S. W. Ry. (1884), [1896] 1 Q. B. 189, n. ; Flood *v.* Jackson, [1895] 2 Q. B. 21 ; Nevill *v.* Fine Arts & General Insce., [1895] 2 Q. B. 156 ; Jones *v.* Hulton, [1909] 2 K. B. 444 ; R. *v.* Stoddart (1909), 73 J. P. 348 ; R. *v.* Bradshaw, Edwards, Jones, etc. (1910), 4 Cr. App. Rep. 280 ; R. *v.* Horn (1912), 76 J. P. 270 ; R. *v.* Immer, R. *v.* Davis (1917), 118 L. T. 416 ; Pratt *v.* British Medical Assocn., [1919] 1 K. B. 244.

493. When question may be left to jury—Not unless evidence of absence of belief.]—(1) In an action for malicious prosecution the question whether the deft. took reasonable care to inform himself of the facts before he instituted the prosecution ought not to be left to the jury unless there is some evidence of his not having made proper inquiries ; & the question whether deft. honestly believed in the charge which he made ought not to be left to the jury unless there is some evidence of the absence of that belief.

(2) There cannot be an absence of reasonable & probable cause when the A.-G. has granted his fiat for the prosecution & it is not shown that the facts were put before him unfairly.—BRADSHAW *v.* WATERLOW & SONS, LTD., [1915] 3 K. B. 527 ; 85 L. J. K. B. 318 ; 113 L. T. 1101 ; 31 T. L. R. 556, C. A.

*Annotations :—As to (1) Folld.* Trebeck *v.* Croudace (1917), 118 L. T. 141. *Generally, Mentd.* R. *v.* Baskerville, [1916] 2 K. B. 658.

#### ii. Knowledge of Defendant.

494. General rule — Question for jury.]—TURNER *v.* AMBLER, No. 444, *ante*.

495. ———.] — ABRATH *v.* NORTH EASTERN RY. CO., No. 418, *ante*.

496. ———.] — PENFOLD *v.* GROSVENOR BANK (1886), 2 T. L. R. 759, D. C.

497. When question may be left to jury—Not unless evidence that inquiries not made.]—BRADSHAW *v.* WATERLOW & SONS, LTD., No. 493, *ante*.

#### SUB-SECT. 5.—EVIDENCE.

See Part V., Sect. 5, *post*.

#### SECT. 4.—DAMAGE.

##### SUB-SECT. 1.—NECESSITY FOR.

##### A. Criminal Proceedings.

498. General rule—Damage must be shown.]—NEWTON *v.* CRESWICK, No. 322, *ante*.

499. ———.] — SAVILE *v.* ROBERTS, No. 510 *post*.

493 i. When question may be left to jury—Not unless evidence of absence of belief.]—JOINT *v.* THOMPSON (1867), 26 U. C. R. 519.—CAN.

#### PART IV. SECT. 3, SUB-SECT. 4.—O. (b) ii.

437 i. When question may be left to

jury—Not unless evidence that inquiries not made.]—WEBBER *v.* MCLEOD (1888), 16 O. R. 609.—CAN.

#### PART IV. SECT. 4, SUB-SECT. 1.—A.

498 i. General rule—Damage must be shown.]—To succeed in an action

for malicious prosecution, pltf. must prove that he has suffered damages unless from the nature of the charge damage is to be implied.—MORTIMER *v.* FISHER (1913), 23 W. L. R. 905, 11 D. L. R. 77 ; 4 W. W. R. 454 ; 1 Sask. L. R. 200.—CAN.

500. ———.]—BYNE *v.* MOORE, No. 26, *ante*.

501. ———.]—A count for maliciously indicting for an assault cannot be supported without proof of some consequential injury sustained by pltf.—FREEMAN *v.* ARKELL (1824), 2 B. & C. 494; 3 Dow. & Ry. K. B. 669; 2 L. J. O. S. K. B. 64; 107 E. R. 467.

*Annotation*:—*Reid*. Wiffen *v.* Bailey & Romford U. C., [1915] 1 K. B. 600.

502. ———.]—WIFFEN *v.* BAILEY & ROMFORD URBAN COUNCIL, No. 37, *ante*.

503. When damage will be implied.]—QUARTZ HILL GOLD MINING CO. *v.* EYRE, No. 21, *ante*.

#### B. Civil Proceedings.

504. General rule—Damage must be shown.]—WATERER *v.* FREEMAN, No. 133, *ante*.

505. ———.]—Case will not lie against two persons for conspiring together, maliciously & vexatiously, & without reasonable or probable cause, to commence, & commencing, an action against pltf., in the name of a third person, but for their own benefit, without an allegation of legal damage resulting to pltf. therefrom.

Where, therefore, a declaration alleged that A. & B., intending to extort money from C., maliciously & vexatiously, & without reasonable or probable cause, conspired together to commence, & did maliciously, etc., commence, an unfounded action against C., in the name of D., but for their own benefit, knowing D. to be a pauper; & that, in further pursuance of the said conspiracy, etc., they maliciously, etc., prosecuted the action until afterwards, to wit, on etc., when D. was nonsuited therein; & then proceeded to allege that afterwards it was considered by the ct. that D. should take nothing by his writ, but that he & his pledges to prosecute should be in mercy, etc., whereupon & whereby the said suit was & is wholly ended & determined; & that, by means of the premises, C. had been put to costs, which, by reason of D.'s insolvency, he had been unable to obtain:—*Held*: no cause of action was disclosed, the declaration showing no award of costs of the nonsuit in the action against C.; & extra costs, *ex concessis*, forming no ground of legal damage.

In an action for a malicious prosecution, or for a conspiracy to bring an action or to institute a prosecution, it is necessary to show that the action or the prosecution was determined (MAULE, J.).

It is clear that no action will lie for improperly putting the process of the law in motion in the name of a third person, unless it is alleged & proved to have been done maliciously & without reasonable or probable cause; but, if there be malice & want of reasonable or probable cause, no doubt the action will lie, provided there be also a legal damage (WILLIAMS, J.).

The mere expenditure of money by pltf. in the defence of the action brought against him does not constitute such legal damage; but the only measure of damage is, the costs ascertained by the usual course of law (TALFOURD, J.).—COTTERELL *v.* JONES (1851), 11 C. B. 713; 21 L. J. C. P. 2; 16 Jur. 88; 138 E. R. 655.

*Annotations*:—*Reid*. Castrique *v.* Behrens (1861), 3 E. & E. 709; Basébé *v.* Matthews (1867), L. R. 2 C. P. 684; Ram

Coomar Coondoo *v.* Chunder Canto Mookerjee (1876), 2 App. Cas. 186; Quartz Hill Gold Mining Co. *v.* Eyre (1883), 11 Q. B. D. 674; The Walter D. Wallet, [1893] P. 202; Bynoe *v.* Bank of England (1902), 86 L. T. 140. *Mentd.* Swinfen *v.* Chelmsford (1860), 5 H. & N. 890; Wren *v.* Weild (1869), 10 B. & S. 51; Howard *v.* Lovegrove (1870), 23 L. T. 396; Giblan *v.* National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; Sanderson *v.* Blyth Theatre Co., [1903] 2 K. B. 533; Valentine *v.* Hyde, [1919] 2 Ch. 129.

506. ———.]—No action lies for maliciously & without probable cause commencing an action, unless it be shown that legal damage has been sustained; & where the declaration disclosed that the only damage arose from pltf.'s own neglect in not appearing to the writ:—*Held*: the declaration was bad, & the action could not be sustained.—MOTTLEE *v.* QUY (1855), 25 L. T. O. S. 157.

507. ———.]—QUARTZ HILL GOLD MINING CO. *v.* EYRE, No. 21, *ante*.

508. ———.]—WIFFEN *v.* BAILEY & ROMFORD URBAN COUNCIL, No. 37, *ante*.

509. Malicious arrest of ship—Proof of damage not necessary—Where mala fides.]—Proof of actual damage is not necessary to sustain an action in a ct. of Admlty. for wrongful arrest if the seizure of the ship was the result of *mala fides* or *crassa negligentia* implying malice:—*Held*: an action lies at common law for malicious arrest of a ship by Admlty. process.—THE WALTER D. WALLET, [1893] P. 202; 62 L. J. P. 88; 69 L. T. 771; 7 Asp. M. L. C. 398; 1 R. 627.

Action for slander of title.]—See LIBEL & SLANDER, Vol. XXXII., pp. 204, 205, Nos. 2543–2559.

Malicious presentation of bankruptcy petition.]—See BANKRUPTCY, Vol. V., p. 1001, No. 8172.

Wrongful execution.]—See EXECUTION, Vol. XXI., p. 459, No. 403.

#### SUB-SECT. 2.—WHAT AMOUNTS TO.

##### A. Damage to Reputation.

510. General rule.]—An action lies for a malicious indictment which puts the party to expense though the charge it contains neither scandalises him nor endangers his personal security.

There are three sorts of damages, any of which would be sufficient ground to support this action. (a) The damage to a man's fame, as if the matter whereof he is accused be scandalous. (b) The second sort of damages, which would support such an action, are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty, which has been always allowed a good foundation of such an action. (c) The third sort of damages, which will support such an action, is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expenses, is without doubt, which is an injury to his property, & if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself (HOLT, C.J.).

Unless the bill be found, no action will lie, for that the party is not damaged, neither is it a good

resulted.—BAYNE *v.* BLAKE (1909), 9 C. L. R. 374.—AUS.

1. Maintenance.]—Upon proof of a special damage, an action for unlawful maintenance lies, notwithstanding that the action maintained was unsuccessful.—NEWSWANDER *v.* GERICH (1906), 12 B. C. R. 272.—CAN.

#### PART IV. SECT. 4, SUB-SECT. 1.—B.

504 i. General rule—Damage must be shown.]—In an action for malicious prosecution special damage must be alleged & proved if proceedings are civil.—HOUGHTON *v.* OAKLEY, 21 N. S. W. L. R. (L.) 26; 16 N. S. W. N. 183.—AUS.

e. Insolvency proceedings—To stifle litigation.]—Assuming that the taking of proceedings in insolvency for the purpose of stifling litigation between the parties amounts to an abuse of the process of the ct. in respect of which an action will lie, a necessary ingredient of the cause of action is that damage has thereby



**Sect. 4.—Damage: Sub-sect. 2, A., B. & C. Part V. Sect. 1: Sub-sects. 1 & 2.]**

ground of action or indictment against a man that he basely procured him to be falsely indicted; but there must be express malice found that it may appear that the prosecution was not for the sake of justice but to gratify the party's peevish revenge or malice (HOLT, C.J.).—**SAVILLE v. ROBERTS** (1698), Carth. 416; 1 Ld. Raym. 374; 1 Salk. 13; 3 Salk. 16; 5 Mod. Rep. 394; 12 Mod. Rep. 208; Holt, K. B. 150, 193; 91 E. R. 1147; *sub nom.* **ROBERTS v. SAVILL**, 5 Mod. Rep. 405; Holt, K. B. 8.

—**Consd. Quartz Hill Gold Mining Co. v. Eyre** (1883), 11 Q. B. D. 674; **Wiffen v. Bailey & Romford U. C.**, [1915] 1 K. B. 600. **Refd.** Anon. (1703), 6 Mod. Rep. 25; **Jones v. Gwynn** (1714), 10 Mod. Rep. 214; **Chambers v. Robinson** (1726), 2 Stra. 691; **Smith v. Hickson** (1734), 2 Barn. K. B. 465; **Reynolds v. Kennedy** (1748), 1 Wils. 232; **Golding v. Crowle** (1751), Say. 1; **Chapman v. Pickersgill** (1762), 2 Wils. 145; **Sutton v. Johnstone** (1786), 1 Term Rep. 493; **Purton v. Honnor** (1798), 1 Bos. & P. 205; **Purcell v. Macnamara** (1808), 9 East, 361; **Sinclair v. Eldred** (1811), 4 Taunt. 7; **Byne v. Moore** (1813), 5 Taunt. 187; **Cotterell v. Jones** (1851), 11 C. B. 713; **Castrique v. Behrens** (1861), 3 E. & E. 709; **Dawkins v. Paulet** (1869), 18 W. R. 336; **Allen v. Flood**, [1898] A. C. 1. **Mentd.** **Subley v. Mott** (1747), 1 Wils. 210; **The Ville de Varsovie** (1817), 2 Dods. 174; **Wren v. Weild** (1869), L. R. 4 Q. B. 730; **Mogul S.S. Co. v. McGregor, Gow** (1888), 21 Q. B. D. 544; **Walters v. Green**, [1899] 2 Ch. 696.

**511.** —.]—**JONES v. GIVIN**, No. 25, *ante*.

**512.** —.]—**BYNE v. MOORE**, No. 26, *ante*.

**513.** —.]—**WIFFEN v. BAILEY & ROMFORD URBAN COUNCIL**, No. 37, *ante*.

**514. Wrongful execution.]—CHURCHILL v. SIGGERS**, No. 527, *post*.

**515. Presentation of bankruptcy petition.]—QUARTZ HILL GOLD MINING CO. v. EYRE**, No. 21, *ante*.

**516. Presentation of winding up petition.]—QUARTZ HILL GOLD MINING CO. v. EYRE**, No. 21, *ante*.

**517. Complaint under Public Health Act, 1875 (c. 55), s. 95.]—WIFFEN v. BAILEY & ROMFORD URBAN COUNCIL**, No. 37, *ante*.

#### B. Damage to Person.

**518. General rule.]—SAVILLE v. ROBERTS**, No. 510, *ante*.

**519.** —.]—**WIFFEN v. BAILEY & ROMFORD URBAN COUNCIL**, No. 37, *ante*.

**520. Loss of liberty.]—JONES v. GIVIN**, No. 25, *ante*.

**521.** —.]—**BYNE v. MOORE**, No. 26, *ante*.

**522. Wrongful execution.]—CHURCHILL v. SIGGERS**, No. 527, *post*.

**523.** —.]—**WIFFEN v. BAILEY & ROMFORD URBAN COUNCIL**, No. 37, *ante*.

#### C. Damage to Property.

**524. Expenses of defence.]—SAVILLE v. ROBERTS**, No. 510, *ante*.

**525.** —.]—**JONES v. GIVIN**, No. 25, *ante*.

**526.** —.]—**COTTERELL v. JONES**, No. 505, *ante*.

**527.** —.]—Where it appears by the declaration that deft. has recovered a judgment for debt & costs, against pltf., & has issued a *ca. sa.* indorsed to satisfy the whole of such debt & costs, & afterwards the debt itself has been satisfied, as where the judgment is recovered by the holder of a bill of exchange against the acceptor, & the drawer, for whose accommodation the bill had been accepted, pays to the holder the amount due on the bill, so as to reduce the sum remaining due on the judgment to a sum below £20, & that afterwards deft. has delivered to the sheriff's bailiff a warrant indorsed to satisfy the whole debt & costs, & has procured pltf. to be arrested to satisfy the whole, & there is an allegation of malice & want of probable cause, & of special damage, by means of the premises, in pltf. being prevented from attending to his business, being injured in his credit, & incurring expense in procuring his liberation by a judge's order, such facts show a good cause of action.—**CHURCHILL v. SIGGERS** (1854), 3 E. & B. 929; 2 C. L. R. 1509; 23 L. J. Q. B. 308; 23 L. T. O. S. 220; 18 Jur. 773; 2 W. R. 551; 118 E. R. 1389.

**Annotations:—Refd.** **Jenings v. Florence** (1857), 2 C. B. N. S. 467; **Gilding v. Eyre** (1861), 10 C. B. N. S. 592; **The Walter D. Wallet**, [1893] P. 202.

**528.** —.]—**WIFFEN v. BAILEY & ROMFORD URBAN COUNCIL**, No. 37, *ante*.

**529. Malicious prosecution of plaintiff's wife.]—**It must now be taken to be a settled point, that an action will lie for maliciously preferring an indictment of any sort. In the present case, the indictment did certainly contain a charge of a scandalous nature, & as to that, the question in the first place is whether it was necessary that the wife should be joined in this action. As to that I agree, that in an action for words spoken against the wife, she must be joined; but in the present case she need not; because by preferring this prosecution against the wife as well as the husband, there might be a special damage to the husband by this means; & therefore this case may be resembled to that of a battery committed on the wife, *per quod* the husband *consortium amisit* (LORD HARDWICKE, C.J.).—**SMITH v. HICKSON** (1734), 2 Barn. K. B. 465; Cunn. 52; 1 Lee temp. Hard. 54; 2 Stra. 977; 94 E. R. 622.

**Annotations:—Refd.** **Savil v. Roberts** (1697), 1 Salk. 13; **Pechell v. Watson** (1841), 8 M. & W. 691.

**530. Not vexatious ejectment.]—**An action on the case to recover damages against the lessor of pltf. in a vexatious ejectment is not maintainable.—**PURTON v. HONNOR** (1798), 1 Bos. & P. 205; 126 E. R. 861.

**Annotation:—Mentd.** **Wren v. Weild** (1869), L. R. 4 Q. B. 730.

**531. Not damage arising from non-appearance to writ—By neglect of plaintiff.]—MORTLEE v. QUY**, No. 506, *ante*.

**Not extra costs.]—See Part VII., Sect. 3, post.**

## Part V.—Evidence.

## SECT. 1.—BURDEN OF PROOF.

## SUB-SECT. 1.—IN GENERAL.

532. Plaintiff must prove both malice & absence of reasonable & probable cause.]—HICKS v. FAULKNER, No. 18, *ante*.

533. —.]—ABRATH v. NORTH EASTERN RY. Co., No. 418, *ante*.

534. —.]—It is for pltf. to prove that deft. instituted the proceedings against him without reasonable & probable cause, & for a reason other than that of promoting the ends of justice (GROVE, J.).—EDWARDS v. ANNETT (1887), 3 T. L. R. 671, N. P.

## SUB-SECT. 2.—ABSENCE OF REASONABLE AND PROBABLE CAUSE.

535. Burden lies on plaintiff—Shifted by *prima facie* evidence.]—In an action on the case for a malicious prosecution, pltf. is to give *prima facie* evidence of want of probable cause, which deft. may rebut, if he can, by showing the existence of probable cause. Deft. presented two bills for perjury against pltf., but did not appear himself before the grand jury, & the bills were ignored. He presented a third, & on his own testimony the bill was found. This prosecution he kept suspended for three years, till pltf., taking the record down to trial, & deft. declining to appear as a witness, although in ct., & called on, pltf. was acquitted:—*Held*: sufficient *prima facie* evidence of want of probable cause.

This is an action for indicting pltf. without probable cause. It is true, as admitted on both sides, that, in order to support such an action, there must be a concurrence of malice in deft. & want of probable cause. Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accuser from liability to an action; for he may have had good reason to make the charge, & yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible where malice is combined with want of probable cause.

Who is to decide what shall be esteemed probable cause? That is a question of law for the judge, as it arises from the facts disclosed; & if there be any discrepancy in the testimony, or imputations on the credit of the witnesses, those are matters for the decision of the jury; so that, as in questions touching reasonable notice & the like, the judge must pronounce his opinion on the facts when found by the jury.

## PART V. SECT. 1, SUB-SECT. 1.

532 i. Plaintiff must prove both malice & absence of reasonable & probable cause.]—TRIM v. BAINES, 20 C. L. T. 145.—CAN.

532 ii. —.]—HALL v. VENKATA-KRISHNA (1890), I. L. R. 13 Mad. 394.—IND.

## PART V. SECT. 1, SUB-SECT. 2.

. Burden lies on plaintiff—by *prima facie* evidence.]—In

an action for malicious prosecution a *prima facie* case of want of probable cause, shifts the burden of proof to deft.—OICLE v. OICLE (1912), 11 E. L. R. 276.—CAN.

537 i. —.]—BARBOUR v. GETTINGS (1867), 26 U. C. R. 544.—CAN.

537 ii. —.]—RAYMOND v. BIDEN (1892), 24 N. S. R. 363.—CAN.

537 iii. —.]—MALCOLM v. PERTH MUTUAL FIRE INSURANCE Co. (1898), 29 O. R. 406, 717.—CAN.

537 iv. —.]—CUNNINGHAM v. EVANS,

The other question which has been discussed is, Who is to show the absence of probable cause?

Pltf. must take the first step; because it is not to be presumed that any one has acted illegally. There must, therefore, be some evidence of want of probable cause, before the deft. can be called on to justify his conduct (TINDAL, C.J.).

Although LORD KENYON said in *Smith v. Macdonald*, No. 371, *ante*, that if the evidence offered to the jury by a prosecutor, on the trial of an indictment, be sufficient to cause them to pause, he should hold it to be a probable cause, I cannot accede to that doctrine, for a person might then suffer from the prejudices or capricious feelings of a jury (PARK, J.).—WILLANS v. TAYLOR (1829), 6 Bing. 183; 3 Moo. & P. 350; 7 L. J. O. S. C. P. 250; 130 E. R. 1250; *subsequent proceedings, sub nom.* TAYLOR v. WILLANS (1831), 2 B. & Ad. 845.

*Annotations*:—*Consd.* Broad v. Ham (1839), 5 Bing. N. C. 722. *Refd.* Shufflebottom v. Allday (1857), 21 J. P. 263; ABRATH v. N. E. Ry. (1883), 11 Q. B. D. 440.

536. —.]—(1) In an action for maliciously suing out a commission against pltf., under which he was adjudged a bkpt., & his goods seized, but which was afterwards superseded, pltf. proved in addition to these facts, an action of trespass brought by him against deft. for the seizure: plea, alleging the bkpcy., issue joined on that fact, & verdict for pltf. He further proved, that shortly before the commission was taken out, he had removed some goods under circumstances which did not make the removal an act of bkpcy., but were probably relied on by deft. as having that effect. It was not shown that this was the fact upon which the comrs. made their adjudication, or by which deft. supported his plea in the former action:—*Held*: this was sufficient evidence to throw on deft. the *onus* of proving probable cause.

(2) What amounts to probable cause for suing out a commission, is a question for the judge alone, if the facts relied upon to amount to probable cause are not in dispute.—COTTON v. JAMES (1830), 1 B. & Ad. 128; 8 L. J. O. S. K. B. 345; 109 E. R. 735.

*Annotation*:—*Generally, Mentd.* Johnson v. Emerson & Sparrow (1871), L. R. 6 Exch. 329.

537. —.]—BURLEY v. BETHUNE, No. 373, *ante*.

538. —.]—In an action for malicious prosecution, it appeared that deft.'s traveller applied to one P. for payment, that P. showed him a receipt of pltf., who had formerly been deft.'s traveller, for £20, which he had never accounted for, that deft. on learning this, communicated with P., who sent the receipt & reaffirmed the payment, that deft. then consulted his attorney, & charged pltf. with embezzlement before the magistrates, who dismissed the charge; it also appeared that there were other cases which if known to deft. would

[1920] 1 W. W. R. 289; 13 Sask. L. R. 120.—CAN.

537 v. —.]—RAYMOND v. THOMAS (1920), 48 N. B. R. 101; 55 D. L. R. 394.—CAN.

537 vi. —.]—GAUR HARI DAS ADHIKARI v. HAYAGRIB DAS (1870), 6 B. L. R. 371.—IND.

537 vii. —.]—RAMAYYA v. SIVAYYA (1900), I. L. R. 24 Mad. 549.—IND.

537 viii. —.]—VYDINADIER v. KRISHNASWAMI IYER (1913), I. L. R. 36 Mad. 375.—IND.



*Sect. 1.—Burden of proof: Sub-sect. 2. Sect. 2: Sub-sects. 1, 2 & 3. Sect. 3: Sub-sects. 1 & 2.]*

clearly have justified him in making the charge, but it was not shown whether he knew of them when he made it:—*Held*: pltf. had failed to show the absence of reasonable & probable cause because the facts of P.'s case showed reasonable & probable cause, or because at all events, as pltf. did not show the contrary, deft. was to be assumed to have known of the other matters.

The burden of proof lies on pltf. to show the absence of reasonable & probable cause on the part of deft. (BYLES, J.).—*BROOKS v. BLAIN* (1869), 39 L. J. C. P. 1.

*Annotation*:—*Refd.* Walker v. S. E. Ry., Smith v. S. E. Ry. (1870), 18 W. R. 1032.

**539.** —.]—In an action for malicious prosecution, A. put in evidence the depositions of defts.' witnesses before the magistrate, which were such as, if previously known to defts., would have given them reasonable cause for entering on the proceedings; but no evidence was given, either by defts. or A., to show whether the witnesses had previously made these statements to defts.:—*Held*: as it was usual to interrogate witnesses as to their evidence before taking such proceedings, & as the burden of proof that there was no reasonable or probable cause lay upon pltf., it must be taken that defts. had reasonable cause for prosecuting pltf.—*WALKER v. SOUTH EASTERN RY. CO., SMITH v. SOUTH EASTERN RY. CO.* (1870), L. R. 5 C. P. 640; 39 L. J. C. P. 346; 23 L. T. 14; 18 W. R. 1032.

*Annotations*:—*Refd.* Bradshaw v. Waterlow (1915), 113 L. T. 1101. *Mentd.* Boyle v. Smith (1905), 70 J. P. 115; Lambert v. G. E. Ry., [1909] 2 K. B. 776.

**540.** —.]—*ABRATH v. NORTH EASTERN RY. CO.*, No. 418, *ante*.

**541.** —.]—It was settled by *Abrath v. N. E. Ry. Co.*, No. 418, *ante*, that it was for pltf. to establish a want of reasonable & probable cause & malice, & that it lay on him to show that defts. had not taken reasonable care to inform themselves of the true facts of the case. It had also been settled that the question of reasonable & probable cause was for the judge (LINDLEY, L.J.).—*BRADSHAW v. GOODWIN & CO.* (1894), 10 T. L. R. 491, C. A.

**542.** —.]—*COX v. ENGLISH, SCOTTISH & AUSTRALIAN BANK*, No. 455, *ante*.

**543.** — To prove minor questions in same connection.]—*ABRATH v. NORTH EASTERN RY. CO.*, No. 418, *ante*.

*Presumption of absence of reasonable & probable cause.*]—*See* Part IV., Sect. 3, sub-sect. 3, *ante*.

## SECT. 2.—ADMISSIBILITY.

### SUB-SECT. 1.—EVIDENCE OF FORMER PROCEEDINGS.

*See, generally*, EVIDENCE, Vol. XXII., pp. 276 *et seq.*, Nos. 2631 *et seq.*

**543 i.** — To prove minor questions in same connection.]—*DAVIS v. GELL*, [1925] V. L. R. 89; 35 C. L. R. 275; 31 Argus L. R. 49.—*AUS.*

**543 ii.** —.]—In an action for malicious prosecution, pltf. is bound to prove his innocence, that there was a want of reasonable & probable cause for the prosecution, & that the proceedings against him were initiated in a malicious spirit.—*CHUTE v. STEWART* (Yuk.) (1907), 6 W. L. R. 569.—*CAN.*

### PART V. SECT. 2, SUB-SECT. 1.

**g.** *Certified copy of indictment.*]—

A copy of an indictment certified by the proper officer, though improperly obtained, is admissible in evidence in an action for malicious prosecution.—*HEANY v. LYNN* (1835), 2 N. B. R. (Ber.) 55.—*CAN.*

**h.** *Production of information.*]—In an action for maliciously making a charge before a magistrate, upon which pltf. was arrested & afterwards discharged:—*Held*: it was necessary to produce the information, or lay a foundation for secondary evidence; & pltf. having done neither was pro-

**544.** *Whether admissible.*]—*COBB v. CAR* (1746), cited Bull. N. P., 5th ed., p. 14.

*Annotation*:—*Refd.* Brooke v. Carpenter (1825), 11 Moore, C. P. 59.

**545.** —.]—In an action for arresting a party & holding him to bail, without a reasonable or probable cause, whatever was admissible in evidence to defeat the action on which the arrest took place is also admissible on the question of the right of the party arrested to recover for the injury sustained.—*HADDAN v. MILLS* (1831), 4 C. & P. 486, N. P.

**546.** — *Depositions—Whether all should be produced.*]—In an action for a malicious arrest on a charge of felony, it is not necessary for pltf. to give in evidence the whole of the proceedings before the magistrates.—*BIGGS v. CLAY* (1834), 3 Nev. & M. K. B. 464; 2 Nev. & M. M. C. 300; 3 L. J. K. B. 124.

**547.** — *Of defendant.*]—Where, in case for a malicious charge of felony, pltf. puts in, to prove a formal part of his case, deft.'s & another person's depositions before the magistrates, deft. has a right to use his own deposition as evidence in the cause, but not that of the other deponent.

I think the rule is this: that the evidence given by prosecutor at the trial charged to be malicious is, from the necessity of the case, an exception to the general rule that a party's own statement is not admissible in his own favour (TINDAL, C.J.).—*JACKSON v. BULL & ALISON* (1838), 2 Mood. & R. 176, N. P.; *subsequent proceedings*, 2 J. P. 695.

**548.** — *Of others on defendant's behalf.*]—*JACKSON v. BULL & ALISON*, No. 547, *ante*.

— *Secondary evidence.*]—*See* EVIDENCE, Vol. XXII., p. 214, No. 1870.

— *Copy of affidavit to hold to bail.*]—*See* EVIDENCE, Vol. XXII., p. 255, No. 2390.

— *Minutes of proceedings.*]—*See* EVIDENCE, Vol. XXII., p. 296, No. 2845.

**549.** — *Copy of record of acquittal.*]—An allegation in a declaration, for a malicious prosecution, that pltf. "by a jury of the said county, etc., was duly & in a lawful manner acquitted" is proved by the production of [a copy of] the record by which it appeared that the jury found pltf. not guilty, & upon that judgment was entered that pltf. should go thereof acquitted.—*HUNTER v. FRENCH* (1744), Willes, 517; 125 E. R. 1298.

*Annotation*:—*Consd.* Willans v. Taylor (1829), 3 Moo. & P. 350.

—.]—*See* EVIDENCE, Vol. XXII., p. 305, Nos. 2948, 2949; Evidence Act, 1851 (c. 99), s. 13.

— *Certificate of clerk of peace.*]—*See* EVIDENCE, Vol. XXII., pp. 305, 306, No. 2957.

**550.** —.]—No copy of acquittal need be granted by the ct., to found an action for a malicious prosecution, except in case of felony.—*MORRISON v. KELLY* (1762), 1 Wm. Bl. 385; 90 E. R. 217.

**551.** — *Conviction for same conspiracy.*]—*HATHAWAY v. BARROW*, No. 597, *post*.

*See, also*, CRIMINAL LAW, Vol. XIV., p. 325 Nos. 3408–3410.

perly nonsuited.—*NOURSE v. POSTEL* (1861), 21 U. C. R. 47.—*CAN.*

**k.** *Record with verdict of jury in dorsed.*]—Pltf. offered in evidence the original record in the suit of deft. against him, with the verdict of the jury in his, pltf.'s favour indorse thereon:—*Held*: inadmissible.—*DAL v. LEAMY* (1856), 5 C. P. 374.—*CAN.*

**l.** *Record of acquittal.*]—*BAECHLE v. ANDREWS*, 15 C. L. T. Occ. N. 51.—*CAN.*

## SUB-SECT. 2.—OBSERVATIONS OF COURT IN FORMER PROCEEDINGS.

**552. Observations of judge on trial of indictment—Not evidence for plaintiff.]**—In case for maliciously indicting pltf., the observations made by the judge on the trial of the indictment are not evidence for pltf.—*BARKER v. ANGELL* (1841), 2 Mood. & R. 371, N. P.

**553. Observations of magistrate when dismissing charge—To show reasonable & probable cause.]**—On the trial of an action for a malicious prosecution for perjury in making a charge against deft. before magistrates, evidence of what the magistrates said in the hearing of deft. on disposing of the charge is admissible, for the purpose of showing the existence of reasonable & probable cause.—*EDDEN v. THORNILOE* (1842), 6 Jur. 265.

**554. — Not evidence for plaintiff.]**—In an action for a malicious prosecution & false imprisonment:—*Held*: (1) pltf. could not give in evidence what the magistrate had said on his, pltf.'s, discharge, as, if unfavourable to pltf., he had no power of replying to it; (2) deft. could not give evidence of matters collateral to that which was the subject of the action, with a view of showing what was passing in his mind at the time of his doing the act complained of.—*WETZLAR v. ZACHARIAH* (1867), 16 L. T. 432, N. P.

**555. Opinion of jury—Not evidence for plaintiff.]**—In an action for malicious prosecution, the opinion of the jury on the former trial not material.

The present inquiry & the investigation on the trial of the indictment are not *ad idem*. The expression of opinion of the former jury, that the evidence before them was insufficient, or the charge malicious, in no way helps pltf. here; *non constat* but deft. may now be in a position to adduce evidence of reasonable & probable cause, which was not laid before the other jury (*KEATING, J.*).—*HIBBERD v. CHARLES* (1860), 2 F. & F. 126.

**556. Judgment of registrar in bankruptcy—Not evidence for plaintiff.]**—The "full written judgment" of the registrar whose order refused resp.'s petition of sequestration against applt. was rightly held to be inadmissible in evidence in an action against resp. for having maliciously presented his petition. Resp. was bound by the registrar's discretion as to making or refusing the order, not by his opinion upon points which he had no jurisdiction to determine.—*KING v. HENDERSON*, [1898] A. C. 720; 67 L. J. P. C. 134; 79 L. T. 37; 47 W. R. 157; 14 T. L. R. 490; 5 Mans. 308, P. C. *Annotation*:—*Mentd. Re Wilson, Ex p. Jones* (1916), 85 L. J. K. B. 1408.

## SUB-SECT. 3.—EVIDENCE OF PLAINTIFF'S CHARACTER.

**557. Whether admissible.]**—In an action for malicious prosecution, where deft. gives evidence of probable cause, a witness may be asked whether pltf. was not a man of notoriously bad character.—*RODRIGUEZ v. TADMIRE* (1799), 2 Esp. 720, N. P.

**558. —.]**—In an action for maliciously procuring pltf. to be arrested on a charge of

larceny, deft. cannot give evidence to show that pltf.'s character was suspicious, & that his house had been searched on former occasions.—*NEWSAM v. CARR* (1817), 2 Stark. 69, N. P.

*Annotation*:—*Reid. Scott v. Sampson* (1882), 8 Q. B. D. 491.

**559. —.]**—In an action of slander for imputing felony, with a count for maliciously charging pltf. with theft before a justice, to which deft. pleaded the general issue, & also pleas in justification of the slander, averring that the charge of felony was true:—*Held*: evidence of general good character was not admissible for pltf.—*CORNWALL v. RICHARDSON* (1825), Ry. & M. 305, N. P.

## SECT. 3.—SUFFICIENCY OF PROOF.

## SUB-SECT. 1.—SOME CHARGES ONLY MALICIOUS AND WITHOUT REASONABLE AND PROBABLE CAUSE.

**560. Proof as to one charge sufficient.]**—*R. v. PROSSER* (circa 1770), cited 1 Term Rep. at p. 533; 99 E. R. 1237.

**561. —.]**—If a pltf. declares that deft. maliciously & without probable cause preferred an indictment, setting it forth, the averment is proved if some charges in the indictment were maliciously & without probable cause preferred, although there was good ground for others of the charges preferred.—*REED v. TAYLOR* (1812), 4 Taunt. 616; 128 E. R. 472.

*Annotations*:—*Fold. Palmer v. Birmingham Manufacturing Co.* (1902), 18 T. L. R. 552. *Reid. Drummond v. Pigou* (1835), 2 Scott, 228; *Abrath v. N. E. Ry.* (1886), 11 App. Cas. 247.

**562. —.]**—In an action for malicious prosecution for perjury, where the indictment contains two assignments of perjury, if pltf., at the trial of the action, confine his case to one of the assignments, deft. is not entitled to prove that there was reasonable & probable cause for the charge contained in the other assignment.—*ELLIS v. ABRAHAMS* (1846), 8 Q. B. 709; 15 L. J. Q. B. 221; 7 L. T. O. S. 82; 10 J. P. 820; 10 Jur. 593; 115 E. R. 1039.

*Annotation*:—*Reid. Abrath v. N. E. Ry.* (1886), 11 App. Cas. 247.

**563. —.]**—*BOALER v. HOLDER*, No. 181, *ante*.

**564. —.]**—Pltf. having been indicted in one count with having stolen a number of articles & having been acquitted, if there was an absence of reasonable & probable cause for the charge as regards one or more of the articles, an action for malicious prosecution will lie on proof of malice.—*PALMER v. BIRMINGHAM MANUFACTURING CO.* (1902), 18 T. L. R. 552.

## SUB-SECT. 2.—TERMINATION OF PROCEEDINGS.

**What amounts to termination.]**—*See Part IV., Sect. 1, sub-sect. 2, ante.*

**565. Abandonment of action—Action in sheriff's Court in London—Entry in minute book.]**—In an action for maliciously arresting & imprisoning pltf. upon a plaint for a debt in the sheriff's ct.

## PART V. SECT. 2, SUB-SECT. 3.

**557 i. Whether admissible.]**—In an action for maliciously making a charge against an engineer, of incompetence & gross negligence, evidence of good conduct in previous employments is inadmissible.—*TAIT v. SNEWIN* (1879), 5 V. L. R. (L.) 374.—*AUS.*

**557 ii. —.]**—*FITCH v. MURRAY* (1876), *Temp. Wood* 74.—*CAN.*

**557 iii. —.]**—Evidence of pltf.'s general bad character is not admissible in mitigation of damages in actions for malicious prosecution.—*FOWLER v. MCARTHUR*, 1 J. R. N. S. 54.—*N.Z.*

## PART V. SECT. 3, SUB-SECT. 1.

**560 i. Proof as to one charge sufficient.]**—*WILSON v. TENNANT* (1894), 25 O. R. 339.—*CAN.*

## PART V. SECT. 3, SUB-SECT. 2.

**m. Dismissal of complaint.]**—*WASSON v. TAYLOR* (1867), 1 Han. 102.—*CAN.*

**n. —.]**—*WOOD v. NEWBY* (1912), 21 W. L. R. 348; 5 D. L. R. 486; 4 Alta. L. R. 333.—*CAN.*

**o. Oral evidence of termination.]**—



*Sect. 3.—Sufficiency of proof: Sub-sect. 2. Sects. 4, 5 & 6. Part VI.]*

in London, without reasonable or probable cause, it is sufficient to allege & prove that the plaint was made "at the sheriff's ct. in London, before J., one of the sheriffs," etc. The usual course of that ct., upon the abandonment of a suit by pltf., being to make an entry in the minute book of "withdrawn" by pltf.'s order, opposite to the entry of the plaint:—*Held*: proof of such entry in the minute book was sufficient to prove an allegation, that the former suit was "wholly ended & determined."—*ARUNDELL v. WHITE* (1811), 14 East, 216; 104 E. R. 583.

*Annotations:—Reid. Pierce v. Street* (1832), 3 B. & Ad. 397. *Mentd. Sharpe v. Abbey* (1828), 5 Bing. 193.

**566. No statement of claim filed—Within a year of issuing writ.**—Where a writ has been sued out against a party, & no declaration filed within a year from the time of suing out the writ, the cause is out of ct.; & this is sufficient proof of the "end & determination" of the suit, to satisfy the averment in a declaration for a malicious arrest.—*PIERCE v. STREET* (1832), 3 B. & Ad. 397; 1 L. J. K. B. 147; 110 E. R. 142.

**567. Acceptance of debt & costs.**—(1) Where, in a case for a malicious arrest, the declaration alleges certain facts "whereupon & whereby the suit was ended & determined," pltf. cannot show any other determination of the suit than the mode stated.

(2) The acceptance of the debt & costs in satisfaction of the action, under a judge's order or a rule of reference, is a sufficient determination of a suit.—*COMBE v. CAPRON* (1834), 1 Mood. & R. 398, N. P.

**568. Rule to discontinue—Proof of payment of costs.**—*WATKINS v. LEE*, No. 141, *ante*.

**569. Writ of extent—Writ discharged by court.**—The writ of extent is the grievance: & all that the rule of law, in cases of malicious prosecution, requires is that the writ of extent should be traced to its close; & that is done by showing it discharged by the ct., though upon an arrangement & by consent (*LORD DENMAN, C.J.*).—*CRAIG v. HASSELL* (1843), 4 Q. B. 481; 3 Gal. & Dav. 299; 12 L. J. Q. B. 181; 7 Jur. 368; 114 E. R. 980.

*GUNN v. COX* (1879), 3 S. C. R. 296.—**CAN.**

**p. Necessity for formal record of acquittal.**—*BACKSTROM v. BECK* (1884), 5 R. & G. 538.—**CAN.**

**q. —.**—*MCCANN v. PRENEVEAU* (1886), 10 O. R. 573.—**CAN.**

**r. —.**—*HEWITT v. CANE* (1894), 26 O. R. 133.—**CAN.**

**t. Abandonment on one charge—Evidence of acquittal on another.**—The abandonment of one charge & uncontradicted evidence of an acquittal on the other, is sufficient evidence of the termination of the proceedings to enable an action to be brought.—*SEARY v. SAXTON* (1895), 28 N. S. R. 278.—**CAN.**

**a. Discharge from custody—Under habeas corpus order.**—In an action for malicious prosecution, a statement in the declaration that pltf. was discharged from custody under a *habeas corpus* order, whereby the prosecution was determined, is not a sufficient allegation of the determination of the prosecution.—*McKINNON v. McLAUGHLIN CARRIAGE CO.* (1904), 37 N. B. R. 3.—**CAN.**

**b. Withdrawal of prosecution—Compromise.**—*COCKBURN v. KETTLE* (1913), 28 O. L. R. 407; 4 O. W. N. 1161; 12 D. L. R. 512.—**CAN.**

**c. —.**—*TAMBLIN v. WESTCOTT*

(1914), 30 W. L. R. 542; 7 W. W. R. 1037; 20 D. L. R. 131; 23 Can. Crim. Cas. 391.—**CAN.**

#### PART V. SECT. 4.

**571 i. Rebuttal of malice—Defendant acting on legal advice.**—In an action for malicious prosecution where there is an improper motive, no advice from a solr., upon which defts. acted in furtherance of that motive, will protect them; or, in another view, the facts would not have been fully disclosed to the solr.—*PRENTISS v. ANDERSON LOGGING CO.* (1911), 18 W. L. R. 340; 16 B. C. R. 289.—**CAN.**

**d. Improper motive.**—Any motive for a prosecution, other than that of wishing to bring guilty party to justice, is evidence of malice.—*ALWARD v. SHARP* (1868), 1 Han. 286.—**CAN.**

**e. —.**—In an action for damages for malicious arrest & prosecution, any wantonness or indirect motive for causing the arrest, such as arresting a person criminally for theft where only a civil action lies for the debt, in order to "hurry him up" in the payment, is evidence of malice.—*CARNE v. HOWE* (1898), 15 S. C. 232.—**S. AF.**

#### PART V. SECT. 5.

**f. Advice given by detective —**

**570. Particular mode of determination averred—Proof restricted to that mode.**—*COMBE v. CAPRON*, No. 567, *ante*.

#### SECT. 4.—MALICE.

Malice, *see* Part IV., Sect. 2, *ante*.

**571. Rebuttal of malice—Defendant acting on legal advice.**—In an action for a malicious prosecution, it is no answer that deft. was encouraged in what he did by the opinion of counsel if the statement of facts were incorrect or the opinion ill founded.—*HEWLETT v. CRUCHLEY* (1813), 5 Taunt. 277; 128 E. R. 696.

**572. —.**—Pltf. who, acting under what he conceives to be sound advice, takes deft. in execution, after he has taken the deft.'s bail in execution, is not liable to an action for maliciously arresting deft. although, previous to the arrest, he had notice from deft. that his proceeding was illegal.—*SNOW v. ALLEN* (1816), 1 Stark. 502, N. P.

**573. —.**—*Qu.*: if counsel's opinion is sufficient to rebut malice in an indictment for a conspiracy.—*BROWN v. HICKNOTT* (1847), 8 L. T. O. S. 345.

**574. —.**—It is idle to suggest that in the proceedings taken defts. were actuated by malice, or that there was an absence of reasonable & probable cause, if counsel's advice was taken & acted upon (*LORD RUSSELL, C.J.*).—*BOSTOCK v. RAMSEY URBAN DISTRICT COUNCIL* (1899), 63 J. P. 728; 16 T. L. R. 18.

**575. Examination in chief of defendant—Question as to ulterior motive.**—*Qu.*: whether in case for malicious prosecution deft. can be asked in chief whether he had any other motive in view than to further the ends of justice.—*HARDWICK v. COLEMAN* (1859), 1 F. & F. 531.

#### SECT. 5.—REASONABLE AND PROBABLE CAUSE.

**576. Collateral matters.**—*WETZLAR v. ZACHARIAH*, No. 554, *ante*.

*Whether admissible.*—Deft. tendered evidence that a detective officer, to whom he stated the facts, gave him certain advice:—*Held*: the evidence having been tendered to show the existence of reasonable & probable cause, was properly rejected.—*McCAFFREY v. HILL* (1903), 3 S. R. N. S. W. 303; 20 N. S. W. W. N. 106.—**AUS.**

**g. Proof of plaintiff's guilt—To establish evidence of reasonable & probable cause.**—Though a deft. in an action for malicious prosecution is not bound to prove pltf.'s guilt as charged in the criminal proceedings, still he is at liberty to do so if it be necessary to establish reasonable & probable cause.—*WATT v. CLARK* (1889), 18 O. R. 602.—**CAN.**

**h. Hearsay evidence—Whether admissible.**—Hearsay evidence communicated to deft. is admissible as showing reasonable & probable cause.—*SMITH v. JOHNSON* (1886), 7 N. S. W. L. R. 176; 2 N. S. W. W. N. 95.—**AUS.**

**k. —.**—*BERNARD v. COUTELLIER* (1880), 45 U. C. R. 453.—**CAN.**

**l. What amounts to sufficient evidence—Bill ignored by grand jury.**—

## SECT. 6.—COMPETENCY OF WITNESSES.

## 577. Grand juror—Identification of prosecutor.]

—SYKES v. DUNBAR (1799), 1 Camp. 202, n., N. P.  
*Annotations*:—*Reid*. Purcel v. M'Namara (1808), 1 Camp. 199; Willans v. Taylor (1829), 3 Moo. & P. 350.

578. Counsel for prosecution—To prove alteration of book during prosecution.]—The rule as to privileged communications between counsel or attorney & client does not extend to facts of which the counsel or attorney of themselves obtain knowledge in the course of trial.

Counsel attended before a magistrate on behalf of a person charged with embezzlement, & a book was produced by the prosecutor in which it was the duty of the person charged to have entered a sum

of money received by him, & there was no such entry. On a second examination, the book was again produced when the entry was found. The party charged having brought an action for a malicious prosecution:—*Held*: the counsel might give evidence as to whether the entry was in the book at the time of the first examination, since the state of the book was not information communicated to him by his client, but knowledge which he acquired by his own observation.—BROWN v. FOSTER (1857), 1 H. & N. 736; 26 L. J. Ex. 249; 28 L. T. O. S. 274; 21 J. P. 214; 3 Jur. N. S. 245; 5 W. R. 292; 156 E. R. 1397.

*Annotations*:—*Mentd.* Kennedy v. Lyell (1883), 23 Ch. D. 387; Tournier v. National Provincial & Union Bank of England, [1924] 1 K. B. 461.

## Part VI.—Malicious Procurement of Issue of Search Warrant.

579. Right of action for.]—The execution of a legal warrant is not a trespass; the party injured must bring his action upon the grounds of bad motives (LORD MANSFIELD).—COOPER v. BOOTH (1785), 3 Esp. 135; 4 Doug. K. B. 339; 99 E. R. 911; *sub nom.* BOOT v. COOPER, cited in 1 Term Rep. at p. 535.

*Annotation*:—*Mentd.* R. v. Watts (1830), 1 B. & Ad. 166.

580. —.]—ELSEE v. SMITH, No. 5, *ante*.

581. —.]—Declaration stated that deft. maliciously & without reasonable or probable cause, charged pltf. before a magistrate with having stolen goods on his premises, & upon such charge obtained a search warrant & maliciously & without reasonable or probable cause, caused & procured his dwelling-house to be searched & rummaged for the said goods, & the door of the house to be broken, etc. Upon general demurrer:

—*Held*: looking at the whole declaration, what followed the making of the charge & obtaining the warrant, was attributable to that charge & done under the warrant & was therefore the subject-matter of an action upon the case, & although it might be bad on special demurrer for informality in not alleging more particularly that it was done under the warrant, it was no misjoinder of case & trespass.—HENSORTH v. FOWKES (1833), 4 B. & Ad. 449; 1 Nev. & M. K. B. 321; 1 Nev. & M. M. C. 79; 110 E. R. 524; *sub nom.* HANSWORTH v. FOWKES, 2 L. J. K. B. 72.

*Annotations*:—*Mentd.* Weeton v. Woodcock (1839), 7 Dowl. 853; Lear v. Caldecott (1843), 7 Jur. 277.

Issue of warrant a defence to action.]—See CRIMINAL LAW, Vol. XV., pp. 850, 851, No. 9342, 9343.

Essentials to action.]—See Part IV., *ante*.

MCCREARY v. BETTIS (1864), 14 C. P. 95.—CAN.

m. —.]—RICE v. SAUNDERS (1876), 26 C. P. 27.—CAN.

n. —.]—CRANDALL v. CRANDALL (1880), 30 C. P. 497.—CAN.

o. —.]—DENNISON v. CANADIAN PACIFIC RY. Co. (1903), 36 N. B. R. 250.—CAN.

p. —.]—DOMVILLE v. GLEESON, Cass. Dig. 2nd ed. 343.—CAN.

q. —.]—BURNS v. CLARK, 21 C. L. T. 24.—CAN.

r. —.]—PRENTISS v. ANDERSON LOGGING CO. (1911), 16 B. C. R. 289.—CAN.

t. —.]—NICHOLSON v. SCANDINAVIAN WATER-RACE CO., LTD. (1911), 31 N. Z. L. R. 65.—N. Z.

a. — Conviction by criminal court.]—GUNGA RAM v. HOOLASEE

(1870), 2 N. W. pt. 2, 88.—IND.

b. —.]—The fact that pltf. has been convicted by a competent ct., although he may subsequently have been acquitted on appeal, is evidence, is unrebutted, of the strongest possible character against pltf.'s necessary plea of want of reasonable & probable cause.—JADUBAR SINGH v. SHEO SARAN SINGH (1898), 1 L. R. 21 All. 26.—IND.

## PART VI.

c. What action lies—For malicious prosecution.]—An action for malicious prosecution will lie for issuing a search warrant without reasonable & probable cause.—YOUNG v. NICHOL (1885), 9 O. R. 347.—CAN.

d. —.]—FORREST v. GRIFFIN (1921), 42 N. L. R. 156.—S. AF.

e. —.]—A person who

without express malice, but without reasonable & probable cause, obtains from a justice a search warrant over another person's premises commits an actionable wrong, & is liable to an action for malicious prosecution.—EVANS v. CRAWFORD (1884), 2 N. Z. L. R. 407 (S. C.).—N. Z.

f. When action lies.]—In an action for malicious prosecution if the prosecutor has had a search warrant issued & executed in order to obtain evidence in support of his charge, pltf., in a subsequent action for malicious prosecution, will have a right to have that considered in aggravation of damages in the event of his getting a verdict in the action; but, if he fails, he can have no separate cause of action based on the issue or execution of the search warrant.—RENTON v. GALLAGHER (1910), 19 Man. L. R. 478; 14 W. L. R. 60.—CAN.



**Sect. 4.—Mandamus: Sub-sect. 1, C. (b) & (c).]**

Dowl. 509; Woll. 111; 10 L. J. M. C. 79; 5 J. P. 210.

*Annotation*:—*Apld.* R. v. Oxfordshire JJ. (1843), 4 Q. B. 177.

**1513.** —.]—At the sessions an objection was raised by the Bench to the right of appls. to be heard, & they accordingly refused to hear the appeal. Upon a motion for a *mandamus* to compel the justices to hear the appeal, resps. showed cause, but the rule was made absolute, & appls. succeeded at the sessions.—R. v. MIDDLESEX JJ. (1851), 17 L. T. O. S. 83; 15 J. P. 355; 15 Jur. 907.

*Annotation*:—*Mentd.* R. v. Ingham (1852), 17 Q. B. 884.

**1514.** — **Decision on another case on similar facts—Agreement to abide by decision in such similar case—Disobedience to order of justices in first case.**—Where the father & son were removed from A to B by two several orders of removal, & the parish officers of A. & B. agreed that the settlement of the son should follow that of the father, without the expense of a separate appeal; in consequence of which an appeal was only entered against the order removing the father; & after the sessions had determined that the father was settled in A. & had quashed that order, A. refused to take back the son; this ct. granted a *mandamus* to the sessions to receive & determine the appeal against the order removing the son, though at a subsequent sessions to that holden next after the order of removal made; the appeal being directed to be entered *nunc pro tunc* with proper continuances.

The sessions are bound to receive an appeal presented at any time during the next sessions after the order of removal made.—R. v. WILTSHIRE JJ. (1801), 1 East, 683; 102 E. R. 264.

**1515.** — **Objection to time of entering.**—R. v. SURREY JJ., No. 1038, *ante*.

**1516.** — **On ground of absence of notice—Usual practice of sessions to allow appeals without notice.**—Poor Relief Act, 1744 (c. 39), s. 4, does not make it imperative on the justices to hear & determine an appeal at the sessions next following the publication of the rate, but they may adjourn it to the next sessions. Where a rate was published on Sept. 16, & the appeal was entered at the Michaelmas Sessions, but deft. did not give notice of his intentions to try his appeal at those sessions, & the justices adjourned it as a matter of course to the Epiphany Sessions, according to the usual practice, & applt. gave notice of her intention to try his appeal at the Epiphany Sessions, when the justices refused to hear it, on the ground that it ought to have been heard & determined at the preceeding sessions, this ct. granted a *mandamus* to compel them to hear the appeal.—R. v. WILTS JJ. (1828), 8 B. & C. 380; 2 Man. & Ry. K. R. 401; 1 Man. & Ry. M. C. 438; 6 L. T. O. S. M. C. 97; 108 E. R. 1084.

*Annotations*:—*Apld.* R. v. Poole Recorder (1837), 1 J. P. 234. *Expld.* R. v. Eyre (1857), 7 E. & B. 609. *Distd.* R. v. Lancashire JJ. (1857), 27 L. J. M. C. 161. *Refd.* R. v. Surrey JJ. (1845), 3 Dow. & L. 343; R. v. Surrey JJ. (1880), 6 Q. B. D. 100.

**1517.** — **On objection that appeal out of time.**—R. v. SUFFOLK JJ., No. 1044, *ante*.

**1518.** — **Error in entry of appeal.**—R. v. BUCKINGHAMSHIRE JJ., No. 1086, *ante*.

**1519.** **Refusal to hear evidence.**—Where it appeared by affidavit that on an appeal against an order of removal appls. offered evidence to show that no complaint had been made before the removing justices, an objection taken in their grounds of appeal, but that the sessions refused to hear the evidence on the ground that the recital

of the complaint in the order was sufficient, the ct. granted a *mandamus* to compel the sessions to enter continuances & hear the appeal.

There was a refusal to entertain the question. If not, it may be so returned; at all events there is enough to induce us to call upon the justices to make a return (LORD DENMAN, C.J.).—R. v. SUSSEX JJ. (1844), 1 New Sess. Cas. 438; 9 J. P. 103.

**1520.** —.]—Where, on the trial of an appeal against an order of removal, appls. produced a former order between the same parties, which had been quashed generally, & resps. tendered evidence of the circumstances under which it had been quashed, namely that they had abandoned it on account of some defect in form, without going to the sessions:—*Held*: the sessions were bound to receive such evidence & having refused a *mandamus* issued to compel them to hear.—R. v. FLINTSHIRE JJ. (1844), 1 New Sess. Cas. 288; 13 L. J. M. C. 163; 3 L. T. O. S. 207; 9 J. P. 135; 8 Jur. 929.

**1521.** —.]—Where the sessions refuse to hear evidence offered by appls. to show that no complaint of chargeability had been made, on the ground that it was sufficient to recite such notice in the order of removal, the ct. will grant a *mandamus* to enter continuances & hear the appeal.—R. v. EAST SUSSEX JJ. (1844), 1 New Mag. Cas. 167; *subsequent proceedings* (1845), 5 L. T. O. S. 241.

**1522.** —.]—An order of justices takes effect from the moment when it is signed by them, & it is competent for a party disputing such order to show that it was in fact signed at a period different from the date apparent on its face. Where, therefore, an application for an order of affiliation against A. was heard on June 24, & A. was then declared to be the putative father, & on June 27 he was served with the order bearing date June 24, & within 24 hours of his being so served he gave notice of appeal, & on his applying at the next sessions to enter his appeal, was refused, on the ground that he was too late, the order purporting to have been made on June 24, whereupon he expressed himself ready to prove that the order was not signed until June 27, but which evidence the justice refused to hear:—*Held*: they ought to have heard such evidence, & a *mandamus* was directed to them to enter continuances & hear the appeal.—R. v. FLINTSHIRE JJ. (1846), 3 Dow. & L. 537; 1 New Mag. Cas. 460; 2 New Sess. Cas. 236; 15 L. J. M. C. 50; 6 L. T. O. S. 376; *sub nom.* R. v. FLINTSHIRE JJ., *Ex p.* RODEN, 10 J. P. 342; *sub nom.* R. v. FLINTSHIRE JJ., RODEN v JONES, 10 Jur. 475.

*Annotations*:—*Consd.* R. v. Huntingdonshire JJ. (1850), 1 L. M. & P. 78. *Refd.* *Ex p.* Johnson (1863), 3 B. & S. 947.

**1523.** **Refusal to hear respondent — Highway board dissolved.**—On Mar. 25, 1883, the date of the dissolution of a highway district under Highway Act, 1862 (c. 61), s. 39, an appeal to quarter sessions, was pending against an order of justices in petty sessions, by which applt. had been ordered to pay to the district highway board a sum of money for "extraordinary expenses," incurred by the board in repairing damage caused to the highways by "excessive weight & extraordinary traffic," in the constant passing over the same of a traction engine & carriages belonging to applt. When the appeal came on to be heard, Apr. 4, the ct. of quarter sessions declined to hear counsel for resp. board, on the ground that, the highway district being dissolved, the board had ceased to exist & could not therefore appear or be heard by counsel as resps. in the appeal; & treating the appeal as

## Part VII.—Pleading and Practice.

### SECT. 1.—IN GENERAL.

**582. Joinder of parties—Husband & wife.]—**Husband & wife may join in an action of conspiracy for malicious prosecution against them both; or the husband may have it alone; for though it is for a tort, yet it is grounded on one entire record.—*DALBY v. DORTALL* (1839), Cro. Car. 553; 79 E. R. 1076.

**583. Invalid plea of judgment recovered—When causes of action distinct—False imprisonment & malicious prosecution.]—**To an action for a malicious prosecution on a charge of felony, without any reasonable or probable cause, whereby deft. had falsely, etc., caused pltf. to be imprisoned & indicted & tried on the charge; deft. pleaded that, before this action, pltf. had brought an action of trespass against deft. for assault & false imprisonment upon a false assertion, that pltf. had committed felony, to which action deft. had pleaded, first not guilty; & secondly, a plea justifying such assertion as true; & that, thereupon, deft. committed the supposed trespass, by giving pltf. into the custody of a police officer; to which pleas pltf. had replied, by joining issue on the first, & by replying *de injuria* to the second, etc.; that that cause was tried before a judge & jury; & that the judge then directed the jury to take into their consideration, whether deft. had accused pltf. with having committed the felony, & whether he had made the charge falsely, etc., & without any probable, etc., cause, & whether he had so falsely & maliciously, etc., committed the grievances complained of in this action; that the jury found a verdict for pltf., & assessed the damages at £125, for which judgment was signed. The plea then proceeded to state, that the several imprisonments in this action are the same as those in the former action; & that all the grievances in this action were directed by the judge to be taken into consideration by the jury in the first action; & that they were taken into their consideration; & that they are the same damages in respect of which & on occasion whereof the damages were given by the jury in the first action:—*Held*: the causes of action were perfectly distinct & different, & the plea was bad.—*GUEST v. WARREN* (1854), 9 Exch. 379; 2 C. L. R. 979; 23 L. J. Ex. 121; 18 Jur. 133; 2 W. R. 159; 156 E. R. 161.

**584. Particulars—By defendant—Reasonable & probable cause.]—**In an action for malicious prosecution, where deft. pleads reasonable & probable cause, the ct. will refuse to order particulars of the facts upon which he relies unless special circumstances are shown why particulars should be ordered.—*ROBERTS v. OWEN* (1890), 54 J. P. 295; 6 T. L. R. 172, D. C.

*Annotation*:—*Folld. Weinberger v. Inglis*, [1918] 1 Ch. 133.

**585. ———.]—**There are cases in which particulars addressed to the state of a person's mind are ordered as a matter of course.

#### PART VII. SECT. 1.

**g. Particulars — By plaintiff.]—***COUSINS v. CANADIAN NORTHERN RY. CO.* (1908), 18 Man. L. R. 320; 9 W. L. R. 308.—CAN.

**h. Trial by jury—In special circumstances.]—**Special circumstances must be shown in order to have an action for malicious prosecution tried by a jury.—*HARVIE v. SNOWDEN* (1893), 9 Man. L. R. 313.—CAN.

**k. Several charges—Proof of untruth of one.]—***MORAN v. LYONS* (1878), 4 V. L. R. (L.) 379.—AUS.

**l. No probable cause shown—Objection not taken at trial—No ground for nonsuit.]—***JONES v. DUFF* (1848), 5 U. C. R. 143.—CAN.

**m. Defence—Must be certain.]—***JONES v. DUNN* (1851), 1 C. P. 204.—CAN.

**n. ———.]—***SANDERSON v. DOWNS* (1853), 11 U. C. R. 99.—CAN.

*e.g.*, in an action for malicious prosecution, particulars going to the question whether deft. had reasonable & probable cause for what he did (*COLLINS, L.J.*).—*ALMAN v. OPPERT*, [1901] 2 K. B. 576; 70 L. J. K. B. 745; 84 L. T. 828; 17 T. L. R. 620; 45 Sol. Jo. 615; 8 Mans. 316, C. A.

*Annotation*:—*N.F. Weinberger v. Inglis*, [1918] 1 Ch. 133.

**586. ———.]—**In actions for malicious prosecution, where deft. confines himself to traversing pltf.'s negative allegation of want of reasonable & probable cause, & where no claim is joined for false imprisonment; in which case an *onus* is thrown on deft., it has not been the practice to order particulars from deft. (*ASTBURY, J.*).—*WEINBERGER v. INGLIS*, [1918] 1 Ch. 133; 87 L. J. Ch. 148; 118 L. T. 208; 34 T. L. R. 104; 62 Sol. Jo. 160.

**587. Service of writ out of jurisdiction—R. S. C., Ord. 11, r. 1.]—**Pltf. sought to serve one deft., an Irish co. out of the jurisdiction, with a writ in an action for malicious prosecution. The other deft., the co.'s manager, had been served within the jurisdiction:—*Held*: (1) above rule applied to actions of tort; (2) the Irish co. were a proper party to the action.—*CROFT v. KING*, [1893] 1 Q. B. 419, 62 L. J. Q. B. 242; 68 L. T. 296; 41 W. R. 394; 37 Sol. Jo. 252; 5 R. 222, D. C.

*Annotation*:—*As to (1) Consd. Williams v. Cartwright*, [1895] 1 Q. B. 142.

**588. Trial by jury—Issue raised on counterclaim in Chancery Division—R. S. C., Ord. 36.]—**In above Ord. r. 2, which gives pltf. in certain actions a right to a trial by jury, the word "pltf." does not include deft. seeking relief by way of counterclaim, & the word "action" does not include a counterclaim. Where, therefore, in an action in the Ch. Div. for specific performance of an agreement deft. counterclaims for libel & malicious prosecution, deft. has no right under above Ord. r. 2, to have the counterclaim tried with a jury; but the ct. can, & in a proper case ought to, under r. 7, direct the issues raised by the counterclaim to the tried with a jury.—*KINNAIRD (LORD) v. FIELD*, [1905] 2 Ch. 361; 74 L. J. Ch. 692; 93 L. T. 190; 54 W. R. 85; 21 T. L. R. 682; 49 Sol. Jo. 670, O. A.

*Annotation*:—*Expld. R. v. Westminster Assmt. Com., Ex p. London & Provincial Victuallers, R. v. Islington Assmt. Com., Ex p. Royal Agricultural Hall Co.*, [1917] 2 K. B. 215.

**Interrogatories.]—**See DISCOVERY, Vol. XVIII., pp. 211 *et seq.*

### SECT. 2.—STATEMENT OF CLAIM.

**589. General rule.]—**In an action for a malicious prosecution of an indictment for perjury, it is necessary to state in the declaration every allegation proper to support the action; namely,

**o. ——— Must not be embarrassing.]—***ROGERS v. CLARK* (1900), 20 C. L. T. 419; 13 Man. L. R. 189.—CAN.

**p. Demurrer.]—***ROACH v. HICKEY* (1857), 4 Nfld. L. R. 162.—NFLD.

#### PART VII. SECT. 2.

**589 i. General rule.]—**In an action for maliciously applying without reasonable cause to bring land under the Real Property Act, actual damage sustained must be alleged in the declaration.—



that deft. falsely, maliciously, & without any reasonable or probable cause, caused deft. to be indicted, & to state the trial & acquittal.—*CARNAN v. TRUMAN* (1788), 1 Bro. Parl. Cas. 101; 1 E. R. 444, H. L.

**590. Absence of reasonable & probable cause—Whether must be stated specifically.]—***JONES v. GIVIN*, No. 25, *ante*.

**591. Laying of information—Necessity for proof where stated.]—**In a declaration for a malicious prosecution, it is not necessary to state that there was an information. It is sufficient to state that deft. procured a warrant to be issued; but if the declaration state that deft. made information on oath, & that upon that information the magistrate granted the warrant, the information must be proved in the regular way, & a recital of it in the warrant is not sufficient.—*GREGORY v. DERBY* (1839), 8 C. & P. 749.

**592. Procurement of issue of warrant.]**  
*GREGORY v. DERBY*, No. 591, *ante*.

**593. Particulars of falsehood—Averment of "falsely inducing judge to grant order for arrest."]**—Declaration alleged that deft., not having any reasonable or probable cause of action against pltf., or for causing him to be arrested, etc., wrongfully, falsely, maliciously & vexatiously procured a judge's order for the arrest of pltf. under Judgments Act, 1838 (c. 110), s. 3, & caused him to be arrested on a *capias* issued thereupon, etc.:—*Held*: bad on special demurrer, for not showing the false charges or statement by which the judge was induced to make the order.—*BRYANT v. BOBBETT* (1847), 10 L. T. O. S. 208; 11 Jur. 1021.

**594. Averment that proceedings instituted by defendant.]—***BARBER v. LESITER*, No. 47, *ante*.

**595. Res gestæ—Evidence of res gestæ.]—***ADERIS v. THRIGLEY* (1876), Bitt. Prac. Cas. 126; 2 Char. Cham. Cas. 43.

**That prosecution ended.]—**See Nos. 3, 25, 47, 114, 132, 140, 144, 162, *ante*.

**Malicious motive.]—**See Nos. 86, 220, *ante*.

**596. Variance between declaration & record—Surplusage.]—**In an action for maliciously, etc., arresting & holding pltf. to bail, in which the declaration, in setting out the judgment by default in the former action, stated that "it was thereupon considered that the then pltf. should take nothing

by their writ, but that they & their pledges to prosecute should be in mercy," etc.; it is no material variance if the record produced in evidence have not the words & their pledges to prosecute, but only have an etc., for these words may be rejected as surplusage, the substance of the allegation being the discontinuance of the former suit.—*JUDGE v. MORGAN* (1811), 13 East, 547; 104 E. R. 483.

*Annotations*:—*Reid*. *Draper v. Garratt* (1823), 2 B. & C. 2. *Mentd.* *Drummond v. Pigou* (1835), 2 Scott, 228.

### SECT. 3.—DAMAGES AND COSTS.

Damage as essential to cause of action, see Part IV., Sect. 4, *ante*.

**597. Damages—What may be recovered—Costs already ordered to be paid.]—**(1) If B. & C. are convicted of a conspiracy, on the prosecution of A., the conviction is not admissible evidence in an action afterwards brought against them by A. for the same conspiracy.

(2) In an action for malfeasance, whereby pltf. incurred costs in judicial proceedings, if there is an order of another ct. for deft. to pay the costs of these proceedings to pltf., he can neither recover, as special damage, the sum at which they are taxed, nor the extra costs as between himself & his attorney.—*HATHAWAY v. BARROW* (1807), 1 Camp. 151, N. P.

*Annotations*:—*As to* (1) *Reid*. *Blakemore v. Glamorganshire Canal Co.* (1835), 1 Gale, 78; *In the Estate of Crippen*, [1911] P. 108. *As to* (2) *Reid*. *Jenkins v. Biddulph* (1827), 12 Moore, C. P. 390. *Generally*, *Mentd.* *Hodges v. Litchfield* (1835), 1 Scott, 443.

**598. ——— Extra costs.]—***HATHAWAY v. BARROW*, No. 597, *ante*.

**599. ———.]—***SINCLAIR v. ELDERED*, No. 306, *ante*.

**600. ———.]—**In an action for a malicious arrest, pltf. cannot recover damages for the extra costs.—*WEBBER v. NICHOLAS* (1826), Ry. & M. 419, N. P.

*Annotation*:—*Reid*. *Doe d. Drax v. Filliter* (1843), 11 M. & W. 80.

**601. ———.]—**In an action for a vexatious & excessive distress, pltf. having received the taxed costs of his replevin on the distress, was

*LACHAUME v. BROUGHTON* (1903), 3 S. R. N. S. W. 475; 20 N. S. W. W. N. 161.—*AUS.*

**590 i. Absence of reasonable & probable cause—Whether must be stated specifically.]—***DENHAM v. RIDOUT* (1842), 6 O. S. 193.—*CAN.*

**590 ii. ———.]—***OWENS v. PURCELL* (1853), 11 U. C. R. 390.—*CAN.*

**590 iii. ———.]—***FISHER v. HOLDEN* (1867), 17 C. P. 395.—*CAN.*

**590 iv. ———.]—***FAHEY v. KENNEDY* (1869), 28 U. C. R. 301.—*CAN.*

**590 v. ———.]—**Action for damages against solrs. for, as alleged in the statement of claim, "wrongfully & unlawfully without any instructions or retainer," issuing a writ of summons against pltf.:—*Held*: neither malice & want of reasonable & probable cause, nor special damage, both of which are necessary in such an action, were sufficiently alleged.—*MITCHELL v. MCMURRICH* (1892), 22 O. R. 712.—*CAN.*

**590 vi. ———.]—***BRODIE v. YOUNG* (1851), 13 Dunl. (Ct. of Sess.) 737; 23 Sc. Jur. 319.—*SCOT.*

**591 i. Laying of information—Necessity for proof where stated.]—***HENDERSON v. ROBERTSON* (1853), 15 Dunl. (Ct. of Sess.) 292; 25 Sc. Jur. 188; 2 Stuart, 159.—*SCOT.*

**q. Procurement of issue of warrant—Judgment need not be set out.]—***CRAWFORD v. STENNETT* (1839), 2 Ont. Dig. 4079, 4080.—*CAN.*

**r. ——— Affidavit to arrest need not be set out.]—***BEAMER v. DARLING* (1848), 4 U. C. R. 211.—*CAN.*

**594 i. Averment that proceedings instituted by defendant.]—**In an action for a malicious arrest under a *ca. sa.*, it is sufficient to aver that deft. maliciously sued out a *ca. sa.*, when he had no reason to believe that pltf. had made, etc.—*MCINTOSH v. DEMERAY* (1849), 5 U. C. R. 343.—*CAN.*

**t. Variation between declaration & record.]—***PRENTICE v. HAMILTON* (1831), 2 O. S. 114.—*CAN.*

**a. ———.]—***CARR v. PROUDFOOT* (1840), 1 Ont. Dig. 654.—*CAN.*

**b. ———.]—***MUNROE v. ABBOTT* (1876), 39 U. C. R. 78.—*CAN.*

**c. Termination of suit.]—***WILCOX v. BURNSIDE* (1837), 5 O. S. 525.—*CAN.*

**d. ———.]—**Where one of two counts was bad for not alleging the suit to be at an end, nor showing how it ended, & pltf. obtained a general verdict:—*Held*: on motion to arrest judgment, that such omission was not cured by verdict.—*MANNING v. ROSSIN* (1854), 3 C. P. 89.—*CAN.*

**e. ———.]—**In an action for arrest under a judge's order:—*Held*: not necessary to allege in the declaration that the action in which the arrest took place was at an end, or that pltf. had been discharged & the order set aside.—*EAKINS v. CHRISTOPHER* (1868), 18 C. P. 532.—*CAN.*

**f. Inconsistent averments.]—***ASHFORD v. GOHREN* (1850), 7 U. C. R. 547.—*CAN.*

**g. Irrelevant matter struck out.]—***MORROW v. CHEYNE* (1888), 12 P. R. 487.—*CAN.*

**h. ———.]—***MANS v. LEPEL* (1910), 27 S. C. 161.—*S. AF.*

**k. Must disclose cause of action.]—***COWAN v. MACAULAY* (1897), 5 B. C. R. 495.—*CAN.*

**l. ———.]—***NAVENDREE, ETC. v. JYOTISH, ETC.* (1922), 1 L. R. 19 Calc. 1035.—*IND.*

**m. Joinder of action for trespass.]—**Under King's Bench Act, 1902, c. 40, r. 257, a pltf. may sue in the same action both for malicious prosecution & trespass.—*COATES v. PEARSON* (1906), 3 W. L. R. 1; 16 Man. L. R. 3.—*CAN.*

**n. Surplusage.]—***JONES v. GORE* (1912), 22 W. L. R. 739; 3 W. W. R. 526; 8 D. L. R. 868.—*CAN.*

**Sect. 3.—Damages and costs.]**

held not entitled to recover, as damages, the extra costs occasioned to him by the replevin.—*GRACE v. MORGAN* (1836), 2 Bing. N. C. 534; 1 Hodg. 398; 2 Scott, 790; 5 L. J. C. P. 180; 132 E. R. 208.

*Annotations*:—*Refd.* *Doe v. Filliter* (1844), 13 M. & W. 47. *Mentd.* *Howard v. Lovegrove* (1870), 23 L. T. 396.

**602.** ———— *]*—In case for a malicious arrest, pltf. is entitled to recover costs incurred in the former suit beyond the taxed costs in that suit.—*GOULD v. BARRATT* (1838), 2 Mood. & R. 171, N. P.

**603.** ———— *]*—*QUARTZ HILL GOLD MINING Co. v. EYRE*, No. 21, *ante*.

**604.** ———— *Costs as between solicitor & client.*—In an action for maliciously holding pltf. to bail he is entitled in the calculation of damages to recover, not merely the taxed costs, but the costs as between attorney & client.

If, by your act you subject a party to a legal liability to pay a sum to another, you must indemnify him against such expenses; if it were otherwise, it would come to this, that an attorney would not maintain an action against his client for the extra costs (*LORD ELLENBOROUGH*).—*SANDBACK v. THOMAS* (1816), 1 Stark. 306, N. P.

*Annotations*:—*N.F. Webber v. Nicholas* (1826), Ry. & M. 419. I should myself have thought that my *LORD ELLENBOROUGH*'s opinion was the correct one; but I must hold myself bound by the decision of this ct., against the authority of a single judge at *Nisi Prius* (*BEST, C.J.*). *N.F. Grace v. Morgan* (1836), 2 Bing. N. C. 534. Whatever respect is due to the opinion of the very eminent judge who tried the cause, we cannot think it sufficient to outweigh the authorities to which we have been referred (*TINDAL, C.J.*). *Refd.* *Holloway v. Turner* (1845), 6 Q. B. 928. *Mentd.* *Howard v. Lovegrove* (1870), 19 W. R. 188.

**605.** ———— *Aggravation—Justification of count of slander.*—In an action for malicious prosecution & false imprisonment the declaration contained a count for slander averring the reiteration by deft. of the charges upon which he prosecuted pltf. Deft. pleaded various pleas to the counts for malicious prosecution & false imprisonment, & in addition pleaded justification to the count for slander. On the trial no evidence was given on either side on the issue raised by the count & plea in slander, & pltf. recovered a verdict with damages generally. On motion for a rule *nisi* for a new trial on the ground that the jury had been misdirected, inasmuch as they had been charged to dismiss from their consideration the aggravation of the original slander in pleading the justification:—*Held*: under the circumstances the operation of the rule that pleading a justification which fails to be supported by evidence is an aggravation of the tort charged was excluded here, & the direction was therefore right.—*BROOKE v. AVRILLON* (1873), 42 L. J. C. P. 126; 21 W. R. 594.

**606.** ———— *Admissibility of evidence in aggravation of damages.*—*MILTON v. ELMORE* (1830), 4 C. & P. 456, N. P.

**607.** ———— *Costs of common defence—Borne by one only of two acquitted parties.*—(1) *Semble*: if one of two parties indicted, having a defence common to both, retains an attorney to

defend them, & pays him the whole costs of defence, & they are acquitted, such party, in an action for malicious prosecution, may demand the costs so paid as part of his damages.

(2) At all events, he may so recover if, the costs of defence being divisible, it has been expressly left to the jury to deduct any part of such costs which they thought not fairly incurred by pltf., & they have found for him as to the whole.—*ROWLANDS v. SAMUEL* (1847), 11 Q. B. 39; 17 L. J. Q. B. 65; 10 L. T. O. S. 109; 12 J. P. 197; 116 E. R. 389.

**608.** ———— *Money expended in defence of action—Other than legal costs.*—*COTTERELL v. JONES*, No. 505, *ante*.

**609.** ———— *Matters for consideration by jury.*—(1) In an action for false imprisonment & malicious prosecution, the counsel for deft., when summing up, is justified in discussing the question of probable damages, because, if the trial result in a verdict for pltf., the question becomes one of damages merely.

(2) In estimating damages in an action for false imprisonment & malicious prosecution, the jury must consider not only the sufferings & loss of pltf., but also the necessity which exists for the occasional prosecution of innocent persons in order to prevent the escape of criminals from justice.—*TULLEY v. CORRIE* (1867), 16 L. T. 796; 10 Cox, C. C. 584, N.P.; *subsequent proceedings*, 17 L. T. 140.

**610.** ———— *General damages—Declaration partly disproved—Apportionment.*—In an action for malicious prosecution the declaration alleged that deft. caused pltf. to be taken before a magistrate upon a charge of riotously assembling to disturb the public peace, & with having unlawfully & riotously pulled down a fence; it then went on to allege that deft. caused pltf. to be indicted for a riot, & to be held to bail, etc. Pltf. proved that deft. charged him before the magistrate with unlawfully & maliciously breaking down a fence:—*Held*: this disproved the first part of the declaration, & the damages, which had been assessed generally by the jury, upon the whole declaration, could not be apportioned.—*OSTERMAN v. BATEMAN* (1850), 14 L. T. O. S. 373.

**611.** ———— *Right of defending counsel—To discuss question of probable damages.*—*TULLEY v. CORRIE*, No. 609, *ante*.

**612.** *Costs—Whether taxing master bound by certificate of counsel—On question of necessity for allowing copies of shorthand notes.*—Judgment as in case of a nonsuit having been signed in an action for a malicious prosecution, the master, in taxing deft.'s costs, allowed three copies of the shorthand writer's notes of the evidence on the trial of the prosecution, considering himself bound by the certificate of counsel that they were necessary:—*Held*: the master was wrong in considering himself bound by the certificate, & was directed to review his taxation, in order that he might exercise his discretion as to the propriety of the allowance.—*MAY v. TARN* (1844), 12 M. & W. 730; 1 Dow. & L. 997; 13 L. J. Ex. 234; 8 Jur. 383; 152 E. R. 1393.

**PART VII. SECT. 3.**

**609 i.** *Damages—What may be recovered—Matters for consideration by jury.*—*HAGERTY v. GREAT WESTERN RY. Co.* (1879), 44 U. C. R. 319.—*CAN.*

**609 ii.** ———— *]*—*HULME v. CHANT*, 22 C. L. T. 216.—*CAN.*

**o.** ———— *Amount awarded by jury must be clear.*—*DAVIS v. WRIGHT*

(1911), 19 W. L. R. 762; 21 Man. L. R. 716.—*CAN.*

*Exemplary damages.*—*]* damages awarded where deft. maliciously prosecuted pltf. for [1918] C. P. D. 168.—*S. AF.*

**q.** *Costs—Of second trial—Paid by defendant—As condition of granting*

*third trial.*—*EVERETT v. BAYLISS* (1882), 3 N. S. W. L. R. 174.—*AUS.*

**r.** ———— *Security—By insolvent.*—An insolvent was ordered to give security for costs in an action by him for malicious prosecution.—*HUMPHRIES v. RAMSAY* (1877), 7 P. R. 188.—*CAN.*

**t.** ———— *Successful plaintiff deprived of costs—Nominal damages recovered.*—



**613. — Signing of certificate under Civil Procedure Act, 1833 (c. 42), s. 2.]—**Upon the execution of a writ of inquiry directed to the sheriff in an action for a malicious prosecution in which the damages are under 40s., a certificate under above sect., to entitle pltf. to costs, should be signed by the under-sheriff in the name of the sheriff & not in his own name.—**STROUD v. WATTS** (1846), 2 C. B. 929; 1 New Pract. Cas. 431; 3 Dow. & L. 799; 15 L. J. C. P. 196; 7 L. T. O. S. 140; 10 Jur. 497; 135 E. R. 1211.

*Annotation:—Mentd.* R. v. Schlesinger (1847), 10 Q. B. 670.

**614. — Plaintiff successful on one issue out of ten—Costs of witnesses.]—**A declaration in case for a malicious prosecution for perjury, in one count, set out ten assignments of perjury, which were alleged to have been prosecuted maliciously & without probable cause; at the trial pltf. failed in proving want of probable cause as to nine of the assignments. He obtained a verdict with damages, on the tenth assignment:—*Held*: he was not entitled to the costs of witnesses called to give evidence of want of probable cause as to those nine; & deft. was not entitled to the costs

of witnesses subpoenaed by him to show probable cause as to those assignments.—**DELISSER v. TOWNE** (1841), 1 Q. B. 333; 4 Per. & Dav. 644; 113 E. R. 1159.

**615. — Taxation on successful issues—Discretion of taxing master—Where no order made.]—**In an action brought to recover damages for, first, malicious proceedings in bkpcy.; second, libel & slander; third, trespass & conspiracy, & tried with a jury, pltf. obtained a verdict & judgment, with a farthing damages upon the claim for libel, & defts. obtained a verdict & judgment upon the other issues. Without any order having been made giving to defts. any costs, a master taxed in favour of defts. the costs of the issues upon which they had succeeded:—*Held*: defts. were entitled to those costs, & the taxation was right.—**MYERS v. DEFRIES** (1880), 5 Ex. D. 180; 49 L. J. Q. B. 266; 42 L. T. 137; 28 W. R. 406, C. A.

*Annotations:—Reid.* Stooke v. Taylor (1880), 5 Q. B. D. 569; Goutard v. Carr (1883), 32 W. R. 242; Huxley v. West London Extension Ry. (1889), 14 App. Cas. 26; Reid, Hewitt & Co. v. Joseph, [1918] A. C. 717. *Mentd.* Bradlaugh v. Clarke (1883), 8 App. Cas. 354; Yorke v. Yorkshire Insee., [1918] 1 K. B. 662.

**ROBINSON v. NELSON** (1880), 2 P. E. I 318.—**CAN.**

a. — — —.]—In an action for malicious prosecution the fact that pltf. recovered only nominal damages is not even *prima facie* "good

cause" for depriving him of costs, but it is an important element to be considered on the question of costs.—**KORDO v. TOLOSKO**, [1921] 1 W. W. R. 230; 56 D. L. R. 721.—**CAN.**

b. — — —.]—**JONES v.**

**ORBELL** (1868), 1 C. A. 86.—**N.Z.**

c. *Costs on lower scale—Defendant deprived of extra costs—Where verdict should have been for larger amount.]—***CARTON v. BRADBURN** (1893), 15 P. R. 147.—**CAN.**

## MANDAMUS.

See CROWN PRACTICE; MAGISTRATES.

## MANOR.

See COPYHOLDS; REAL PROPERTY AND CHATTELS REAL.

## MANORIAL COURTS.

See COPYHOLDS; REAL PROPERTY AND CHATTELS REAL.

## MANSLAUGHTER.

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## MAP.

See BOUNDARIES, FENCES AND PARTY-WALLS; COPYRIGHT AND LITERARY PROPERTY; EVIDENCE.

## MARGARINE.

*See* FOOD AND DRUGS.

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*See* INSURANCE ; SHIPPING AND NAVIGATION.

## MARINE STORES.

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## MARINERS.

*See* CRIMINAL LAW AND PROCEDURE ; FISHERIES ; MASTER AND SERVANT ; SHIPPING AND NAVIGATION.

## MARITIME COURTS.

*See* ADMIRALTY ; COURTS ; SHIPPING AND NAVIGATION.

## MARITIME LIEN.

*See* SHIPPING AND NAVIGATION.

## MARKET GARDEN.

*See* AGRICULTURE.

## MARKET OVERT.

*See* AUCTION AND AUCTIONEERS ; CRIMINAL LAW AND PROCEDURE ; MARKETS AND FAIRS ; SALE OF GOODS.



# MARKETS AND FAIRS.

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<i>Game</i> . . . . .	„ GAME.	<i>Stints</i> . . . . .	„ COMMONS.
<i>Highways</i> . . . . .	„ HIGHWAYS.	<i>Street Traffic</i> . . . . .	„ STREET AND AERIAL TRAFFIC.
<i>Hops</i> . . . . .	„ CUSTOM AND USAGES ; FOOD AND DRUGS.	<i>Summary Jurisdiction</i> . . . . .	„ MAGISTRATES.
<i>Horseflesh</i> . . . . .	„ FOOD AND DRUGS ; PUBLIC HEALTH.	<i>Tea</i> . . . . .	„ FOODS AND DRUGS ; TRADE AND TRADE UNIONS.
<i>Inspectors of Nuisances</i> . . . . .	„ NUISANCE ; PUBLIC HEALTH.	<i>Trade Marks</i> . . . . .	„ TRADE MARKS.
		<i>Trades, generally</i> . . . . .	„ TRADE AND TRADE UNIONS.
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## Part I.—Nature of Markets and Fairs.

### SECT. 1.—IN GENERAL.

1. **Royal prerogative.**—ANON. (1704), 6 Mod. Rep. 183; 87 E. R. 939.

### SECT. 2.—MARKETS.

2. **Franchise.**—GLOUCESTER GRAMMAR SCHOOL CASE (1410), Y. B. 11 Hen. 4, fo. 47, pl. 21.

*Annotations* :—**Mentd.** R. v. Patrick (1667), 2 Keb. 164; Keble v. Hickerlingell (1707), Kel. W. 273; Allen v. Flood, [1898] A. C. 1.

3. —.—]—ASTILL v. CLARKE, No. 16, *post*.

4. —.— **Distinct from franchise of fair.**—NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL, No. 176, *post*.

5. **Not an interest in land.**—A.-G. v. HORNER, No. 45, *post*.

*See, also*, No. 177, *post*.

6. **Proprietary market — Distinguished from legal market.**—A.-G. v. HORNER (No. 2), No. 103, *post*.

7. **Market “legally established” under Hawkers Act, 1810 (c. 41)—Whether market de facto included.**—A daily market was held at W., & had been for upwards of twenty years; but the only legal grant authorising a market was for one on Fridays, & the owner of the soil had taken the tolls as for a market on Friday upwards of twenty years:—**Held**: this was a legal market within above Act, s. 5, only on Fridays; & therefore a person hawking on Saturday without a licence was rightly given into custody, & taken before a magistrate.—BENJAMIN v. ANDREWS (1858), 5 C. B. N. S. 299; 27 L. J. M. C. 310; 22 J. P. 464; 4 Jur. N. S. 976; 6 W. R. 692; 141 E. R. 119.

*Annotation* :—**Refd.** Newcastle v. Worksop U. C., [1902] 2 Ch. 145.

### SECT. 3.—FAIRS.

8. **Franchise.**—JEWEL'S CASE, No. 70, *post*.

9. —.— **Distinct from franchise of market.**—NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL, No. 176, *post*.

10. **Distinguished from statute sessions for hiring servants.**—Applt. placed a stall for refreshments upon a public footpath during a statute sessions for the hiring of servants, which took place close by. These statute sessions had been held regularly every year for nearly fifty years, & it had been the custom on these occasions to have stalls on this footpath. Justices at petty sessions convicted applt. of obstructing a highway under Highway Act, 1835 (c. 50), s. 72:—**Held**: the conviction was proper; this claim of right by applt. did not oust the justices' jurisdiction; & there could not be a legal origin for such a custom.

“In the case of a regular market or fair for the sale of goods, there may be a valid right of persons to erect stalls in the market place or street. But these statute sessions are not on the same footing as a fair for the sale of commodities” (BLACKBURN, J.).—SIMPSON v. WELLS (1872), L. R. 7

Q. B. 214; 41 L. J. M. C. 105; 26 L. T. 163; 36 J. P. 774.

*Annotation* :—**Refd.** Mercer v. Denne, [1904] 2 Ch. 534.

11. **Whether confined to place for buying & selling—Construction of local Act.**—A local Act by sect. 126 imposed a penalty upon any occupier of land within the borough who held or permitted to be held any market or fair thereon, without the licence of the corpn. Deft., being the occupier of certain land within the borough of Walsall, on certain days, one being a regular fair day, without the licence of the corpn., brought on to his land & used certain swing boats, roundabouts, shooting galleries, & many other contrivances for the amusement of the people. These contrivances were the property of different persons, & it was not proved that such persons made any payment to deft. for the use of the land, or that there was any buying or selling of goods, or exposing the same for sale thereon. Deft. was convicted under the sect. of permitting the holding of a “fair” on his land:—**Held**: [BRUCE, J. having withdrawn his opinion] deft. was properly convicted, as the word “fair” has a wider meaning than that of a fair in the ordinary sense as a place for buying & selling, & although buying & selling are the chief idea in the word, yet it would include places where amusements of the kind in question were provided, although there was no buying & selling; (2) (BRUCE, J.) he ought not to have been convicted as the word “fair” in the sect. was used in its proper sense as a mart or gathering for the selling of goods & would not include gatherings where amusements only were provided.—COLLINS v. COOPER (1893), 68 L. T. 450; 9 T. L. R. 250; 37 Sol. Jo. 387; 17 Cox, C. C. 647; 5 R. 256; *sub nom.* COOPER v. COLLINS, 57 J. P. 248, D. C.

*Annotations* :—As to (1) **Dbtd.** Walker v. Murphy, [1915] 1 Ch. 71. As to (2) **Apprvd.** Walker v. Murphy, [1915] 1 Ch. 71.

12. **Amusements & shows—Whether fairs—Within local Act—Swings, roundabouts, etc.**—COLLINS v. COOPER, No. 11, *ante*.

13. —.— —.— **Horseraces.**—A local Act of 1774 authorised the corpn. at the request of the stewards & wardens from time to time to grant leases of parts of the Town Moor for the purpose of improving the same, but s. 7 enacted that no lease should be granted of that part of the Town Moor called the Cowhill & such part adjoining the same as should be necessary for holding the Cowhill fairs, nor of another part of the moor called the Race ground, nor of any part of the moor where any booths, stalls & other erections had been set up during the holding of the said fairs or horse races, but the same should be reserved for fairs & horse races as theretofore. The local Act of 1870, s. 6, constituted a committee of the stewards & wardens, to be elected annually, to act for the stewards & wardens & for the freemen & widows of freemen for all purposes relating to the Town Moor, & s. 8 authorised the committee & the corpn. from time to time to enter into agreements for the appropriation of parts of the Town Moor for not exceeding ten days at a time for agricultural shows or other public purposes.

### PART I. SECT. 1.

11. **Royal prerogative.**—The right to set up a market or fair is a preroga-

tive right, which can only be granted by the Crown, after a preliminary inquiry under a writ of *ad quod damnum*.—DOWNSHIRE (MARQUIS) v. O'BRIEN

(1887), 19 L. R. Ir. 380.—IR.

111. —.—]—PIETERMARITZBURG MUNICIPALITY v. LISTER (1889), 10 N. L. R. 36.—S. AF.

unopposed, the magistrates quashed the order appealed against. Upon a rule for a *mandamus* to the justices to enter continuances & hear & determine the appeal:—*Held*: (1) although, on the dissolution of the highway district, the highway board ceased to be the highway authority for all purposes connected with the control & management of the highways, they nevertheless continued to exist as a corporate body for other purposes, viz., preparing & stating their accounts, getting in debts & other moneys due, distributing the funds in hand to the proper recipients, & generally winding up their affairs, & they were therefore proper resps. in the appeal, & entitled to be heard accordingly; (2) there had been no hearing & determination of the appeal on its merits, but merely an erroneous decision of the justices upon a preliminary objection, & therefore the rule for a *mandamus* must be made absolute.—*R. v. ESSEX JJ.* (1883), 11 Q. B. D. 704; 49 L. T. 394; 32 W. R. 220; *sub nom. Re BILLERICAY HIGHWAY BOARD, R. v. ESSEX JJ.*, 52 L. J. M. C. 124, C.A.

**1524. Refusal to enter judgment—On agreement of parties.]**—The London County Council, objecting to the totals of the assessments of certain parishes within their jurisdiction as too low, appealed to quarter sessions of the County of London. A compromise was, however, effected, & the magistrates were asked to enter judgment in accordance with the agreement, & to alter the totals in the valuation list to those agreed upon. This they refused to do in the absence of detailed accounts, showing how the new totals were arrived at:—*Held*: the magistrates, in regarding the incongruity between the totals & the details, which would result from the alterations agreed upon, acted upon a consideration apart from the facts which they ought not to have taken into account & had therefore not heard & determined according to law.—*R. v. EDLIN, ETC. JJ.* (1891), 65 L. T. 83; 55 J. P. 790; 7 T. L. R. 483, D. C.

(c) *Dismissal on Formal Grounds.*

**1525. Objection that appeal out of time.]**—An appeal to the next sessions after an inclosure made by virtue of an inquisition taken on a writ of *ad quod damnum* is too late, if those sessions be not the next after the inquisition taken & entered & recorded at the sessions; therefore where the sessions dismissed such appeal as being out of time this ct. refused a *mandamus* to them to enter continuances, etc.—*R. v. BUCKS JJ.* (1813), 2 M. & S. 230; 105 E. R. 368.

**1526. —.]**—An order of removal, with grounds, was served on applts. on Nov. 21; on Dec. 9, they applied for a copy of the depositions & received it on Dec. 12: on Dec. 24 resps. received a notice that applts. would commence & prosecute the appeal at quarter sessions next after the expiration of fourteen days at least from the service of notice. By the practice of sessions ten days' notice of appeal was required. At the Epiphany sessions, on Jan. 5, no appeal was entered. The pauper was removed on Feb. 17. On Mar. 16, resps. received grounds of appeal: & at sessions on Apr. 5, applts. entered the appeal; but, on an objection that it was too late, sessions refused to hear it. On *mandamus* to the justices to hear the appeal:—*Held*: they were right, inasmuch as applts., if not bound to try at sessions in Jan., ought to have entered & respited at those sessions.—*R. v. WEST RIDING JJ.* (1858), E. B. & E. 713; 31 L. T. O. S. 232; 6 W. R. 681; 120 E. R. 677; *sub nom. R. v. WEST RIDING OF YORKSHIRE JJ.*,

*BROMSGROVE v. HALIFAX*, 27 L. J. M. C. 269; 23 J. P. 148; 5 Jur. N. S. 17.

*Annotations*:—*Consd.* *Liverpool Gas Co. v. Everton* (1871), L. R. 6 C. P. 414. *Refd.* *R. v. Skircoat* (1859), 28 L. J. M. C. 224; *R. v. Sussex JJ.* (1865), 4 B. & S. 966; *R. v. Surrey JJ.* (1880), 50 L. J. M. C. 10; *Imperial & Grand Hotels Co. v. Christchurch Grdns.*, [1905] 1 K. B. 89; *R. v. Norfolk JJ., Ex p. Wayland Union* (1908), 78 L. J. K. B. 236.

**1527. —.]**—On an appeal to quarter sessions against an order of removal it is the duty of the ct. of quarter sessions to consider the question whether sessions at which the appeal has been entered are the next practicable sessions after the date of the order, & they are not necessarily precluded from hearing an appeal on the ground that there has been some delay on the part of applts. in applying for a copy of the depositions & giving notice of appeal which delay had prevented the appeal from being heard at a preceding session. A *mandamus* to enter continuances & hear an appeal will not be granted if it clearly appears that the sessions preceding those at which the appeal is entered were the next practicable sessions.—*R. v. DERBYSHIRE JJ.* (1871), 25 L. T. 161; 35 J. P. 663; 19 W. R. 876.

*Annotation*:—*Refd.* *R. v. Norfolk JJ., Ex p. Wayland Union* (1908), 78 L. J. K. B. 236.

**1528. —.]**—(1) The question whether Licensing Act, 1872 (c. 94), s. 52 (3), has been complied with is a question of fact to be determined by quarter sessions.

The ct. of quarter sessions having held that a delay of four days unaccounted for was sufficient to show that the statute had not been complied with, the Q. B. Div. refused to interfere by *mandamus*.

(2) The word “immediately” means the same thing as “forthwith” & implies prompt action & as speedy as the circumstances reasonably admit of.—*R. v. BERKSHIRE JJ.* (1879), 4 Q. B. D. 469; 48 L. J. M. C. 137; 27 W. R. 798; *sub nom. Ex p. TUCK*, 43 J. P. 607, D. C.

**1529. Objection to sufficiency of notice.]**—*R. v. OXFORDSHIRE JJ.*, No. 1040, *ante*.

**1530. —.]**—*R. v. MIDDLESEX JJ.* (1837), 1 J. P. 370.

—.]—A notice of appeal against an order of removal was in the following terms: “take notice, that we being a majority of & acting for & on behalf of the churchwardens & overseers of,” etc., “& that the grounds of our appeal,” etc., & was signed by one person, “churchwarden of,” etc., & by four persons, “overseers of,” etc. It appeared that there were two churchwardens & four overseers of applt. parish, & no more. Quarter sessions having decided that the notice was insufficient, refused to hear the appeal:—*Held*: the notice was good, as sufficiently showing that it was an appeal by & on behalf of the whole body of parish officers; & the decision of quarter sessions on the point was a decision on a preliminary objection, & therefore, the ct. would grant a *mandamus*, commanding them to enter continuances & hear the appeal.—*R. v. SURREY JJ.* (1846), 3 Dow. & L. 573; 2 New Sess. Cas. 245; 1 Saund. & C. 12; *sub nom. R. v. SURREY JJ., ST. ANNE'S, WESTMINSTER (CHURCHWARDENS & OVERSEERS) v. ST. MARY MAGDALEN, BERMONDSEY (CHURCHWARDENS & OVERSEERS)*, 1 New Mag. Cas. 491; 15 L. J. M. C. 46; 6 L. T. O. S. 377; 10 Jur. 410; 10 J. P. Jo. 119.

**1532. —.]**—In an appeal from a conviction by two justices of the Cinque Ports under Licensing Act, 1872 (c. 94), s. 12, applt. served a notice of appeal on the clerk to the justices, out of ct., addressed generally to the justices for the liberties



*Sect. 3.—Fairs. Part II. Sects. 1 & 2: Sub-sects. 1 & 2. Sect. 3: Sub-sect. 1.]*

Prior to 1882 horse races with attendant roundabouts & shows had for many years been held on the race ground on the Town Moor, but in that year they were & ever since had been held elsewhere. From 1882 down to 1912 a temperance festival with attendant roundabouts & shows was annually held on the old race ground on the moor with the joint consent of the committee & of the corp'n., & had grown into a very large gathering of many thousands of people. In 1912 the heavy traction engines used by defts. to bring their roundabouts & shows to the festival cut up the surface of the moor & seriously damaged the herbage; consequently, in 1913 the committee, while consenting to the festival being held as usual on the moor, declined to join with the corp'n. in granting a licence to defts. to bring their roundabouts & shows on the moor for the festival. The

corp'n. nevertheless granted defts. a licence for that purpose, & damage ensued to the herbage. Most of the holders of stint tickets for the years 1912 & 1913 were not freemen, but persons who had purchased tickets from freemen. In an action by the committee against defts. for an injunction to restrain them from bringing their roundabouts & shows on to the moor, & for damages, the corp'n. not being parties to the action:—*Held*: neither the horse races nor the temperance festival with the attendant roundabouts & shows was a fair within s. 7 of the Act of 1774, & the corp'n. had no power under either of the Acts to grant the licence to defts. without the consent of pl'ts.—*WALKER v. MURPHY*, [1915] 1 Ch. 71; 83 L. J. Ch. 917; 112 L. T. 189; 79 J. P. 137; 59 Sol. Jo. 88; 13 L. G. R. 109, C. A.

14. — — — Temperance festival with roundabouts & shows.]—*WALKER v. MURPHY*, No. 13, *ante*.

## Part II.—Creation and Proof of Markets and Fairs.

### SECT. 1.—IN GENERAL.

15. Creation by royal ordinance—*Apart from grant.*—*PARLIAMENT (BURGESSES OF) CASE* (1614), Hob. 14; 80 E. R. 165.

*Annotation*:—*Mentd.* *Ashby v. White* (1703), 2 Ld. Raym. 938.

### SECT. 2.—CREATION BY CROWN GRANT.

#### SUB-SECT. 1.—IN GENERAL.

*See, generally*, CONSTITUTIONAL LAW, Vol. XI., pp. 557 *et seq.*

16. Grant by letters patent — Grant by Crown as Duke of Lancaster—*Fair in possessions of Duchy—Whether sealed with Great Seal or Duchy Seal.*—

(1) The grant of a fair, newly created within the possession of the Duchy of Lancaster, by letters patent need not be under the Duchy Seal.

There is a distinction between possession & prerogatives. Possessions ought to pass under the Duchy Seal but Royal franchises, such as a fair, out of the County Palatine & within the Duchy ought to pass by the Great Seal.

(2) A fair is a royal franchise derived out of the Crown.—*ASTILL v. CLARKE* (1697), 2 Lut. 1233, 1 Ld. Raym. 341; 125 E. R. 684.

17. Grant by charter.]—Where, by a royal charter two markets, two fairs, a court-house, & a booth-hall, for the sale of merchandises, together with the tolls & profits of the market are granted to a corp'n. to be held *ad usum et proficuum burgi et burgentium*, this cannot be considered as a grant for a charitable purpose, but must be applied to the public use of the corp'n.; but to what use it must be applied the members of the corp'n. are the judges uncontrolled by this ct.—*A.-G. v. WARWICK CORPN.* (1737), West temp. Hard. 55; 25 E. R. 817.

18. — — — “With the assent” of Parliament—*Effect.*—A charter of 1327 made by the King with the assent of the prelates, earls, barons & all the commons of our realm assembled in our

present Parliament, granted to the citizens of the city of London certain privileges, & among them “that no market within seven miles round about the city shall be granted by us or our heirs to any one.” By letters patent in 1682, reciting an inquisition founded on a writ of *ad quod damnum*, the King granted to resps.’ predecessor in title the right of holding markets on Thursday & Saturday in every week in Spittal Square, within the seven miles.

User of the market was proved since 1723. Applt. co. set up a depot or row of stalls at their terminus within 300 yards of Spittal Square & let them to dealers for the purpose of selling fruit & vegetables brought up by their railway, & justified their depot on the ground that resps.’ market was very crowded, that it was difficult for dealers to get stalls there, & that if any persons other than resps.’ tenants wished to sell in resps.’ market there would be no room for them; & that resps.’ market infringed the provisions of certain Paving Acts:—*Held*: (1) the charter of 1327 had, at the most, the force of a private or personal statute, & concerned the corp'n. of London only & not the general public; (2) the consent of the corp'n. was to be presumed to the letters patent of 1682; (3) the letters patent of 1682 conferred a valid right of market; (4) the co.’s depot was in fact a rival market, & a disturbance of resps.’ right of market, & entitled resps.’ to an injunction to restrain the co. from using their depot in the above manner or so as to interfere with resps.’ rights, & even if the co. had proved that there was not sufficient accommodation in resps.’ market, or that the Paving Acts had been infringed, those circumstances would have afforded no answer to the action for an injunction.

This ancient & immemorial corp'n. had certain market rights within the limits of the city, which market right according to the general presumption of law would be entitled to a certain amount of protection, *prima facie* extending to a distance of nearly 7 miles from the places in which they might

#### PART II. SECT. 1.

a. Power to establish fairs—*Includes power to establish markets.*—A power to establish fairs necessarily includes a power to establish markets.—*JAMIESON*

*v. FREDERICTON CITY* (1861), 2 All. 128. —CAN.

#### PART II. SECT. 2, SUB-SECT. 1.

b. Grant of land for public market

*place—Rights of grantee.*—The grant of a piece of land for a public market place authorises the grantee to establish a market there.—*EDWARDS v. BURGOYNE* (1881), 21 N. B. R. 228.—CAN.

be exercised (LORD SELBORNE, C.).—**GREAT EASTERN RY. CO. v. GOLDSMID** (1884), 9 App. Cas. 927; 54 L. J. Ch. 162; 52 L. T. 270; 49 J. P. 260; 33 W. R. 81, H. L.; *affg.* S. C. *sub nom.* **GOLDSMID v. GREAT EASTERN RY. CO.**, 25 Ch. D. 511, C. A.

*Annotations*:—*As to* (2) **Distd. Haynes v. Ford**, [1911] 1 Ch. 375. **Refd.** **Toronto Corp. v. Russell**, [1908] A. C. 493; **Dewhurst v. Salford Gdns.**, [1925] Ch. 655. *As to* (3) **Refd.** **A.-G. v. Horner** (No. 2), [1913] 2 Ch. 140. *As to* (4) **Consd.** **Wilcox v. Steel**, [1904] 1 Ch. 212; **Gingell & Foskett v. Stepney B. C.**, [1908] 1 K. B. 115. **Refd.** **A.-G. v. Horner** (1884), 14 Q. B. D. 245; **Morpeth Corp. v. Northumberland Farmers' Auction Mart Co.**, [1921] 2 Ch. 154. *Generally*, **Refd.** **Abergavenny Improvement Comrs. v. Straker** (1889), 42 Ch. D. 83; **Birmingham Corp. v. Foster** (1894), 70 L. T. 371; **Stepney B. C. v. Gingell & Foskett** (1909), 100 L. T. 629; **Hammerton v. Dysart**, [1916] 1 A. C. 57. **Mentd.** **Hampstead Corp. v. Mid. Ry.**, [1904] 2 K. B. 802; **Selby v. Whitbread**, [1917] 1 K. B. 736.

19. Grant over land not belonging to grantee—Rights of grantee.]—**A.-G. v. HORNER**, No. 45, *post*.

*See, also*, No. 43, *post*.

Form of grant—Omission of “ad damnum” clause.]—*See* No. 20, *post*.

#### SUB-SECT. 2.—GRANT PREJUDICIAL TO EXISTING MARKET.

20. General rule—Grant void.]—[In a grant of a fair or market] if it be *ad damnum* the patent is void; for in all such patents the condition is implied viz. that it be not *ad damnum* of the neighbouring merchants (*per* CUR.).—**R. v. BUTLER** (1685), 3 Lev. 220; 83 E. R. 659, H. L.; *affg.* S. C. *sub nom.* **BUTLER'S CASE** (1680), 2 Vent. 344, L. C.

*Annotations*:—**Refd.** **Eastern Archipelago Co. v. R.** (1853), 2 E. & B. 856; **G. E. Ry. v. Goldsmid** (1884), 9 App. Cas. 927. **Mentd.** **R. v. Bowdley** (1712), 1 P. Wms. 207; **R. v. Aires** (1717), 10 Mod. Rep. 354.

21. ———.]—**Re ISLINGTON MARKET BILL**, No. 352, *post*.

22. Whether supported on ground of public convenience.]—**Re ISLINGTON MARKET BILL**, No. 352, *post*.

23. Whether grant prejudicial—Neighbouring market held on different days.]—**ANON.** (1409), Y. B. 11 Hen. 4, fo. 5, pl. 13.

*Annotations*:—**Folld.** **Elwes v. Payne** (1879), 27 W. R. 704. **Refd.** **R. v. Butler** (1685), 3 Lev. 220; **R. v. Aires** (1716), 10 Mod. Rep. 354. **Mentd.** **Herd v. Burstowe** (1590), Cro. Eliz. 177; **Strata Mercellias Case** (1591), 9 Co. Rep. 24 a.

*See, also*, No. 28, *post*.

24. ——— New market within four miles of old.]—**R. v. EYRE** (1717), 1 Stra. 43; 93 E. R. 374; *sub nom.* **R. v. AIRES**, 10 Mod. Rep. 354.

*Annotation*:—**Refd.** **Eastern Archipelago Co. v. R.** (1853), 2 E. & B. 856.

25. ——— Presumption of law—New market within common law distance of old.]—**Re ISLINGTON MARKET BILL**, No. 352, *post*.

26. ——— How tested—On scire facias.]—**ANON.** (1409), Y. B. 11 Hen. 4, fo. 5, pl. 13.

*Annotations*:—**Folld.** **R. v. Butler** (1685), 3 Lev. 220. **Refd.** **R. v. Aires** (1716), 10 Mod. Rep. 354; **Elwes v. Payne** (1879), 27 W. R. 704. **Mentd.** **Herd v. Burstowe** (1590), Cro. Eliz. 177; **Strata Mercellias Case** (1591), 9 Co. Rep. 24 a.

*See, generally*, CROWN PRACTICE, Vol. XVI., pp. 245 *et seq.*

27. Effect of omission of “ad damnum” clause—Clause implied.]—**R. v. BUTLER**, No. 20, *ante*.

28. Whether ground for recalling former grant—Second market held on different days.]—The last patentee shall not have a *sci. fa.* to repeal a former patent, though he seem to have right.

If the last patent be of fairs & markets holden at different times from those by the first patent, it is no cause of repeal.—**BASSET v. TORRINGTON CORPN.** (1568), 3 Dyer, 276; 73 E. R. 617.

*Annotation*:—**Refd.** **Gill v. Prior** (1680), T. Jo. 118.

*See, also*, No. 26, *ante*.

29. Effect of long acquiescence.]—If the grantee of a market under letters patent from the Crown, suffer another to erect a market in his neighbourhood & use it for the space of twenty-three years without interruption, he is by such user barred of his action on the case for disturbance of his market. The Crown is not. *Qu.*: whether if no specific toll be granted in the letters patent, the grantee be entitled to any toll, & whether in such case he can support any action for an injury to his market.—**HOLCROFT v. HEEL** (1799), 1 Bos. & P. 400; 126 E. R. 976.

*Annotations*:—**Expld.** **Campbell v. Wilson** (1803), 3 East, 294. **Consd.** **Stamford Corp. v. Pawlett** (1830), 1 Cr. & J. 57. **Refd.** **Dawson v. Norfolk** (1815), 1 Price, 246; **Benjamin v. Andrews** (1858), 5 C. B. N. S. 299; **Newton v. Cubitt** (1862), 12 C. B. N. S. 32; **London Corp. v. Low** (1879), 49 L. J. Q. B. 144.

30. ——— Consent of new grant presumed.]—**GREAT EASTERN RY. CO. v. GOLDSMID**, No. 18, *ante*.

*See, generally*, EQUITY, Vol. XX., p. 523; ESTOPPEL, Vol. XXI., pp. 333 *et seq.*

#### SECT. 3.—CREATION BY OR UNDER STATUTE.

##### SUB-SECT. 1.—BY LOCAL ACT.

31. What amounts to—Charter granted by King & Parliament.]—**Re ISLINGTON MARKET BILL**, No. 352, *post*.

32. ———.]—**GREAT EASTERN RY. CO. v. GOLDSMID**, No. 18, *ante*.

33. Effect of statute upon existing franchise.]—**MANCHESTER CORPN. v. PEVERLEY**, No. 425, *post*.

34. ———.]—**MANCHESTER CORPN. v. LYONS**, No. 342, *post*.

35. ———.]—**BIRMINGHAM CORPN. v. FOSTER**, No. 343, *post*.

36. Acquisition of site—What may be acquired.]—A market co. obtained a special Act, the preamble of which recited that a convenient site might be obtained, between certain streets on the east & certain other streets on the west, & which enacted that the Markets & Fairs Clauses Act, 1847 (c. 14), was incorporated therewith. Sect. 24 authorised the erection of a market house on land described in the deposited plans, & by sect. 25 the co. were enabled to alter & widen streets in the way pointed out on the deposited plans, & by sect. 30, to buy additional lands, not exceeding two acres. A. was the owner of land on the west side of one of the streets on the western boundary of the area spoken of in the preamble, & his land was described in the deposited plans, but it did not thereby appear that more was intended to be taken than enough to widen one of the streets named in sect. 25. The co. proceeded to take the whole land of A. compulsorily, & to build upon it a covered building, in addition to the market house authorised by sect. 24, whereupon A. filed his bill for an injunction, which was granted, the judge deciding that the co. could only erect one market house, & not two, & that on the east side; & that although the preamble could not control the enactment it might be resorted to to remove obscurity. The co. appealed:—**Held**: as the land of pltf. was described in the plan, & as therefore it might be wanted, the co. were



**Sect. 3.—Creation by or under statute: Sub-sects. 1 & 2. Sects. 4, 5 & 6.]**

authorised to take it, & as by the general Act "the singular may mean the plural," the co. were not restricted by the word "market house," & the enactments of the special Act did not require a reference to the preamble to explain them, & the injunction must be dissolved, the co. being the proper judges of what lands were necessary for the works. — *RICHARDS v. SCARBOROUGH PUBLIC MARKET CO.* (1853), 23 L. J. Ch. 110.

**SUB-SECT. 2.—UNDER PUBLIC HEALTH ACTS.**

**Power of local authority to establish—Urban authority.]—See, generally, Public Health Act, 1875 (c. 55), ss. 166–168.**

**—Rural district council.]—See Public Health Act, 1908 (c. 6).**

**37. — What amounts to "establishing."]**

(1) Where a corpn. change the site of a market held in the borough, & they do so not by virtue of their right at common law, but under the provisions of the Local Government Act, 1858 (c. 98), & as a local board, rather than in their corporate capacity, they must act in accordance with the provisions of the Act, & their powers will be limited accordingly.

(2) *Semble*: a transfer of the old market, hitherto held in the public street, to a new building at the end of the same street, & some distance from the old market, was the establishing of a market within Local Government Act, 1858 (c. 98), s. 50.

(3) The ct. refused to restrain the corpn. by injunction from opening the new market, it not appearing that they proposed preventing the continuance of the old, until plffs. had established their rights at law.—*ELLIS v. BRIDGNORTH CORPN.* (1861), 2 John. & H. 67; 4 L. T. 112; 25 J. P. 324; 9 W. R. 331; 70 E. R. 973; *subsequent proceedings* (1863), 15 C. B. N. S. 52.

*Annotations*:—As to (1) *Apprvd. Manchester Corpn. v. Peverley* (1876), 22 Ch. D. 294, n. *Generally, Reifd. Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co.*, [1921] 2 Ch. 154.

**38. — Meaning of "prescribed limits."]**

Applt., a cattle salesman, occupied premises, which he used for the sale of cattle, under leases granted by the corpn. of a borough, containing covenants for quiet enjoyment. Afterwards the corpn., as the urban authority, established a cattle market in the borough, & published a list of tolls. Applt. was convicted for selling cattle, for which no toll had been paid, in his sale yard, within the borough, but not within the limits of the market:—*Held*: (1) the corpn. had not derogated from their grant by establishing a market; (2) applt. had not by virtue of the leases acquired any right to sell cattle within Public Health Act, 1875 (c. 55), s. 166, which the urban authority could not interfere with by establishing a market, & was therefore liable to a penalty under Markets & Fairs Clauses Act, 1847 (c. 14), s. 13; (3) by the use of the words "within their district" in Public Health Act, 1875 (c. 55), s. 166, the district of the urban authority was constituted "the prescribed limits" within Markets & Fairs Clauses Act, 1847 (c. 14), s. 13.—*SPURLING v. BANTOFT*, [1891] 2 Q. B. 384; 60 L. J. Q. B. 745;

**39. Restriction on interfering with rights, powers & privileges—What rights, etc., protected—Erection of private "market" for auction sales—With approval of local authority.]—A market was**

duly opened in 1871 by the local board, under Local Government Act, 1858 (c. 98), & Markets & Fairs Clauses Act, 1847 (c. 14). Resp. was charged by applt. with infringing sect. 13 of the latter Act by selling twelve sheep in a place other than the market not being his own dwelling-place or shop. The justices refused to convict under the following facts: Resp. had erected in 1865, under the approval of the local board, a large building called the Agricultural Hall, capable of holding one hundred head of cattle, with a large open yard with fixed pens capable of holding fourteen hundred sheep. The hall & yard were the private property of resp., & in his own occupation. Resp.'s dwelling-house adjoined & communicated with the yard. Resp. was in the habit of advertising & holding sales by public auction every Monday, which was the market day, the average sale each Monday being about one hundred cattle & one thousand sheep. The cattle & sheep so sold were the property of farmers & others, resp. charging the vendors a commission & guaranteeing payment of the amount of the sales. The offence proved was the sale of twelve sheep in the hall on a Monday, the hall being within the district of the board, & tolls being taken for the sale of sheep in the market:—*Held*: (1) the justices ought to have convicted, for the sale was not within resp.'s own shop within Markets & Fairs Clauses Act, 1847 (c. 14), s. 13; (2) resp. by the establishment of his business under the approval of the local board, had not acquired any right, power, or privilege within Local Government Act, 1858 (c. 98), s. 50.—*FEARON v. MITCHELL* (1872), L. R. 7 Q. B. 690; 41 L. J. M. C. 170; 27 L. T. 33; 36 J. P. 804.

*Annotations*:—As to (1) *Consd. Elwes v. Payne* (1879), 12 Ch. D. 468; *Haynes v. Ford*, [1911] 2 Ch. 237; *Hallisham Cattle Market Co. v. Tolman*, [1915] 2 Ch. 1. *Reifd. Manchester Corpn. v. Lyons* (1882), 47 L. T. 677; *Wright v. Wallasey L. B.* (1887), 18 Q. B. D. 783; *Clayton v. Le Roy*, [1911] 2 K. B. 1031. As to (2) *Consd. London Corpn. v. Low* (1879), 49 L. J. Q. B. 144; *Woolwich Corpn. v. Gibson* (1905), 92 L. T. 538. *Reifd. Spurling v. Bantoft*, [1891] 2 Q. B. 384.

**40. — Whether lease of premises to cattle salesman included—With covenant for quiet enjoyment.]—SPURLING v. BANTOFT, No. 38, ante.**

**41. — Whether right as member of public to sell in market.]—By letters patent in 1619 James I. granted a right to a Friday market for the town of W. By an Act of 48 Geo. 3, after reciting the letters patent, it was enacted that it should be lawful for the person entitled to keep the market to take tollage of markets holden on Wednesday & Saturday. On June 13, 1887, the market rights were conveyed & assigned to the W. Local Board. In 1888 bye-laws were made regulating the use of the market place. Bye-law 15 provided that a market for the sale of goods, meat, fish, poultry, provisions, fruit, vegetables, plants, flowers, hardware, furniture, apparel, & all other goods, merchandise & marketable commodities should be held on every day except Sunday, Christmas Day, & Good Friday.**

By a charter in 1269, a Tuesday market in P. was granted, which became vested in Queen's College, Oxford, who conveyed to pltf. Under Local Government Act, 1899 (c. 14), s. 19, a scheme was made for W. & an Order in Council was made extending the boundaries of W. so as to include P. No provision was made for charging tolls, but power to do so was given by the Woolwich Borough Council Act, 1903 (c. clxxvii), s. 4. Plffs. asked for an injunction to restrain defts. from hawking, selling, or offering or exposing for sale within the borough of W., except in their own dwelling-houses or shops, any articles or com-

modities usually sold in public markets except in a market place of the borough of W., & after payment of the tolls payable to plths. Some of defts. claimed a right to sell in the market without paying toll, & proved that they had sold without paying toll for a number of years:—*Held*: (1) as the right to take tolls was not given by the charter, but by the Act of 1903, no right was acquired by non-payment of tolls for a considerable period; (2) the words “rights, powers, or privileges” in Public Health Act, 1875 (c. 55), s. 166, meant rights, powers, or privileges acquired adversely to the rest of the world & peculiar to the individual, & did not include the right of a person simply as a member of the public to sell in the market without payment of tolls.—*WOOLWICH CORPN. v. GIBSON* (1905), 92 L. T. 538; 69 J. P. 361; 21 T. L. R. 421; 3 L. G. R. 961.

42. — What amounts to interference — Former market not discontinued.] — *ELLIS v. BRIDGNORTH CORPN.*, No. 37, *ante*.

#### SECT. 4.—MARKETS OR FAIRS BY PRESCRIPTION.

43. Over what land claimable—Whether land of another.]—*R. v. —* (1433), Y. B. 11 Hen. 6, fo. 23, pl. 20.

*Annotation*:—*Reid*. Swayne's Case (1608), 8 Co. Rep. 63 a.

*Compare* No. 45, *post*.

44. By whom claimable.]—An annual officer of an hundred, to which the privilege of holding a fair has been granted, may prescribe to hold it, although not a corpn.—*TAYLOR v. RONDEAU* (1757), 2 Keny. 50; 96 E. R. 1103.

45. Whether lost grant presumed — Grant proved for less than claim.]—By letters patent in 1682, the King granted to the predecessor in title of those under whom deft. claimed as lessee the right to hold two markets, one on Thursday & the other on Saturday, in every week, “in or next to Spital Square.” The market place & four inner streets connected therewith were made by the grantee on the square piece of land which had formerly been Spital Square, & which land he had acquired when the charter was granted to him, but he never acquired the adjoining land which surrounded such square piece, & on which, subsequently to the charter, were made certain outer streets, into which the four inner streets ran. By letters patent in 1688, made void by a local Act, a third market was given, viz., on Monday in every week, & a market on Wednesday substituted for that on Thursday.

In proceedings taken at the instance of the local authority to restrain deft. from licencing the sale of goods in either the outer or the inner streets adjoining the market, the local authority relied on certain Paving Acts of George III., which empowered such authority to remove the obstruction caused by selling articles in those specific streets, & deft. proved a usage from the time of living memory to sell vegetables & fruit in any of those streets, & to pay toll to the market owner for so doing, when by reason of the market being so crowded it was impossible to get nearer to the inside market, & he also proved such usage to hold the market on other days of the week besides on Thursday & Saturday:—*Held*: (1) the market was a market without metes & bounds, & might extend, therefore, from time to time, as the crowded state of the market might require, over any of these surrounding streets, all of which were to be presumed to have been dedicated to the

public subject to the exercise of the market franchise, notwithstanding the Paving Acts, as such Acts were not to be construed as interfering with the market rights; (2) the right to hold the market was confined to the two days mentioned in the charter of Charles II., & under the particular circumstances of the case a lost grant for the other days of the week was not to be inferred.

The grant [of franchise of a market] does not assume to grant any land, or any interest in land. It grants the franchise of holding a market & authorises a market to be held. . . . I am of opinion both on principle & authority that the grant of the franchise of a market has nothing to do with the ownership of the land by the person to whom it is granted (*BRETT, M.R.*).—*A.-G. v. HORNER* (1884), 14 Q. B. D. 245; 54 L. J. Q. B. 227; 49 J. P. 326; 33 W. R. 93; 1 T. L. R. 28, C. A.; *on appeal* (1885), 11 App. Cas. 66, H. L.

*Annotations*:—*As to* (1) *Reid*. *Williams v. Wednesbury Overseers, etc.* (1890), Ryde, Rat. App. (1886–90) 327; *Horner v. Stepney Assmt. Com.* (1908), 6 L. G. R. 651. *As to* (2) *Folld*. *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Reid*. *Newcastle v. Worksop U. C.*, [1902] 2 Ch. 145. *Generally, Reid*. *Gingell & Foskett v. Stepney B. C.*, [1908] 1 K. B. 115. *Mentd*. *Simpson v. Godmanchester Corpn.* (1895), 64 L. J. Ch. 837; *Lonsdale v. Lowther*, [1900] 2 Ch. 687; *A.-G. v. Simpson*, [1901] 2 Ch. 671; *A.-G. v. Exeter Corpn.*, [1911] 1 K. B. 1092; *Selby v. Whitbread*, [1917] 1 K. B. 736; *Central Control Board (Liquor Traffic) v. Cannon Brewery Co.*, [1919] A. C. 744; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508; *Re Ellis & Ruislip-Northwood U. C.*, [1920] 1 K. B. 343; *Newcastle Breweries v. R.*, [1920] 1 K. B. 854.

46. —.]—*A.-G. v. HORNER* (No. 2), No. 103, *post*.

—.]—*See, also*, No. 7, *ante*; No. 339, *post*.

#### SECT. 5.—EVIDENCE OF MARKET.

47. What evidence admissible—Accounts signed by steward's clerk—Found among family muniments.]—Accounts of the receipts of tolls of a market, signed by a person since deceased, styling himself managing clerk of a deceased steward of claimant's ancestor, are not evidence of title, although such accounts are found among the family muniments.—*DE RUTZEN v. FARR* (1835), 4 Ad. & El. 53; 5 Nev. & M. K. B. 617; 1 Har. & W. 735; 5 L. J. K. B. 38; 111 E. R. 707.

*Annotations*:—*Mentd*. *Wright v. Doe d. Tatham* (1837), 7 Ad. & El. 313; *Doe d. Graham v. Hawkins* (1841), 2 Q. B. 211; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *Doe d. Ashburnham v. Michael* (1851), 17 Q. B. 276.

—.]—*See, generally*, EVIDENCE, Vol. XXII., pp. 53 *et seq.*

#### SECT. 6.—TESTING THE RIGHT TO MARKET OR FAIR.

48. Whether by quo warranto—No demand of toll.]—*R. v. —* (1682), 2 Show. 201; 89 E. R. 890.

*Annotation*:—*Reid*. *Moseley v. Chadwick* (1782), 3 Doug. K. B. 117.

49. —.]—Information in nature of *quo warranto* will not lie for encouraging the exercise of a franchise. *Qu.*: whether it will lie for holding a fair or market.—*R. v. MARSDEN* (1765), 3 Burr. 1812; 1 Wm. Bl. 579; 97 E. R. 1113.

*Annotations*:—*Reid*. *Mosley v. Chadwick* (1782), 7 B. & C. 47, n.; *G. E. Ry. v. Goldsmid* (1884), 9 App. Cas. 927. *Mentd*. *R. v. Wallis* (1793), 5 Term Rep. 375; *R. v. M'Kay* (1826), 5 B. & C. 640; *Hammerton v. Dysart*, [1916] 1 A. C. 57; *R. v. Speyer, R. v. Cassel*, [1916] 1 K. B. 595.

50. Effect of non-appearance to writ—Whether market forfeited.]—*R. v. —* (1475), Y. B. 15 Edw. 4, fo. 6, pl. 12.

*Annotation*:—*Mentd*. *Quick's Case* (1611), 9 Co. Rep. 129 a.



## Part III.—Rights and Liabilities in connection with Markets and Fairs.

### SECT. 1.—OF OWNER.

#### SUB-SECT. 1.—IN GENERAL.

51. Right to hold market—A right of property.]—*BRECON CORPN. v. EDWARDS* (1862), 1 H. & C. 51; 31 L. J. Ex. 368; 6 L. T. 293; 26 J. P. 614; 8 Jur. N. S. 461; 158 E. R. 797.

*Annotation*:—*Distd. Wilcox v. Steel*, [1904] 1 Ch. 212.

—Area.]—*See* Part IV., Sect. 2, sub-sect. 1, *post*.

Right of removal.]—*See* Part IV., Sect. 3, sub-sect. 1, *post*.

Right to change market day.]—*See* No. 45, *ante*; Nos. 176, 342, *post*.

Right to restrain sales in shops.]—*See* Part VII., Sect. 1, sub-sect. 3, E. & Nos. 103, 339, *post*.

Right to tolls.]—*See* Part VI.

Remedies for disturbance.]—*See* Part VII., Sect. 3, *post*.

Cattle market—Construction of slaughter houses—Control by local authority.]—*See* PUBLIC HEALTH.

52. Duty to persons using—To keep in safe condition.]—Defts. were the owners of a cattle market, & in the market place they had erected a statue, round which they had placed a railing as a fence. Pltfs. attended the market with their cattle, & occupied a particular site, for which they paid a toll. A cow belonging to them, in attempting to jump the railing, injured herself, & subsequently died from the injuries. The jury found that the railing was dangerous:—*Held*: defts. having received toll from pltfs., & invited them to come to the market with their cattle, a duty was imposed on them to keep the market in a safe condition, & therefore an action would lie against defts. for the loss sustained by pltfs.—*LAX v. DARLINGTON CORPN.* (1879), 5 Ex. D. 28; 49 L. J. Q. B. 105; 41 L. T. 489; 44 J. P. 312; 28 W. R. 221, C. A.

*Annotations*:—*Consd. Yarmouth v. France* (1887), 19 Q. B. D. 647. *Expld. Norman v. G. W. Ry.*, [1914] 2 K. B. 153. *Refd. Thomas v. Quartermaine* (1887), 18 Q. B. D. 685. *Mentd. British Petroleum Co. v. A.-G. for Ceylon*, [1926] A. C. 147.

Liability to invitees, *see, generally*, NEGLIGENCE.

Liability for illegal holding, *see* Part IV., Sect. 4, *post*.

#### SUB-SECT. 2.—PROVISION OF ADEQUATE ACCOMMODATION.

53. Reasonable accommodation to be provided.]—*MOSLEY v. WALKER*, No. 91, *post*.

54. —.]—*Re ISLINGTON MARKET BILL*, No. 352, *post*.

55. —.]—By a local Act the corpn. of Edinburgh, who were grantees of a market in Edinburgh "may cover in a suitable & convenient

manner the fruit & vegetable market place, & improve & better adapt the same for the purposes of such market, & for the accommodation of parties using the same, & of the public, etc. Provided always that the ground floor only of such market place shall be used for such fruit & vegetable market, & that all vacant portions of such market place, whether on the ground floor or above the same, & all vacant & unlet stands, stalls, or shops in or on such market place may be let or used by the corpn. for such purposes & for such rents or sales as to them shall seem proper":—*Held*: the corpn. were not entitled to exclude members of the public from the covered portion of the market during market hours & devote the building to other purposes.

When a grant of market is not confined to any particular locality, the grantee may, from time to time, change the site in order to suit his own convenience; but it is an implied condition of the exclusive privilege that he shall provide a market place, & that implied condition is satisfied so long as he gives reasonable accommodation to those members of the public who use the market either as buyers or sellers, & the extent of the accommodation which must be afforded in each case must vary with the circumstances (*LORD WATSON*).—*EDINBURGH MAGISTRATES v. BLACKIE* (1886), 11 App. Cas. 665, H. L.

56. Inadequacy of accommodation—Whether ground for forfeiture of grant.]—*GREAT EASTERN Ry. Co. v. GOLDSMID*, No. 18, *ante*.

—Whether justification for selling out of market.]—*See* Part VII., Sect. 1, sub-sect. 3, *post*.

### SECT. 2.—OF THE PUBLIC.

#### SUB-SECT. 1.—IN GENERAL.

57. Right to bring goods for sale.]—Every person has of common right a liberty of carrying his goods to a public fair for sale.—*AUSTIN v. WHITTRED* (1746), Willes, 623; 125 E. R. 1353.

*Annotation*:—*Refd. R. v. Bedford, Bedford v. St. Paul's, Covent Garden, Overseers* (1881), 45 L. T. 616.

58. Right of way to market.]—A man can claim a way to a market, church, etc. without showing any estate, for he has it of common right.—*HARRISON v. ROCK* (1626), Benl. 160; Palm. 420; 73 E. R. 1025; *sub nom.* *HARRISON v. PECK*, Lat. 110.

—By custom.]—*See* CUSTOM & USAGES, Vol. XVII., pp. 16, 17, Nos. 155-157.

59. Right of entry—For recovery of stolen goods.]—The principle is laid down by Blackstone, who says, "If, for instance, my horse is taken away, & I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but

#### PART III. SECT. 1, SUB-SECT. 1.

c. Duty to persons using—To keep in safe condition—Effect of knowledge of risk.]—Pltf. continued each week to renew her occupation of a stall in a market established by deft. municipal corpn. after she knew of its unsanitary conditions:—*Held*: her health was the result of her own conduct, & she was not entitled to recover damages from deft. corpn. for their negligence in not repairing the stall.

—*WOOD v. HAMILTON* (1913), 28 O. L. R. 214; 4 O. W. N. 805; 12 D. L. R. 451.—CAN.

d. — Safe-keeping of animals placed in pen.]—A city corpn., having lawfully established a public cattle market under the Municipal Act, & fixed the fees to be paid by persons using it, are not liable to a person who has paid the usual market fee for the safe-keeping of animals placed by him in a pen in such market.—*GILLIES v.*

*HODGSON*, 20 C. L. T. 336.—CAN.

e. Right to erect structures necessary to purpose of market—Construction of grant.]—On the facts:—*Held*: the Crown grant to defts. contained an implied authority to defts. to erect upon the land structures necessary or reasonably convenient or useful for the purpose of the market.—*CITY OF FREDERICTON v. MUNICIPALITY OF YORK* (1898), 1 N. B. Eq. Rep. 556.—CAN.

I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except to be feloniously stolen, but must have recourse to an action at law" (TINDAL, C.J.).—ANTHONY v. HANEY (1832), 8 Bing. 186; 1 Moo. & S. 300; 1 L. J. C. P. 81; 131 E. R. 372.

*Annotations*:—*Reid*. Jay's Furnishing Co. v. Brand, [1914] 2 K. B. 132. *Mentd*. Patrick v. Colerick (1838), 3 M. & W. 483.

**60. Right to fix method of sale—Sale by auction.**—A bye-law made in 1862 by the owners of an ancient public market at Tavistock provided that "no person shall sell or cause to be sold by auction, Dutch auction, or public competition any goods, articles or things whatsoever, without the consent of the superintendent, collector, inspector or surveyor of the markets or his assistant signified in writing under his hand," & imposed a penalty of forty shillings for a breach of the bye-law. Since 1895 sales by auction had become the usual method of disposing of live stock in the market:—*Held*: according to the common law affecting public markets, those who used & had a right to use the public market upon payment of the dues had the right to fix the manner in which their goods should be offered for sale & the purchaser & the price ascertained, namely, by public auction if they so desired, more especially where that was the ordinary method for effecting sales; & a bye-law, whether it altogether prevented the conduct of sales by auction, or whether, as in this particular case, it only prohibited sales by auction without the consent of the superintendent or other officer of the market, was invalid as being repugnant to the laws of that part of the United Kingdom in which Tavistock was situated, within Markets & Fairs Clauses Act, 1847 (c. 14), s. 42.—NICHOLLS v. TAVISTOCK URBAN DISTRICT COUNCIL, [1923] 2 Ch. 18; 92 L. J. Ch. 233; 128 L. T. 565; 87 J. P. 98; 67 Sol. Jo. 298; 21 L. G. R. 194.

**Right to resort to old market place—After removal to new site.**—*See* Nos. 89, 117, *post*.

**Exemption from distress damage feasant.**—*See* DISTRESS, Vol. XVIII., p. 443, Nos. 1803–1807.

#### SUB-SECT. 2.—ERECTION OF STALLS.

**61. Whether of common right.**—NORTHAMPTON CORPN. v. WARD, No. 246, *post*.

**62. —.**—Trespass lies for setting tables in a market place for the sale of goods thereon, without leave of the owner of the soil.—NORWICH CORPN. v. SWANN (1776), 2 Wm. Bl. 1116; 96 E. R. 659.

*Annotation*:—*Reid*. R. v. St. Peter of Mancroft, Norwich (1828), 6 L. J. O. S. M. C. 69.

**63. —.**—R. v. BURDETT, No. 267, *post*.

**64. — Liability for stallage.**—YARMOUTH CORPN. v. GROOM, No. 257, *post*.

**65. Claim of right by custom—Butcher.**—CHAFIN v. BETSWORTH (1684), 3 Lev. 190; 83 E. R. 644.

**66. — On payment of stallage—Victualler.**—In trespass, for breaking & entering pltf.'s close, & erecting stalls, posts, booths, & tables there, deft. justified under a custom that, at fairs holden at certain times of the year, on some part of the commons & waste of a manor, to be named by the lord of the manor, the *locus in quo* being parcel of such commons & waste, & named by the lord, every liege subject exercising the trade of a victualler might enter at the time of the fairs, & erect a booth, etc., & continue the same for a reasonable time after the fairs, for the more conveniently carrying on his calling, paying 2d.

to the lord:—*Held*: the custom was reasonable & the plea good.—TYSON v. SMITH (1838), 9 Ad. & El. 406; 3 J. P. 65; 112 E. R. 1265; *sub nom*. SMITH v. TYSON, 1 Per. & Dav. 307; 1 Will. Woll. & H. 749, Ex. Ch.

*Annotations*:—*Consd*. London Corpn. v. Cox (1867), L. R. 2 H. L. 239; Mills v. Colchester Corpn. (1867), L. R. 2 C. P. 476. *Reid*. Elwood v. Bullock (1844), 6 Q. B. 383; Lloyd v. Jones (1848), 6 C. B. 81; Race v. Ward (1855), 4 E. & B. 702; Mills v. Colchester Corpn. (1864), 17 C. B. N. S. 635; Sowerby v. Coleman (1867), L. R. 2 Exch. 96. *Mentd*. Peter v. Daniel (1848), 12 Jur. 604; Dunraven v. Llewellyn (1850), 14 Jur. 1089; Bradburn v. Foley (1878), 3 C. P. D. 129; Mercer v. Denne, [1905] 2 Ch. 538.

**67. Claim by prescription—As occupier of house in market place.**—ELLIS v. BRIDGNORTH CORPN., No. 119, *post*.

**68. Enforcement of rights—By representative action.**—R. S. C., Ord. 16, r. 9, which provides for persons suing or being sued as representing a class, is not confined to persons who have or claim some beneficial proprietary right which they are asserting or defending. To justify a person suing in a representative character, it is enough that he has a common interest with those whom he claims to represent.

Several pltfs. sued on behalf of themselves & all others the growers of fruit, flowers, vegetables, roots & herbs within Covent Garden Market Act, 1828 (c. cviii), to enforce various preferential rights to stands in the markets which they alleged to have been given to the class of growers by the Act. Deft. was the lord of the market:—*Held*: without prejudging the construction of the Act, pltfs. had an interest in common, & deft. was not entitled to have the action stayed either on the ground that pltfs. had no beneficial proprietary right, or that the joinder of pltfs. claiming separate & different rights under the Act, both personally & as representing a class, would embarrass or delay the trial.—BEDFORD (DUKE) v. ELLIS, [1901] A. C. 1; 70 L. J. Ch. 102; 83 L. T. 686; 17 T. L. R. 139, H. L.; *affg*. S. C. *sub nom*. ELLIS v. BEDFORD (DUKE), [1899] 1 Ch. 494, C. A.

*Annotations*:—*Consd*. Markt v. Knight S.S. Co., Sale & Frazar v. Knight S.S. Co., [1910] 2 K. B. 1021. *Reid*. Crofield v. Manchester Ship Canal Co. (1904), 90 L. T. 557; Janson v. Property Insee. (1913), 30 T. L. R. 49; Vacher v. London Soc. of Compositors, [1913] A. C. 107; Mercantile Marine Service Assocn. v. Toms, [1916] 2 K. B. 243; Churchill v. Whetnall, Aberconway v. Whetnall (1918), 119 L. T. 34; Esquimalt & Nanaimo Ry. v. Wilson, [1920] A. C. 358. *Mentd*. Taff, Vale Ry. v. Amalgamated Soc. of Ry. Servants, [1901] A. C. 426; West v. Sackville, [1903] 2 Ch. 378; Chapman v. Michaelson, [1909] 1 Ch. 238; Guaranty Trust Co. of New York v. Hannay, [1915] 2 K. B. 536.

**Liability for stallage.**—*See, generally*, Part VI., Sect. 2, *post*.

**Occupation of stall—Whether occupation for purpose of franchise.**—*See* ELECTIONS, Vol. XX., p. 17, No. 95.

#### SECT. 3.—DEVOLUTION AND ALIENATION OF MARKET RIGHTS.

**69. Market on land subject to customary descent—Descent of stallage & pickage—Separated from right to market & tolls.**—HEDDEY v. WELHOUSE, No. 196, *post*.

*See, now*, Law of Property Act, 1922 (c. 16), sched. XII. (1) (d), & Administration of Estates Act, 1925 (c. 23), s. 45.

**70. Lease of market or fair—Voidable by lessor's successor.**—A lease made by a bishop, by deed indented, of a fair, parcel of the possessions of the bishopric, for three lives, reserving the old rent, & confirmed by the dean & chapter, does not



**Sect. 3.—Devolution and alienation of market rights.**  
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bind his successor. If the lease had been made for twenty-one years, the successor might avoid it.

A fair is but a franchise or liberty, not manurable, out of which a rent cannot be reserved, & therefore for such rent reserved the lessor or his successors have not any remedy, either by distress or assize; & all leases of such inheritances, out of which the ancient & accustomed rent cannot be well & lawfully renewed are voidable by the Act [1 Eliz.] (*per CUR.*).—**JEWEL'S CASE** (1588), 5 Co. Rep. 3 a; 77 E. R. 51.

*Annotations:—*Reid Bally v. Wells (1769), Wilm. 341; British Mutoscope & Biograph Co. v. Homer, [1901] 1 Ch. 671. *Mentd.* Salisbury's (Bp.) Case (1614), 10 Co. Rep. 58 b; Gee v. Freedland (1626), Cro. Car. 47; Young v. Fowler (1639), Cro. Car. 555.

**Recovery of rent—Whether by distress.]—JEWEL'S CASE**, No. 70, *ante*.

**72. ——— Whether by action against assignee.]—JAMES v. BLUNCK** (1656), Hard, 88; 145 E. R. 395.

*Annotation:—*Reid Bally v. Wells (1769), Wilm. 341.

**73. ——— Lessee's right to tolls—Express power to let in local Act—Demise by parol.]—**(1) By a private Act of Parliament, passed in 1835, the market of Devonport belonging to A., was enlarged into a market for cattle, sheep, etc., & A. was empowered to let the erections, buildings, etc., on the ground whereon the market should be held, & to demand & take certain tolls of & from any person or persons bringing any goods or articles to the market. There was also a clause providing that if the owner should demise or lease the market, or the site thereof, & all or any of the erections or buildings thereon, the lessee should, subject to such exceptions or restrictions as might be expressly contained in the lease, take & enjoy the rents & tolls authorised to be taken by the Act, as the owner would have been entitled to do if the lease had not been made:—*Held*: a lessee of the market, under a parol demise, was entitled to demand & receive the tolls.

(2) A person brought sheep to a public-house forty yards out of the limits of the market, left them there, went into the market in search of customers, whom he brought back to the public-house, & there sold the sheep to them:—*Held*: this was a fraud upon the market, for which the seller was liable to an action on the case by the lessee of the market.—**BRIDGLAND v. SHAPTER** (1839), 5 M. & W. 375; 8 L. J. Ex. 246; 151 E. R. 159.

*Annotations:—*As to (2) *Consd.* Brecon Corpn. v. Edwards (1862), 1 H. & C. 51; Manchester Corpn. v. Lyons (1882), 47 L. T. 677.

**74. Lease of stallage & plicage — Whether right to soil included.]—COLEMAN v. HOWARD** (1860), 2 L. T. 463.

**75. Lease of tolls — By corporation — Whether seal necessary.]—**A corpn. aggregate may maintain *assumpsit* for the use & occupation of tolls, although they did not grant the tolls to the occupier by any instrument under their common

seal.—**CARMARTHEN CORPN. v. LEWIS** (1834), 6 O. & P. 608.

*Annotations:—*Reid. Finlay v. Bristol & Exeter Ry. (1852), 7 Exch. 409. *Mentd.* Fishmongers' Co. v. Robertson (1843), 5 Man. & G. 131.

**76. ——— In consideration of fine — Invalid.]—**The portreeve, etc., of Aberavon were a corpn. from time immemorial, owning freehold estates & a town hall, & were not made subject to the provisions of the Municipal Corporation Act. By the local Act, 1848, the portreeve, etc., were empowered to construct a market, market place, etc., & to levy & receive rents & tolls, which were to be applied, first, in defraying the costs of obtaining the Act; secondly, in making & maintaining the buildings & in paying off borrowed moneys; & thirdly, to such objects as the portreeve, etc., should think fit. In 1860, pending an application by the inhabitants for a charter of incorporation, the portreeve, etc., sold all their property, except the town hall & the market, etc., constructed under the above mentioned Act; & early in 1861, after an intimation that the Lord President would recommend the Queen to grant the charter, they sold the town hall, & agreed to let the rents & tolls of the market to J. for fifty years, at an annual rent of £5, in consideration of a fine of £600. On Mar. 15, 1861, the original information was filed, praying a declaration that the portreeve, etc., were not authorised so to demise or lease the rents & tolls, & that any such demise or lease would be a breach of trust; & praying an injunction accordingly. On July 2, 1861, a new charter was granted to the inhabitants under the Municipal Corporations Amendment Act, & on Feb. 6, 1862, the information was amended by making the mayor, aldermen & burgesses under the new charter defendants, & praying a declaration that the markets, market place, etc., & the lands belonging thereto, & all rights to levy rents & tolls, & all other the property & rights of the portreeve, etc., had become vested in the mayor, etc., under the Municipal Corporations Act, etc.; that the portreeve, etc., might be decreed to deliver up possession thereof, & that inquiries & accounts might be directed to ascertain what property belonged to the portreeve, etc., at the date of the new charter. The portreeve, etc., insisted that there was no trust for the benefit of the inhabitants, & their lordships having come to the conclusion that this was so, except as to the property under Aberavon Market Act, 1848:—*Held*: the only decree that could be made upon the information was to restrain leases of the market property upon fine.—**A.-G. v. AVON (OTHERWISE ABERAVON) CORPN.** (1863), 3 De G. J. & Sm. 637; 2 New Rep. 564; 33 L. J. Ch. 172; 9 L. T. 187; 11 W. R. 1050; 46 E. R. 783, L. JJ.

*Annotation:—**Mentd.* Evans v. Bagshaw (1870), 39 L. J. Ch. 145.

**77. ——— By market company—Valid.]—WAKEFIELD BOROUGH MARKET CO. v. CRAWSHAW** (1865), 29 J. P. Jo. 791.

**78. Mortgage of tolls—Remedy of mortgagee.]—**A corpn., by Act of Parliament, was authorised

**PART III. SECT. 3.**

**72 i. Lease of market or fair—Recovery of rent—Whether by action against assignee.]—**Covenant lies against the assignee of the lessee for lives of the profits of a fair, on a covenant to pay the rent reserved.—**LUCAN (EARL) v. GILDEA** (1831), 2 Hud. & B. 635.—*IR.*

**72 ii. ———.]—**A., by deed, demised to B., for thirty-one years, reserving a rent, "all that & those the customs of the fairs & markets of the

town of E."; & B., for himself, his exors. & administrators covenanted with A., his heirs & assigns, that he, his exors. & administrators, would pay the reserved rent to the lessor, his heirs & assigns:—*Held*: an action was maintainable on this covenant by A. against the assignee of B.—**EGREMONT (EARL) v. KRENN** (1837), 2 Jo. Ex. Ir. 307.—*IR.*

**1. Lease of tolls—By corporation —Valid.]—**A sale by the corpn. of Fredericton of the right to collect

market tolls for a year, is not illegal under the city charter, 22 Vict. c. 8; such sale, being a demise of the tolls, may be by parol.—**CITY OF FREDERICTON v. MULLIGAN** (1863), 5 All. 571.—*CAN.*

**2. ——— Necessity for registration.]—**The right to collect market dues upon a given piece of land is a benefit to arise out of land within Registration Act, 1877, s. 3. A lease of such right for a period of more than one year must be made by registered instru-



to raise money by debentures upon the tolls, rents & stallages of the borough markets. The interest upon these debentures was allowed to fall into arrear:—*Held*: the ct. could grant a receiver of the tolls, but it had no jurisdiction to interfere with the corp'n. in the letting or

management of the stalls, etc., in the market place.—*DE WINTON v. BRECON CORPN.* (1858), 26 Beav. 533; 28 L. J. Ch. 598; 53 E. R. 1004.

*Annotations*:—*Reid*. *Gardner v. L. C. & D. Ry.* (No. 1). *Drawbridge v. Same*, *Gardner v. Same* (No. 2), *Imperial Mercantile Credit Assocn. v. Same* (1867), 2 Ch. App. 201. *Mentd.* *Brecon Corpn. v. Seymour* (1859), 26 Beav. 548.

## Part IV.—Holding of Markets and Fairs.

### SECT. 1.—DAYS AND HOURS.

**79. Market held on Sunday—Effect of 27 Hen. 8, c. 5.]**—A justification in trover that the goods were bought in market overt, impliedly confesses the allegation that they belonged to pltf. In pleading a sale in market overt, it is not necessary to allege the market to be in any certain person, or that it was not held on a Sunday, or that any toll was paid, or that the vendor had a special property in the goods sold.

He [def't.] alleges the prescription to be to hold a fair there every year upon Aug. 29, & he does not except Sunday, as it ought to be. *Sed non allocatur*. For a fair held upon the Sunday is well enough; although by above Act, there is a penalty inflicted upon the party that sells upon that day, but it makes it not to be void. It is not alleged here that any toll was paid, for otherwise the property is not changed. *Sed non allocatur*. For it is not of necessity, & in many villis no toll is used to be paid; & if it ought, it should be shown on the other part, to avoid the sale, that there was not any toll paid (*per CUR.*).—*COMYNS v. BOYER* (1596), Cro. Eliz. 485; 78 E. R. 736.

*Annotations*:—*Reid*. *Drury v. Defontaine* (1808), 1 Taunt. 131; *Begbie v. Levi* (1830), 1 Cr. & J. 180. *Mentd.* *Fancourt v. Bull* (1835), 1 Bing. N. C. 681; *Cooper v. Shepherd* (1846), 3 C. B. 266.

, generally, TIME.

**80. Market or fair held on day other than prescribed day—Whether validated by prescription.]**—*A.-G. v. HORNER*, No. 45, *ante*.

**81. — Levying of tolls illegal.]**—*A.-G. v. HORNER* (No. 2), No. 103, *post*.

**82. Unlicensed change of market day—Ground for forfeiture—At option of Crown.]**—*NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL*, No. 176, *post*.

**83. — Levying of tolls illegal.]**—*NEWCASTLE (DUKE) v. WORKSOP URBAN COUNCIL*, No. 176, *post*.

**84. Change of market day by statute—Former franchise abolished.]**—*MANCHESTER CORPN. v. LYONS*, No. 342, *post*.

**85. Question for jury.]**—The days & distances upon & at which fairs & markets are held are matters of evidence for the jury.—*R. v. AIRES* (1717), 10 Mod. Rep. 354; 88 E. R. 762; *sub nom.* *R. v. EYRE*, 1 Stra. 43.

*Annotation*:—*Mentd.* *Eastern Archipelago Co. v. R.* (1853), 2 E. & B. 856.

### SECT. 2.—PLACE OF HOLDING.

#### SUB-SECT. 1.—AREA WITHIN WHICH LEGAL.

**86. Where no place specified in grant.]**—If the King grant a fair generally, the grantee may

keep it where he pleases; or if granted to be held in a town, he may keep it in any place in the town.

—*DIXON v. ROBINSON* (1686), 3 Mod. Rep. 107; 87 E. R. 68.

*Annotations*:—*Reid*. *Curwen v. Salkeld* (1803), 3 East, 538; *Gingell & Foskett v. Stepney B. C.*, [1906] 2 K. B. 468.

— **Effect of addition of new streets.]**—*See* No. 45, *ante*; Nos. 103, 104, *post*.

**87. Where place specified in grant—Anywhere within precincts of grant—Grant to town.]**—*DIXON v. ROBINSON*, No. 88, *ante*.

**88. — — — — —.]**—*KERBY v. WHICHELOW* (1700), 2 Lut. 1498; 125 E. R. 825.

*Annotations*:—*Reid*. *Hill v. Smith* (1812), 4 Taunt. 520; *Wells v. Miles* (1821), 4 B. & Ald. 559.

**89. — — — — —.]**—The lord of a manor, to whom a grant of a market is made *infra villam de W.* may hold it any where *infra villam de W.*; & whether villa extend to the town of W. or the township or parish of W. the lord has a right to remove the market place from one situation to another within the precinct of his grant, & though he should have holden it for above twenty years within the township of W. when the grant only gave it him within the town properly so called at the time, yet if he afterwards give notice of the removal to another place in the township, the public have no right to go upon his soil & freehold in the old market place; & any person going there is liable to an action of trespass by the lord.—*CURWEN v. SALKELD* (1803), 3 East, 538; 102 E. R. 703.

*Annotations*:—*Reid*. *Prince v. Lewis* (1826), 5 B. & C. 363; *Mosley v. Walker* (1827), 7 B. & C. 40; *Stamford Corpn. v. Pawlett* (1830), 1 Cr. & J. 57; *De Rutzen v. Lloyd* (1836), 5 Ad. & El. 456; *R. v. Starkey* (1837), 6 L. J. K. B. 202; *Ellis v. Bridgnorth Corpn.* (1863), 15 C. B. N. S. 52; *Wortley v. Nottingham L. B.* (1869), 33 J. P. 806; *Gingell & Foskett v. Stepney B. C.*, [1906] 2 K. B. 468.

**90. Right claimed by prescription—In right of manor—Market always held in one spot.]**—In case, by the lord of a manor, for disturbance of a market, if the lord prove a market immemorially holden in certain places within the manor, it is not a necessary legal inference, no grant being produced, that the market was granted to be holden in those places only; but a jury may presume, from circumstances, that the market was granted to be holden in any convenient place within the manor.—*DE RUTZEN v. LLOYD* (1836), 5 Ad. & El. 456; 6 Nev. & M. K. B. 776; 5 L. J. K. B. 202; 111 E. R. 1238.

*Annotations*:—*Consd.* *Gingell & Foskett v. Stepney B. C.*, [1906] 2 K. B. 468. *Reid*. *Ellis v. Bridgnorth Corpn.* (1863), 15 C. B. N. S. 52. *Mentd.* *Delegal v. Higley* (1837), 5 Scott, 394; *Todd v. Jeffery* (1837), 7 Ad. & El. 519; *Jolliffe v. Mundy* (1838), 4 M. & W. 507; *Evans v. Collins* (1845), 14 L. J. Q. B. 257.

**91. Control by owner—Power to limit market to part—Subject to needs of public.]**—The lord of

ment.—*SIKANDAR v. BAHADUR* (1905), I. L. R. 27 All. 462.—IND.

### PART IV. SECT. 1.

**801. Market or fair held on day other**

than prescribed day—Whether validated by prescription.]—It being objected for def't. that no market could lawfully be held on Good Friday, or May 29, or Oct. 23, which days were required by statute to be kept holy:

the prohibition under the statutes did not affect the prescriptive or chartered rights of persons entitled to markets.—*CORK CORPN. v. SHINKWIN* (1825), Sm. & Bat. 395, 399.—IR.



*Sect. 2.—Place of holding: Sub-sects. 1, 2 & 3.]*

an ancient market may, by law, have a right to prevent other persons from selling goods in their private houses situated within the limits of his franchise. Where such a market had been from ancient times held in a public street, but in consequence of the increased population & traffic, persons frequenting the market place were subjected to inconvenience & danger, & the lord had permitted part of the market place to be used for other purposes than for the sale of articles usually sold there; in an action brought by the lord against the owner of a house adjoining to the market place for there opening a shop & selling goods, but who, at the time when he sold the goods, had a stall in the market place, which he might have occupied:—*Held*: it was properly submitted to the jury to find whether, from the state of the market place, deft. had a reasonable cause for selling in his private house; & a verdict having been found for pltf., the ct. refused to grant a new trial.

He may either permit every place within the specified limits of the market to be the place where articles may be sold or . . . fix upon a particular place & he may say that different places shall be appropriated to the sale of different articles (BAYLEY, J.).

I take it to be implied that the grantee . . . shall fix it in such parts as will yield to the public reasonable accommodation (BAYLEY, J.).—*MOSLEY v. WALKER* (1827), 7 B. & C. 40; 9 Dow. & Ry. K. B. 863; 5 L. J. O. S. K. B. 358; 108 E. R. 640.

*Annotations*:—*Consd.* Manchester Corpn. v. Lyons (1882), 47 L. T. 677. *Refd.* Macclesfield Corpn. v. Pedley (1833), 4 B. & Ad. 397; *Devizes Corpn. v. Clark* (1835), 3 Ad. & El. 506; *Re Islington Market Bill* (1835), 3 Cl. & Fin. 513; *R. v. Starkey* (1837), 7 Ad. & El. 95; *Macclesfield Corpn. v. Chapman* (1843), 12 M. & W. 18; *North & South Shields Ferry Co. v. Barker* (1848), 2 Exch. 136; *Brecon Corpn. v. Edwards* (1862), 1 H. & C. 51; *Pope v. Whalley* (1865), 6 B. & S. 303; *Fearon v. Mitchell* (1872), L. R. 7 Q. B. 690; *Penryn Corpn. v. Best* (1878), 3 Ex. D. 292; *A.-G. v. Horner* (1884), 14 Q. B. D. 245; *G. E. Ry. v. Goldsmid* (1884), 9 App. Cas. 927; *Wilcox v. Steel*, [1904] 1 Ch. 212; *Gingell v. Stepney B. C.* (1907), 77 L. J. K. B. 347. *Mentd.* Blacketer v. Gillett (1850), 14 L. T. O. S. 351.

92. — *Power to appropriate specific part for certain articles.*—*MOSLEY v. WALKER*, No. 91, *ante*.

93. — — — — —.]—The corpn. of N. being lords of the manor, & having a grant to hold a market within the manor, transferred the sale of skins from the site of the old market to a separate place conveniently situated within the manor:—*Held*: (1) this power to transfer part of the market was implied at common law; (2) a bye-law was void which prevented any person placing a skin anywhere in the market without leave of a superintendent.—*WORTLEY v. NOTTINGHAM LOCAL BOARD* (1869), 21 L. T. 582; 33 J. P. 806.

*Annotation*:—*As to* (2) *Folld.* Nicholls v. Tavistock U. C., [1923] 2 Ch. 18.

94. *Effect of enlargement of borough—Under Municipal Corporation Acts.*—(1) In boroughs, the limits of which for the purposes of Parliamentary representation have been fixed by 2 & 3 Will. 4, c. 64, s. 35, sched. O, & which are included in Municipal Corporations Act, 1835 (c. 76), s. 1, scheds. A, B, all places within the limits so fixed are, by Municipal Corporations Act, 1835 (c. 76), s. 8, parts of the borough for all purposes; & an ancient borough market may be lawfully held within such limits, although outside the limits of the old municipal borough.

(2) A market held in the same town with an old market if held upon the same day, is a disturbance by intendment of law, but if it is held on a different day it is only evidence of disturbance for the jury.

(3) To support an action for disturbance of a market, it is not necessary that deft. should have actually sold; any active interference by him in the conduct of the new market or participation in its profits or risk is sufficient.—*DORCHESTER CORPN. v. ENSOR* (1869), L. R. 4 Exch. 335; 39 L. J. Ex. 11; 21 L. T. 145; 34 J. P. 167.

*Annotations*:—*As to* (1) *Refd.* Manchester Corpn. v. Lyons (1882), 22 Ch. D. 287. *As to* (2) *Refd.* Wilcox v. Steel (1903), 89 L. T. 640; *Hammerton v. Dysart*, [1916] 1 A. C. 57; *Morpeth Corpn. v. Northumberland Farmers' Auction Mart. Co.*, [1921] 2 Ch. 154; *Winsford Entertainments v. Winsford U. D. C.* (1924), 23 L. G. R. 254.

95. — *Place bounded by streets—Dedication subject to market rights presumed.*—*A.-G. v. HORNER*, No. 98, *post*.

96. *Question for jury.*—*R. v. AIRES*, No. 85, *ante*.

*Area protected by statute.*—*See Part VII., Sect. 2, sub-sect. 1, post.*

## SUB-SECT. 2.—ENLARGEMENT OF MARKET.

97. *Market defined by metes & bounds—No power to enlarge.*—*Re ISLINGTON MARKET BILL*, No. 352, *post*.

98. *Express power to enlarge—What amounts to.*—(1) It is not essential, to make the grant of a market good, that it should be granted to a person who has the freehold in the land.

(2) A grant of a market "in or near" a certain place contemplates the extension of the market, if the owner of the market rights should see fit, beyond the particular area specified. *Semble*: such extension cannot go on indefinitely.

(3) Market rights "in or near" a certain place called "S. Square" were granted by letters patent to a person who was at the time lessee of the square & had acquired the greater part of the reversionary interest in it. The square was laid out as a market square, with four internal streets, & the adjoining land was afterwards laid out as four external streets. There was evidence that from the time of living memory the market had, in fact, extended beyond the four internal streets into parts of the four external streets:—*Held*: it must be presumed that the four external streets were made & dedicated to the public, subject to the market rights "in or near" the square, & with a view to the utilisation of the grant to its full extent & to the whole of its terms.—*A.-G. v. HORNER* (1885), 11 App. Cas. 66; 55 L. J. Q. B. 193; 54 L. T. 281; 50 J. P. 564; 34 W. R. 641; 2 T. L. R. 202, H. L.

*Annotations*:—*As to* (2) *Appld.* *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *As to* (3) *Consd.* *Gingell & Foskett v. Stepney B. C.*, [1908] 1 K. B. 115; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Refd.* *Williams v. Wednesbury Churchwardens & Overseers & West Bromwich Union* (1890), Ryde, Rat. App. (1886-90), 327. *Generally, Refd.* *Newcastle v. Worksop U. C.*, [1902] 2 Ch. 145; *Horner v. Stepney Assmt. Com.* (1908), 6 L. G. R. 651. *Mentd.* *Lonsdale v. Lowther*, [1900] 2 Ch. 687; *A.-G. v. Simpson*, [1901] 2 Ch. 671; *A.-G. v. Exeter Corpn.*, [1911] 1 K. B. 1092; *Selby v. Whitbread*, [1917] 1 K. B. 736; *Central Control Board (Liquor Traffic) v. Cannon Brewery Co.*, [1919] A. C. 744; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508; *Re Ellis & Ruislip-Northwood U. C.*, [1920] 1 K. B. 343; *Newcastle Breweries v. R.*, [1920] 1 K. B. 854.

## PART IV. SECT. 2, SUB-SECT. 2.

b. *Extension of market to adjoining streets—Effect of long user.*—*HENNESSY v. BAKER*, [1918] V. L. R. 13.—*AUS.*



**99. — What extension within power — Erection of corn exchange near market.]—**(1) In the Cambridge Market Act, 1850, power was given to the mayor, aldermen, & burgesses in council, to “enlarge” as well as improve the market of that borough:—*Held*: the meaning of the word was not restricted to merely extending the market to streets theretofore forming parts of its sides, but authorised them to extend the market to other streets in its immediate neighbourhood, even though such streets were not mentioned in the Act.

(2) The words in the Act, the “market place,” were not confined to the Market Hill, but extended to streets where *de facto* the market had been held.

(3) The general object of the Act being to enlarge & improve the market of the borough, the mayor & aldermen, who had the right to hold markets in the borough, though by the Act not authorised to enlarge an existing corn exchange, were held authorised to erect a new corn exchange, & make it adjoin the borough market, such being, in their opinion, a matter of public convenience, & an enlargement and improvement of the market.—*A.-G. v. CAMBRIDGE CORPN.* (1873), L. R. 6 H. L. 303; 22 W. R. 37, H. L.

*Annotation*:—*Generally*, *Mentd.* *Lyon v. Fishmongers’ Co.* (1877), 42 J. P. 163.

**100. — Extension to streets bounding market place.]—***A.-G. v. HORNER*, No. 98, *ante*.

**101. Extension of market to adjoining streets—Statutory power of extension—Grant “in or near” certain place.]—***A.-G. v. CAMBRIDGE CORPN.*, No. 99, *ante*.

**102. — Grant “in or near”—Market bounded by streets—Dedication subject to market rights presumed.]—***A.-G. v. HORNER*, No. 98, *ante*.

**103. — Private market—No presumption of dedication subject to market rights.]—**In 1682 Charles II. granted to H.’s predecessor in title a right to hold markets on Thursdays & Saturdays. In *A.-G. v. Horner*, No. 98, *ante*, it was held that this charter authorised an overflow of the market into the adjoining streets on Thursdays & Saturdays, & that a lost charter for the other days of the week was not to be presumed. H. held markets on all the days of the week, made use of the adjoining streets for the purposes of these markets, & took tolls from the persons who used them; & took tolls from sellers instead of from buyers. An action was brought to restrain him from doing so:—*Held*: the question of a lost grant of a market on days other than Thursdays & Saturdays could not, after the decision in *A.-G. v. Horner*, No. 98, *ante*, be raised in that ct.; deft. had no right in respect of a private market to overflow into the streets on days other than Thursdays & Saturdays; he had always claimed to act under the franchise, & the ct. would not presume a legal origin for a usage which was inconsistent with the right claimed & would not presume that the streets had been dedicated to the public subject to the right of overflow; in the absence of custom or prescription or individual contracts to the contrary, market tolls were payable by the buyers & not by the sellers; the tolls taken were reasonable & there was no obligation on a franchise owner to publish a list of his charges; the fact that other members of the public would be benefited by the continuance of the illegal acts was immaterial.

As a matter of decision, it is now established

that there is a franchise of a market without metes & bounds, but not for any days other than Thursdays & Saturdays. *Applt.* contends, & rightly, that on the other four days of the week it was competent to him to allow sellers & buyers to come upon his ground to traffic, & that in that sense the owner of the land could hold upon those four days that which *applt.* has called a private market, or proprietary market, or *de facto* market. This is no doubt so. But it is not a market in a legal sense on those days; he has on those days no right to charge tolls in the streets (*BUCKLEY, L.J.*).—*A.-G. v. HORNER* (No. 2), [1913] 2 Ch. 140; 82 L. J. Ch. 339; 108 L. T. 609; 77 J. P. 257; 29 T. L. R. 451; 57 Sol. Jo. 498; 11 L. G. R. 784, C. A.

*Annotations*:—*Refd.* *London Corpn. v. Horner* (1914), 111 L. T. 512; *Maskell v. Horner*, [1915] 3 K. B. 106. *Mentd.* *Clode v. L. C. C.*, [1914] 3 K. B. 852; *Dysart v. Hammerton*, [1914] 1 Ch. 822; *Fowke v. Berington*, [1914] 2 Ch. 308.

**104. — Market by prescription—Without metes & bounds—Dedication of adjoining modern streets subject to market rights presumed.]—**There was in the parish of Whitechapel, which was included in the manor of Stepney, an ancient manorial market without metes & bounds, which was held in a street called High Street. There was evidence from which it might be inferred that the right to hold the market extended to holding it in streets adjoining High Street, when that street was overcrowded. Under an Act of Parliament passed in 1840 two new streets were made adjoining High Street on ground that included the sites of pre-existing streets which adjoined that street. Under an Act of Parliament passed in 1865 another new street, by which an existing street was connected with High Street, was made upon ground previously covered with houses. These streets were all in the parish of Whitechapel. The Acts under which they were respectively made provided that, when the streets were made, the ground laid open into them should form part of the streets, & should be used by the public accordingly. There was evidence that the streets so made had been for many years used for the purposes of the market without interference by the highway authority:—*Held*: the right to hold the market extended to holding it in these streets, when High Street was overcrowded, & the statutory dedication of them as highways must be taken to be subject to the user of them for the purposes of the market.—*GINGELL, SON & FOSKETT, LTD. v. STEPNEY BOROUGH COUNCIL*, [1908] 1 K. B. 115; 77 L. J. K. B. 347; 97 L. T. 598; 71 J. P. 486; 23 T. L. R. 759; 51 Sol. Jo. 717; 6 L. G. R. 180, C. A.; *affd. sub nom.* *STEPNEY CORPN. v. GINGELL, SON & FOSKETT, LTD.*, [1909] A. C. 245, H. L.

*Annotations*:—*Refd.* *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Mentd.* *Selby v. Whitbread*, [1917] 1 K. B. 736.

**105. — For standing for customers’ carts—Billingsgate market.]—***DAVIS v. HARVEY* (1887), 3 T. L. R. 800, D. C.

#### SUB-SECT. 3.—MARKETS ON HIGHWAYS.

**106 Dedication subject to market rights—Exclusive right of occupation on market days.]—***Applt.*, by virtue of a lease from the corpn. of Wednesbury, had the right to take certain stallage & other dues in a market, which was held under a charter, on specified days, on land within the borough, part of which was dedicated as a highway. The sessions found that on market days